POLICY ROUNDTABLES

Merger Remedies

2003

Introduction

The OECD Competition Committee debated merger remedies in October 2003. This document includes an executive summary and the documents from the meeting: an analytical note by Mr. Gary Hewitt of the OECD, written submissions from Australia, Brazil, Canada, the Czech Republic, Denmark, the European Commission, Germany, Hungary, Israel, Japan, Korea, Lithuania, the Netherlands, Norway, Sweden, Switzerland, the United Kingdom, and the United States, as well as an aide-memoire of the discussion.

Overview

The following principles should guide competition authorities when they devise remedies in merger cases: i) remedies are to be considered only if a threat to competition has been identified; ii) remedies should be the least restrictive means to effectively eliminate competition concerns; iii) remedies should address only competition concerns, and should not be used for industrial planning or other non-competition purposes; and iv) flexibility and creativity are key in devising remedies.

Competition authorities in general strongly prefer structural remedies in the form of divestitures even though they might consider behavioural remedies, alone or in conjunction with divestiture remedies, appropriate in certain cases to address competitive concerns raised by a merger.

Where several competition authorities consider remedies in the same transaction, coordination and cooperation among them is important to ensure consistency between remedial solutions. Despite differences in substantive tests and procedures, such cooperation and coordination with respect to remedies has been successful in an increasing number of transnational mergers.

Related Topics

OECD Council Recommendation on Merger Review (2005)
Media Mergers (2003)
Mergers in Financial Services (2000)
Notification of Transnational Mergers (1999)
Merger Cases in the Real World - A Study of Merger Control Procedures (1994)

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MERGER REMEDIES

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Merger Remedies which was held by the Competition Committee in October 2003.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'originale dans laquelle elle a été soumise, relative à une table ronde sur les remèdes en cas de fusion, qui s'est tenue en octobre 2003 dans le cadre du Comité de la Concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée « Les tables rondes sur la politique de la concurrence ».

OTHER TITLES

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EXECUTIVE SUMMARY

by the Secretariat

Considering the discussion at the roundtable, the member country submissions, and the background paper, a number of key points emerge:

(1) When devising remedies in merger cases, competition authorities should be guided by the following principles: (i) competition authorities should consider remedies only if a threat to competition has been identified; (ii) remedies should be the least restrictive means to effectively eliminate competition concerns; (iii) remedies should address only competition concerns, and should not be used for industrial planning or other non-competition purposes; and (iv) competition authorities should be flexible and creative in devising remedies.

Merger remedies should be considered only if they are demonstrably necessary, *i.e.*, when the competition authority has determined that a merger is in fact a threat to competition.

There can be a risk that competition authorities and merging parties agree to remedies that err on the overly strict side, in particular where review deadlines are strict and/or the parties are particularly anxious about timing or publicity of their transaction. Unnecessary, or unnecessarily strict, remedies, however, might harm consumers by reducing the efficiencies expected from a merger. Competition authorities therefore should not accept remedies simply to avoid investigative work. A competition authority can in most cases eliminate the risk of unnecessary or unnecessarily strict remedies by carefully examining proposed merger's potential risks to competition as well as the remedies proposed by parties. Procedural arrangements, such as the involvement of a specialized remedies unit, solicitation of third party comments, or a more flexible timeframe during remedies negotiations, can provide additional safeguards.

Remedies should focus on maintaining competition at pre-merger levels or, in the case of consummated transactions, on restoring competition to such levels. In some countries, however, competition authorities may be satisfied with remedies that ensure that a merger, even if it might reduce competition, does not "substantially" lessen competition or does not create a dominant position. In either case, however, the effectiveness of a remedy must be the overriding concern. To be effective, a remedy may have to go beyond what is strictly necessary to maintain competition at, or restore competition to, the required level.

Remedies should not be used to "improve" deals that do not rise to the level of a violation, or to make the competitive landscape better than it was before the transaction. Competition authorities should not use merger review to engage in industrial policy or to become a market regulator, even if the outcome of such an intervention could be more desirable from a competition point of view.

As merger review relies heavily on a fact-oriented analysis to identify possibly threats to competition, devising remedies also needs a fact-based analysis to ensure that remedies will be appropriate and effective. A strict and inflexible rules-based approach is not appropriate in negotiating remedies.

(2) Competition authorities in general strongly prefer structural remedies in the form of divestitures. They nevertheless acknowledge the usefulness of behavioural remedies in certain circumstances, in particular to complement structural remedies.

Most competition authorities have a strong preference for structural remedies in the form of divestitures. Given that mergers bring about structural, permanent changes in the market, a structural remedy frequently will be the most appropriate solution where the merger gives rise to competition concerns. In addition to being more effective, structural remedies also typically are easier to administer because they do not require ongoing monitoring by authorities.

The difference between structural and behavioural remedies, however, is not always clear cut. Some behavioural remedies, such as irrevocable licenses in intellectual property right, may have effects that are very similar to the effects of structural, divestiture-type remedies.

Some competition authorities find that structural remedies in the form of divestitures are not always more efficient and less costly than behavioural remedies. In particular where divestiture would be impracticable or disproportionate to remedy the adverse effects arising from a merger, behavioural remedies might sometimes be preferable. This will apply especially in the case of mergers with vertical elements, and where markets are quickly developing and future developments are difficult to anticipate. In addition, in small economies structural remedies might sometimes be more difficult to implement than behavioural remedies.

(3) In case of structural remedies, the divestiture of an autonomous ongoing business in the market creates fewer risk for the effectiveness of the remedy than the divestiture of a collection of unrelated assets (mix and match divestiture).

The divestiture of an entire ongoing business will increase the likelihood that a remedy will be effective. An ongoing business has already proven to the market that it is a viable, competitive force and its divestiture closely reflects how the firms actually compete in the market. Thus, by insisting on the divestiture of an ongoing business, a competition authority does not have to make assumptions about the competitiveness and viability of a collection of assets. This substantially reduces the risk of making wrong assumptions about future competition. Insisting on the divestiture of an ongoing business might be less important where a competition authority has many years of experience in reviewing transactions in certain industries and has good knowledge of how markets function.

To preserve pre-merger levels of competition, competition authorities also have a preference for a divestiture to a single buyer, rather than a collection of independent buyers. A preference for a single buyer might sometimes exclude smaller competitors from acquiring parts of the divested business. These concerns, however, typically are not considered a convincing argument for a sale to several buyers where the sale of the divested business as a single entity is deemed necessary to address the adverse effects of the merger.

Ensuring that a viable ongoing business is divested sometimes requires divesting assets used in markets not negatively affected by the merger. The divestiture of a wider package also may be required to ensure that the divested business can independently compete and is not dependent on the seller's continued goodwill and cooperation.

(4) In the case of divestiture remedies, competition authorities may use a number of "ancillary" tools to ensure the viability of the assets to be divested, their timely sale, and their most effective use to maintain pre-merger levels of competition. These include interim measures such as hold separate orders and monitoring trustees which can prevent assets from deteriorating pending divestiture; fix-it-first remedies,

upfront buyer requirements and crown jewel provisions which mitigate the risk that a divestiture package might turn out not to be workable; and divestiture trustees who can complete a divestiture if the underlying transaction is allowed to proceed, but the parties fail to timely meet their divestiture obligations.

There are a number of reasons why competition authorities may wish to adopt "ancillary" measures to protect against the risk that a divestiture remedy may ultimately fail. The merging parties will have incentives to select a buyer that seems the least likely to be a serious competitive threat, and to engage in a variety of strategic behaviour to undermine the success of the buyer. In addition, buyers may lack information to operate the acquired business, lack bargaining power to negotiate acceptable terms with the sellers, or have incentives that are not identical with the intentions of the competition authority. Some buyers may seek to use the acquired assets in markets other than the one where a competition agency is seeking to address competitive concerns. Moreover, where the parties propose the divestiture of limited assets, the viability of those assets as a competitive force may be difficult to assess at the time when the remedy is being negotiated.

Up-front buyer requirements and crown jewel provisions can be particularly important where a collection of assets, rather than an ongoing business, is being divested. In these circumstances, it frequently will be uncertain whether the divested assets will be viable and/or whether a suitable purchaser can be found. The up-front buyer requirement enables a competition authority to review the proposed remedy *and* the proposed buyer before allowing the merger to proceed. This will assure that a suitable buyer exists and is in fact interested in acquiring the divested assets, and will, if necessary, enable the competition authority to require the inclusion of additional assets in the divestiture package. Even if a competition authority does not use an up-front buyer approach, it usually should insist on the right to approve the buyer of divested assets.

Crown jewel provisions can be used where an up-front buyer approach is not feasible, and there is a substantial risk that a proposed divestiture might fail (after the parties consummated the underlying transaction). They enable a competition authority to require that the merging parties divest a more attractive package than initially proposed, thus creating a more divestible package of assets. Some competition authorities, however, have viewed crown jewel provisions as problematic because they can lead to a divestiture that is wider than necessary to address the competition problem raised by the underlying transaction. They also can create uncertainty, and delay integration of assets and the realization of efficiencies of the underlying transaction.

Where the underlying transaction is allowed to proceed prior to the implementation of a divestiture remedy, competition authorities also may require the authorization to appoint a divestiture trustee who can accomplish the divestiture if the parties fail to timely meet their obligations. The mere possibility that a trustee would have the right to sell the divested assets at no minimum price and without the parties' involvement appears to serve as a powerful incentive for the parties to timely comply with divestiture obligations. Competition authorities that regularly use divestiture trustee provisions report that these provisions rarely must be invoked because parties typically meet their obligations.

Competition authority may also adopt measures to ensure that the assets will not deteriorate prior to divestiture. These measures can include hold separate orders to ensure that the divested business is removed from the merging parties' control and remains viable prior to the divestiture, and the appointment of monitor trustees to ensure that the parties comply with interim order provisions and to prevent them from behaving strategically to undermine divestitures.

(5) Even though competition authorities have a general preference for divestiture remedies, they might consider behavioural remedies, alone or in conjunction with divestiture remedies, appropriate in certain cases to address competitive concerns raised by a merger.

Behavioural remedies are considered particularly appropriate in mergers with vertical elements as they may be better suited to preserve potential efficiencies of a merger while preventing foreclosure risks. They can be important also in high tech industries characterized by rapidly evolving, intellectual property intensive markets as they provide more flexible solutions that can be tailored to unusual fact situations.

Behavioural remedies also can be important in conjunction with divestitures to ensure the viability of the divested business. Such behavioural remedies can include supply obligations, measures such as waivers of long term contracts and *pro rate* refunds to facilitate switching of customers, and the obligation to provide the buyer of divested assets technical assistance and training.

In general, behavioural remedies should not be imposed for an indefinite time or should be reviewed after a certain period to ensure that remedies remain relevant and do not become an undue restriction on competition.

(6) Where several competition authorities consider remedies in the same transaction, coordination and cooperation among them is important to ensure consistency between remedial solutions. Despite differences in substantive tests and procedures, such cooperation and coordination with respect to remedies has been successful in an increasing number of transnational mergers.

Cooperation and coordination among competition authorities with respect to remedies have proven useful not only in mergers where markets are global. Competition authorities have found it particularly important to coordinate their efforts in designing and implementing remedial solutions and to take account of each other's concerns where markets and competition concerns are different in reviewing jurisdictions, and/or where the parties hold significantly different competitive positions. These efforts are essential to ensure that a remedies package meets the competition concerns of all authorities involved, and leaves the parties with a set of non-conflicting obligations. To be fully effective, cooperation and coordination should cover both the designing stage and the implementation stage of remedies.

Continuing convergence in both procedures and substantive assessment of mergers will facilitate coordination and reduce the risk of inconsistent remedial solutions.

There is a risk that parties engage in strategic gaming and attempt to play off one competition authority against another by reaching a settlement with one authority and trying to use that commitment as leverage in settlement negotiations with other authorities. Competition authorities can limit this risk by maintaining close and frequent contacts, and by making the parties aware that such regular contacts occur.

SYNTHÈSE

rédigée par le Secrétariat

Des échanges qui ont eu lieu lors de la table ronde, des contributions des pays Membres et du document de référence, il ressort les points suivants :

(1) Dans la mise au point des correctifs à apporter aux fusions, les autorités de la concurrence doivent être guidées par les principes suivants : (i) les autorités de la concurrence doivent réserver l'application de mesures correctives qu'aux cas où une menace à la concurrence a été identifiée ; (ii) les mesures correctives doivent être le moyen le moins restrictif de résoudre effectivement le ou les problèmes de concurrence posés par une fusion; (iii) les mesures correctives ne doivent porter que sur les problèmes de concurrence et ne sauraient être utilisées à des fins de planification industrielle ou pour poursuivre d'autres objectifs n'ayant rien à voir avec la concurrence ; (iv) les autorités de la concurrence doivent faire preuve de souplesse et de créativité dans la mise au point des mesures correctives.

Les mesures correctives à apporter aux fusions doivent être envisagées uniquement s'il est démontré qu'elles sont nécessaires, c'est-à-dire lorsque l'autorité de la concurrence a déterminé qu'une fusion donnée représente réellement une menace pour la concurrence.

Il existe un risque que les autorités de la concurrence et les entités qui fusionnent conviennent d'un ensemble de mesures correctives pêchant par excès de rigueur, notamment lorsque les dates du contrôle sont strictes ou que les parties sont particulièrement soucieuses de la chronologie ou de la publicité de leur transaction. Pourtant, les mesures correctives d'une rigueur excessive, voire sans utilité, peuvent être pénalisantes pour les consommateurs si elles limitent le gain d'efficience que l'on peut attendre d'une fusion. Les autorités de la concurrence ne doivent pas se contenter d'approuver des mesures correctives parce qu'elles les dispensent d'un travail d'enquête. Par un examen attentif des risques potentiels d'une fusion proposée pour la concurrence et des mesures correctives proposées par les parties, une autorité de concurrence peut dans la plupart des cas s'assurer qu'elle ne prend pas de mesures d'une rigueur excessive, voire inutiles. Des dispositions procédurales peuvent encore atténuer ce risque : le recours à une cellule spécialisée dans les mesures correctives, l'appel à commentaires de parties tierces, ou la fixation d'un calendrier plus souple pour la négociation des mesures correctives, par exemple.

L'objectif des mesures correctives doit être de maintenir la concurrence au niveau qui prévalait avant la fusion, ou dans le cas d'opérations déjà réalisées, de rétablir ce niveau. Dans certains pays toutefois, les autorités de la concurrence se contenteront de mesures correctives qui empêchent la fusion de causer une diminution « substantielle » de la concurrence ou de donner naissance à une position dominante. Dans un cas comme dans l'autre, le critère prépondérant doit être l'efficacité de la mesure. Pour être efficace, une mesure doit aller au-delà de ce qui est strictement nécessaire pour maintenir ou rétablir la concurrence au niveau souhaitable.

Les mesures correctives ne doivent pas être utilisées pour « optimiser » des opérations qui ne constituent pas des violations, ou pour améliorer la configuration de la concurrence par rapport au statu quo ante. Les autorités de la concurrence ne doivent pas recourir au contrôle de concentration comme à un outil de politique industrielle ou pour s'arroger le rôle de régulateurs d'un marché, même si l'issue d'une telle intervention serait favorable du point de vue de la concurrence.

De la même manière que le contrôle de concentration s'appuie pour l'essentiel sur une analyse factuelle servant à identifier les menaces éventuelles à la concurrence, la mise au point de mesures correctives passe elle aussi par une analyse factuelle pour s'assurer que ces mesures sont efficaces et adaptées à la situation. Une approche stricte et rigide n'est pas adaptée à la négociation des mesures correctives.

(2) Les autorités de la concurrence montrent généralement une nette préférence pour les mesures structurelles sous forme de cession d'actifs. Elles reconnaissent toutefois l'utilité des mesures comportementales dans certaines circonstances, notamment en complément de mesures structurelles.

La plupart des autorités de la concurrence marquent une nette préférence pour les mesures structurelles prenant la forme de cession d'actifs. Dans la mesure où les fusions entraînent des modifications structurelles et permanentes du marché, les mesures correctives structurelles représentent souvent la meilleure solution lorsqu'une fusion pose des problèmes de concurrence. Outre qu'elles sont plus efficaces, les mesures correctives structurelles sont aussi généralement plus facilement administrables parce qu'elles ne nécessitent pas de surveillance continue de la part des autorités.

La différence entre les mesures correctives structurelles et les mesures correctives comportementales n'est toutefois pas évidente. Quelques mesures correctives comportementales, comme les licences irrévocables en matière de droit de propriété intellectuelle, peuvent avoir des effets très similaires à ceux des mesures correctives structurelles avec cessions d'actifs.

Quelques autorités de la concurrence estiment que les mesures correctives structurelles avec cessions d'actifs ne pas toujours plus efficaces et moins coûteuses que les mesures correctives comportementales. En particulier, lorsqu'une cession d'actifs serait irréalisable ou disproportionnée par rapport aux effets négatifs d'une fusion, des mesures correctives comportementales peuvent parfois être préférables. C'est le cas en particulier des fusions présentant des éléments verticaux et des marchés en développement rapide où il est difficile d'anticiper les évolutions à venir. En outre, dans les économies de petite taille, les mesures correctives structurelles peuvent parfois être plus difficiles à appliquer que les mesures correctives comportementales.

(3) Dans le cas des mesures correctives structurelles, la cession d'une entité autonome en exploitation sur le marché représente un risque moindre d'inefficacité que la cession d'un ensemble d'actifs sans lien les uns avec les autres (cessions hétérogènes).

La cession totale d'une entité autonome en exploitation accroît les chances d'efficacité des mesures correctives. Une entité autonome en exploitation a déjà prouvé au marché qu'elle est une force viable et concurrentielle et sa cession va refléter de près la configuration effective de la concurrence. Par conséquent, en imposant la cession d'une entité existante, une autorité de concurrence n'a pas besoin de tirer des conjectures sur la compétitivité et la viabilité d'un ensemble d'actifs. Cela réduit considérablement le risque d'erreurs de jugement sur la concurrence future. Il peut être moins important d'imposer la cession d'une activité en exploitation lorsqu'une autorité de concurrence a de nombreuses années d'expérience d'examen des transactions dans certains secteurs d'activité et qu'elle a une bonne connaissance du fonctionnement des marchés.

Pour préserver le niveau de concurrence prévalant avant la fusion, les autorités de la concurrence tendent à privilégier les cessions d'actifs au profit d'un seul acquéreur plutôt qu'à celui de plusieurs acquéreurs indépendants. La préférence pour l'acquéreur unique peut dans certains cas exclure les concurrents de taille modeste en les empêchant d'acquérir des actifs cédés. Cet aspect ne suffit généralement pas à faire pencher la balance en faveur d'une cession à plusieurs acquéreurs lorsqu'il a été jugé préférable de céder une activité en un seul tenant pour contrer les effets négatifs de la fusion.

Pour faire en sorte que l'entité en exploitation cédée soit viable, il faut parfois céder des actifs relevant de marchés qui ne sont pas affectés négativement par la fusion. La cession d'un ensemble plus large peut aussi être nécessaire pour s'assurer que l'entité cédée puisse jouer un rôle autonome dans le jeu concurrentiel sans dépendre de la bonne volonté et de la coopération du vendeur.

(4) Dans le cas de mesures correctives reposant sur des cessions d'actifs, les autorités de la concurrence peuvent avoir recours à des outils « accessoires » pour s'assurer de la viabilité des actifs à céder, de leur vente effective dans les délais, et de leur utilisation efficace de manière à maintenir le niveau de concurrence antérieur à la fusion. Il peut s'agir de mesures temporaires : ordonnances de séparation des actifs ou désignation de mandataires de contrôle pour veiller à ce que les actifs ne soient pas détériorés avant la cession ; solution de la « mise en ordre préalable » ; impératif de l'acquéreur initial et dispositions sur la cession de « joyaux de la couronne » qui limitent les risques de non viabilité de l'ensemble cédé ; désignation de mandataires de cession qui pourront réaliser une cession d'actifs si la transaction en question a reçu le feu vert mais que les parties n'ont pas rempli leurs obligations de cession dans les délais prescrits.

Un certain nombre de raisons peuvent pousser les autorités de la concurrence à opter pour des mesures « accessoires » pour prévenir le risque qu'une mesure corrective reposant sur des cessions d'actifs finisse par échouer. Les parties qui fusionnent auront intérêt à désigner un acquéreur qui leur semble le moins susceptible possible de représenter un concurrent sérieux et seront tentées d'adopter différents comportements tactiques pour compromettre le succès de l'acquéreur. En outre, il se peut que les acquéreurs ne disposent pas de suffisamment d'informations pour exploiter les actifs, qu'ils n'aient pas de pouvoir de négociation sur les modalités face aux vendeurs, ou que leurs intentions diffèrent de celles des autorités de la concurrence. Ils peuvent par exemple utiliser les actifs dans d'autres marchés que ceux où les autorités de la concurrence entendaient répondre à un déficit de concurrence. De plus, lorsque les parties proposent la cession d'un nombre d'actifs limités, la viabilité de ces actifs dans le jeu concurrentiel peut être difficile à évaluer au moment où les mesures correctives sont négociées.

Les impératifs de l'acquéreur initial et les dispositions de cession des « joyaux de la couronne » peuvent jouer un rôle particulièrement important en cas de cession d'un ensemble d'actifs disparates, par opposition à une entité en exploitation. Dans ces circonstances, il existe une forte incertitude quant à la viabilité des actifs cédés ou à la possibilité de trouver un acquéreur adéquat. L'impératif de l'acquéreur initial permet à une autorité de concurrence d'évaluer la mesure corrective proposée *et* l'acquéreur proposé avant d'autoriser l'opération. Cela permet de s'assurer qu'il existe un acquéreur crédible, qu'il est bien intéressé par l'acquisition des actifs et que, si nécessaire, il permettra que l'autorité de la concurrence impose l'inclusion d'actifs supplémentaires dans l'ensemble cédé.

Les dispositions de cession des « joyaux de la couronne » peuvent être un recours lorsque la solution de l'acquéreur initial n'est pas réalisable et qu'il existe un risque réel d'échec de la cession proposée (une fois que les parties ont réalisé l'opération en question). Elles permettent à une autorité de concurrence d'imposer aux parties qui fusionnent de céder un lot d'actifs plus attrayant que dans la proposition initiale, de manière à ce que l'ensemble soit plus facile à céder. Toutefois, certaines autorités de la concurrence ont une certaine réticence à l'égard de ce type de dispositions car elles risquent de conduire à une cession d'actifs plus importante que nécessaire pour résoudre le problème de concurrence posé par une opération de fusion.

Lorsque la fusion reçoit le feu vert avant la mise en œuvre d'une mesure corrective reposant sur une cession d'actifs, les autorités de la concurrence peuvent aussi demander l'autorisation de désigner un mandataire de cession qui peut réaliser la cession si les parties ne parviennent pas à s'acquitter de leurs obligations en temps utile. La simple possibilité qu'un mandataire puisse céder les actifs en question sans prix plancher et sans intervention des parties peut représenter pour les parties une forte motivation à

remplir leurs obligations en matière de cession d'actifs. Les autorités de la concurrence qui recourent régulièrement à la solution du mandataire de cessions indiquent que cette disposition est rarement invoquée car les parties parviennent généralement à s'acquitter de leurs obligations.

L'autorité de la concurrence peut aussi prendre des mesures pour empêcher une détérioration des actifs avant leur cession. Il peut s'agir d'ordonnances de séparation des actifs, de manière à ce que les actifs cédés ne soient plus sous le contrôle des entités qui fusionnent et qu'ils restent viables, ou de la désignation de mandataires de contrôle pour veiller à ce que les parties se conforment aux dispositions des ordonnances provisoires et pour les empêcher de recourir à des moyens stratégiques pour compromettre la survie des éléments cédés.

(5) Si les autorités de la concurrence ont tendance à privilégier les mesures correctives reposant sur des cessions d'actifs, elles peuvent aussi envisager des mesures correctives comportementales, soit seules soit en conjonction avec des cessions, car elles sont adaptés dans certains cas pour répondre aux problèmes de concurrence soulevés par une fusion.

Les mesures correctives comportementales sont considérées comme particulièrement indiquées dans les fusions comportant des éléments verticaux, car elles préservent généralement mieux le gain d'efficience potentiel des fusions tout en prévenant les risques de fermeture du marché. Elles peuvent aussi avoir leur importance dans les industries de hautes technologies caractérisées par des marchés de propriété intellectuelle en rapide évolution, car elles permettent d'apporter des solutions plus souples qui peuvent être adaptées à des situations peu courantes.

Les mesures correctives comportementales jouent aussi un rôle non négligeable en conjonction avec les cessions d'actifs, afin d'assurer la viabilité des actifs cédées. Il peut s'agir d'obligations de fourniture, de dérogations aux contrats à long terme, de remboursements au pro rata permettant aux clients de changer de fournisseur, ou de l'obligation de fournir assistance et formation à l'acquéreur de l'actif cédé.

En règle générale, les mesures correctives comportementales doivent être de durée limitée, ou elles doivent être réexaminées au bout d'un certain temps pour s'assurer qu'elles demeurent pertinentes et ne créent pas une distorsion indue à la concurrence.

(6) Lorsque plusieurs autorités de la concurrence envisagent de définir des mesures correctives concernant une même opération de fusion, il est essentiel qu'elles se coordonnent et qu'elles coopèrent de manière à assurer la cohérence des solutions apportées. Même si des divergences subsistent au niveau des critères de fonds et des procédures, cette coopération et cette coordination fonctionnent de plus en plus souvent dans les fusions transnationales.

La coopération et la coordination entre autorités de la concurrence concernant les mesures correctives se sont avérées fructueuses, et pas uniquement dans les cas de fusions intervenant sur des marchés mondiaux. Les autorités de la concurrence ont constaté qu'il était particulièrement important de coordonner leurs travaux dans la mise au point et l'application de mesures correctives et de prendre en compte les problèmes des unes et des autres lorsqu'il existe des divergences entre les systèmes juridiques concernés sur les enjeux de marché et de concurrence ou qu'il y a une forte dissymétrie entre les positions concurrentielles des parties. Cet effort est essentiel pour que l'ensemble des mesures correctives réponde aux problèmes de concurrence de toutes les autorités concernées et que les obligations faites aux parties ne soient pas contradictoires. Pour être pleinement efficaces, la coopération et la coordination doivent porter à la fois sur la mise au point et sur l'application des mesures correctives.

Grâce à la poursuite de cet effort de convergence, tant au niveau des procédures qu'à celui des critères de fonds d'évaluation des fusions, la coordination s'en trouvera facilitée, alors que se réduira le risque de voir appliquer des mesures correctives incompatibles.

Il est aussi possible que les parties se livrent à des manoeuvres stratégiques et tentent de jouer une autorité de concurrence contre l'autre en passant un accord avec l'une d'elles et en se servant de cet engagement comme d'un levier pour peser dans les négociations avec les autres autorités de la concurrence. Pour limiter ce risque, les autorités de la concurrence ont tout intérêt à entretenir des contacts étroits et fréquents et à le faire savoir aux parties.

BACKGROUND NOTE

> …remedies – including structural ones – modify the task of the [European Commission] Merger Task Force (MTF), making it closer to a regulator than a Competition Authority (CA). This change is inherently linked to the nature of remedies, that by their very nature aim at changing the structure of the industry, and it occurs despite the MTF…sensibly trying to avoid becoming a regulator….[T]hese different tasks objectively raise challenges for the EC, and…economic theory can so far offer little help to it (or other CAs): more work is needed in this field.[1]

1. Introduction

Merger review basically consists of answering two questions: does a merger pose a threat for competition; and if so, how could that threat best be eliminated. This paper focuses on the second of those questions, but avoids getting into the legal details that would be necessary to properly understand any particular jurisdiction's approach to remedies. Those details as well as the provision of extended examples, are left to the country contributions for the roundtable.

Competition authorities can deal with anti-competitive mergers in three basic ways. The first is simply to prohibit them. Sometimes this is the only remedy that will work.[2] The second, probably most common type of remedy, is a divestiture, i.e. a structural remedy. This contrasts with a behavioural remedy, which instead of transferring property rights, constrains their use. More detail is provided in the next section on the range of available structural and behavioural remedies.

Regardless of the particular merger review regime, there are a number of general principles for devising remedies that probably apply in most if not all jurisdictions. The next four sub-headings are a paraphrase of four general principles contained in a recent speech by Deborah Majoras.[3]

1.1 Remedies should not be applied unless there is in fact a threat to competition

It seems obvious that remedies should be imposed only if they are demonstrably necessary. From the legal perspective this is probably a formal requirement. In the real world of merger review, however, remedies are applied to deal with uncertain *potential* threats to competition and this effectively confers considerable discretion on the competition authority.

Competition authorities are always under pressure to economise on scarce investigative resources, but without compromising their duty to protect the public interest in competition. Meanwhile, merging parties are usually very eager to complete their transaction. It may therefore be in the interests of both competition authorities and merging parties to agree reasonably quickly on remedies that err on the side of being too strict. The downside to this tendency, if it exists, is that overly strict or even unnecessary remedies could actually harm consumers by reducing the efficiencies expected from a merger or protecting competitors rather than competition. [4]

In some jurisdictions, e.g. the European Union, there is a strict timetable for merger review. Where that is the case, any tendency to err on the side of making remedies too strict pressures to agree on overly strict remedies could be still stronger. Where there are such timetables, it is therefore especially advisable to grant merging parties an informal pre-filing opportunity to sound out the competition authority's preliminary views, thus enabling them to begin working on remedies as early as possible. The European Commission's Notice on Remedies explicitly provides such an opportunity. In addition, the E.C. is

considering adopting "stop the clock" provisions to improve its remedy formulation and approval procedure.[5]

1.2 Remedies should be the least restrictive means to effectively eliminate the competition problem(s) posed by a merger

This principle may be legally required in certain jurisdictions, but even if not, it has much to recommend it. In merger review, competition authorities are dealing in future probabilities not observable certainties, so a minimalist approach to eliminating potential competition problems is wise especially since it will grant parties greater freedom to reap available efficiencies and respond to future developments.

1.3 Reinforcing the previous point, competition authorities typically have no mandate to use merger review to engage in industrial planning

As Majoras (2002, 3-4) expressed it:

> …having proven a violation, the goal is not to review the market and decide how it would best operate. Rather, the goal is to effectively remedy the violation for the benefit of consumers, maintaining competition at premerger levels. Once the violation is remedied, competition will decide how the market performs, including choosing the winners and losers."

1.4 Ccompetition authorities "…must be flexible and creative in devising remedies…."[6]

This point applies especially well to non-horizontal mergers in general and to mergers in rapidly changing markets in particular.

It is worth considering whether the above four general principles should be supplemented by noting that in some situations it might be better to forego imposing a merger remedy and instead to rely on *ex post* remedies to resolve any actual problems emerge post-merger. The option to proceed in this way is made possible by the discretion a competition authority inherently has in dealing with predicted rather than known threats to competition.

Determining how and when to take the *ex post* route would involve considering things like: the nature and degree of uncertainty associated with the threat to competition; the remedies actually available post-merger; the relative costs of imposing a merger remedy versus the costs of monitoring behaviour after the merger; and the importance of efficiencies likely to be foregone if the merger is blocked or conditioned.[7]

Suppose for example that the threat to competition is an increased probability of collusion. This would favour adopting a merger remedy, probably a structural one, because collusion is exceedingly hard to detect and tacit collusion may be nearly impossible to remedy short of using overt price control or ordering a divestiture. A merger remedy would be even more strongly favoured if the threat were the institution or strengthening of monopoly or oligopoly pricing, i.e. supra-competitive pricing likely to materialise without any illegal co-ordination among competitors. In contrast to these possibilities, suppose the threat to competition arises out of concern that the merger would facilitate anti-competitive exclusive dealing. Perhaps that threat could be adequately addressed by simply relying on an *ex post* prohibition order.

A decision to rely on post-merger remedies may not always mean exclusively depending on them. The parties could be required to agree to the merger being revisited and subject to normal merger remedies should standard post-merger remedies prove to be inadequate. They could also be obliged to regularly

report certain information that would make it easier for a competition authority to determine whether an abuse of dominance has occurred or some anti-competitive agreement made.

The rest of this paper will focus in turn on: the remedies available to competition authorities (the tools in the tool box); designing remedies (deciding what tools to use); and implementation (ensuring the tools work as intended).

Much of what is discussed below is relevant to remedies in both merger and non-merger situations. That applies, however, more to behavioural than to structural remedies. Few competition authorities have the power to order divestitures outside the merger context, and those who do use the power only very rarely.

Suggested Issues for Discussion

1. Do delegates agree with the above four general principles? Should they be expanded to consider the adequacy of relying on post-merger remedies to take care of competition problems if and when they actually arise? Under what conditions would it be acceptable to rely on post-merger remedies?

2. How significant, if at all, is the possibility that competition authorities and merging parties will agree to remedies that err on the overly strict side? In what situations are such risks likely to be especially high and what, if anything, can be done to reduce them?

3. Can delegates supply examples of mergers in which they chose to rely on standard post-merger prohibitions and penalties, rather than to impose ex ante *behavioural or structural remedies to take care of unusually uncertain or weak threats to competition? Were the parties subject to any reporting requirements in those cases? How did these mergers work out?*

2. Range of Remedies

A rough classification of structural and behavioural remedies is:

1. divestiture of a stand-alone, ongoing business and related assets;

2. divestiture of something less than a stand-alone, ongoing business;

3. contractual arrangements "…such as the licensing of intellectual property or perhaps a supply agreement"; and

4. other behavioural remedies.[8]

The structural/behavioural dichotomy should not be taken to imply that the two sorts of remedies are mutually exclusive. It is sometimes necessary to use a combination drawn from both categories, and some behavioural measures can be regarded as quasi-structural.[9]

Structural and behavioural remedies can be supplemented with a number of interim measures that competition authorities might take to ensure that the chosen corrective has its desired effect, such as:

1. injunctions to delay the merger and/or hold separate orders to ensure a full range of remedies remains available until an informed decision can be taken; and

2. various measures, including the appointment of a monitoring trustee to ensure that assets retain their commercial value pending a divestiture.

Interim measures are very helpful in maintaining a competition authority's leverage in negotiating a remedy in the absence of a statutory bar on closing pending the authority's review. Once a merger has taken place and assets have been co-mingled, it may be impossible to "unscramble the egg", i.e. to order a sale of assets that would remove the threat to competition without undermining the viability of the divesting firm. With this in mind, one can properly regard pre-notification requirements as an essential part of devising remedies.[10]

With specific regard to behavioural remedies, the following list drawn from actual Canadian experience is sufficient to make the point that they come in a large range of shapes and sizes:

1. require an acquiring firm to seek tariff remissions and reductions;

2. restrict information-sharing between joint venture parties (an example of "firewalls");

3. require the supply of third parties on fair and reasonable terms;

4. require adherence to codes governing conduct towards suppliers, customers and competitors;

5. require provision of data created by jointly dominant firms to competitive data networks for use in generating transactions with the dominant firms;

6. restrict the upstream exercise of market power through controlling discounts, receivables, and other trade terms;

7. prohibit the tying of services related to a product to a sale of that product;

8. open up access to data networks in order to facilitate the supply of new services;

9. prevent the use of contractual barriers to entry to keep control of an installed equipment base; and

10. prevent the use of contractual barriers to entry to tie up supply of a critical information input (and require the supply of historical information).[11]

Alongside the more standard structural and behavioural remedies, there is also a rarely used and somewhat controversial remedy that could prove highly useful in certain cases. It can be described as a "contingent remedy", one that is imposed post-merger only if competition conditions deteriorate. An example can be found in connection with a joint venture between the Peninsular and Oriental Steam Navigation Company (P & O) and Stena Line AB concerning a proposed joint venture to provide ferry services on cross-channel "Short Sea routes". P & O and Stena undertook that the joint venture would be subject to a price cap on passenger fares under the following circumstances:

> (i) where [the Director General of Fair Trading - DGFT] finds that the aggregate market share of the joint venture and Eurotunnel of the market for tourist vehicles on Short Sea routes is at least 90 per cent, and the joint venture's share is at least 30 per cent; and following
>
> (ii) the end of duty free sales;
>
> (iii) the expiry of any initial individual exemption granted by the European Commission pursuant to [Article 81(3)] of the EC Treaty….

. . . . . .

> P & O and Stena [further undertook] that, under such circumstances, the joint venture would:
>
> Notify the DGFT in advance of any permanent reduction in the number of vessels which the joint venture intends to operate on either the Dover-Calais or the Newhaven-Dieppe route, so that the DGFT may then review the operation of the undertakings;
>
> in respect of quality standards, seek to secure ISO 9002 Accreditation for all parts of its business.
>
> P & O…in addition [undertook] to provide the DGFT with such information as he considers necessary to monitor…prices…and…markets on the routes served by the joint venture.[12]

Suggested issue for discussion

Do delegates have examples of contingent merger remedies? If so, how difficult was it to specify a sufficiently objective triggering event, and how did the remedy work?

3. Design Issues - Effectiveness

A merger remedy must be both effective and administrable (including enforceable). In this section, the focus is on effectiveness. Administrability is dealt with in the next.

The starting point for designing a remedy is to specify clearly what the threat to competition is including its likelihood and durability. Once this is done and the results communicated, the parties will presumably be in a position to advance possible remedies.

Competition authorities generally prefer a structural remedy to eliminate problems linked to a structural change. As the European Commission's Notice on Remedies puts it:

> Where a proposed merger threatens to create or strengthen a dominant position which would impede effective competition, the most effective way to restore effective competition, apart from prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture.
>
> The divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis. Normally a viable business is an existing one that can operate on a stand-alone-basis, which means independently of the merging parties as regards the supply of input materials or other forms of cooperation other than during a transitory period.[13]

The United States Federal Trade Commission (USFTC) made a major contribution to merger remedy design through a study of the divestitures it had ordered from 1990 through 1994. This "FTC Divestiture Study" was designed, "…to investigate whether there were systemic reasons why some of the post-[*Hart-Scott-Rodino Act*] divestitures failed to achieve the Commission's remedial objectives."[14] Three general findings emerged from the study:

1. most divestitures appear to have created viable competitors in the market of concern to the Commission;

2. respondents tend to look for marginally acceptable buyers and may engage in strategic conduct to impede the success of the buyer; and

3. …most buyers of divested assets do not have access to sufficient information to prevent mistakes in the course of their acquisitions.[15]

The USFTC was surprised by the last finding since it had previously assumed that buyers of divested assets would be able to protect themselves despite obvious problems associated with sellers not wishing to create or strengthen their competitors. It is also well to remember that such buyers and sellers could have a joint interest in not wishing to increase competition in the market. We will return to this in the next section of the paper.

Baer and Redcay provided a good summary of the more detailed findings of the FTC Divestiture Study:

> Seventy-five percent of the divestitures studied (28 of 37) passed the test by "result[ing] in viable operations in the relevant market." A higher percentage (19 of 22) of the divestitures that involved sale of an entire ongoing business were successful. Of the divestitures that involved sales of more limited assets, 40 percent (6 of 15) were non-viable. This difference led the staff to conclude "that divestiture of an on-going business is more likely to result in viable operation than divestiture of a more narrowly defined package of assets and provides support for the common sense conclusion that the Commission should prefer the divestiture of an on-going business." This conclusion, plus the other two findings of the study, reinforced the Commission's conviction that its changed approach to merger remedies was justified.
>
> In divestitures that failed, the study concluded that many respondents had engaged in conduct intended to impede the success of the divestiture buyer. Those findings were not startling. The study found that respondents negotiated to limit divestiture packages as much as possible. Once the consent agreement was in place, respondents tended to select relatively weak buyers, i.e., those who seemed least likely to be a serious competition threat. The Divestiture Study also catalogued a variety of strategic behaviours by respondents to undermine the success of the buyer.
>
> Turning to the other side of the divestiture transaction, the Divestiture Study concluded that buyers were less sophisticated and more prone to mistakes than staff had assumed. Buyers often lacked information needed to operate the business. They saw themselves as lacking the bargaining power with the respondent needed to negotiate acceptable terms. Buyers also were reluctant to invoke the FTC's assistance in addressing their problems with respondents. Finally, some buyers had different interests in the transaction than the FTC; for example, some wanted the assets to compete in markets other than the one where the FTC was seeking to address its competitive concerns.[16]

One of the summary observations made in the FTC's Divestiture Study stressed the importance of what had been discovered about buyers:

> The divestiture package must take into account the fact that the respondent almost always has greater information about the to-be-divested business than either the buyer or the [FTC] staff. The divestiture must reduce or eliminate this information imbalance and protect the viability of the divested business before and during the divestiture. Growing experience with hold separate agreements, crown jewels, rights to visit respondents' facilities, rights to hire employees, and auditor trustees, indicates these are important tools to redress some of the imbalance and facilitate transfers.[17]

Baer and Redcay noted that the FTC Divestiture Study provided support for the USFTC's preference for: "…up-front buyers, sale of the entirety of an ongoing business and the use of crown jewels."[18] Discussion of up-front buyers and crown jewels will be postponed to the next section of the paper because they have more to do with implementing than with designing a remedy.

The USFTC's preference for sale of an entire ongoing business rather than limiting a divestiture to lines of commerce where competition problems are expected is directly linked to its objective of restoring competition lost because of the merger. Merely eliminating overlaps would not necessarily meet that objective. A competitor is still lost and not replaced unless the buyer or buyers use the divested assets to compete effectively with the merged entity.

Divesting a viable ongoing business sometimes requires divesting assets used in markets not negatively affected by the merger. This could be the case for example where a competitor would be non-viable unless it is able to reap important economies of scale and scope. It could also happen because a wider package of assets is required to ensure that the purchaser is not dependent on the seller's continued good will and co-operation. Such dependence would hardly be conducive to vigorous competition.

The USFTC has come under criticism for certain divestitures ordered in retail market mergers.[19] This stemmed in part from the USFTC preference for a "clean sweep" approach as opposed to divesting some assets from one of the merging entities and some from another. This preference is shared by the European Commission.[20] The clean sweep approach also entails selling divested assets to a single buyer rather than to a collection of buyers. The clean sweep approach is motivated by a desire to increase the probability that a divestiture will preserve pre-merger levels of competition. It may have, however, the effect of discouraging selling all or a part of the divested assets to smaller enterprises. This may or may not matter depending on a particular jurisdiction's merger law and political realities. Interestingly, the European Commission shares the USFTC's preference for a clean sweep approach.

Competition authorities might sometimes be able to accept a divestiture falling short of a stand-alone, viable business, provided the assets could be used by a buyer to strengthen its ability to compete in the pertinent markets. Such a divestiture is necessarily somewhat riskier from the competition authority's point of view than divestment of a viable, stand-alone business.

Four years after its Divestiture Study, the USFTC published a statement on negotiating merger remedies.[21] It contains details about things like determining which assets are to be divested, identifying an acceptable buyer, and the provisions to include in a divestiture agreement (including attention to preserving the marketability of assets to be divested). Despite the general reference to "Negotiating Merger Remedies", the statement refers only to divestitures. Other provisions of a behavioural nature are covered simply as possible ancillary orders.

Competition authorities must take care to ensure that divestiture orders do not inadvertently make things worse. This point is emphasized in Motta et al. (2002) where it is argued that a divestiture could end up facilitating collusion by making firms more symmetrical in size or by increasing multi-market contacts.[22] They also note that if the divestiture is made to a long-standing incumbent, the chances that the divested business would evolve into a maverick may be significantly reduced.[23] For this and other reasons, the effect of any divestiture on competition can only be assessed when the buyer is identified to the competition authority. Motta et al. accordingly deduce that: "…the requirement of an upfront buyer should be systematic rather than occasional.[24] As we shall see, there are also enforcement related reasons to prefer an up-front buyer or fix-it-first solution.

While divestitures are generally the preferred remedy for problematic horizontal mergers, that preference weakens when it comes to vertical mergers threatening competition.[25] Behavioural remedies

can and are used to ensure access on acceptable terms to key assets owned by a vertically integrated firm, or to prevent inappropriate use of sensitive information. Behavioural remedies are also particularly appropriate in regard to either horizontal or vertical mergers where a suitable buyer cannot be found, or "…competition problems…result from specific features, such as the existence of exclusive agreements, the combination of networks…or the combination of key patents."[26]

Concerning the greater incidence of behavioural remedies in vertical as contrasted with horizontal mergers, Morse opines:

> It is not clear whether this is a result of the agencies' weak negotiating position given the uncertainty of the vertical theories, or the agencies' sympathy to the interests of the parties in preserving the efficiencies of vertical integration.[27]

Efficiencies are clearly important in sectors undergoing liberalisation. Balto and Mongoven, for example, cite the U.S. natural gas industry in which liberalization involved moving away from a model of vertical integration from gas field to city gate. Divestitures may not be the most effective remedies in such circumstances:

> The horizontal and vertical efficiencies that drive many mergers may be lost through divestiture, and if potential anticompetitive effects can be avoided through other means, divestiture may not be called for. Licensing, although not common in natural gas cases, may be used where substantial intellectual property rights are an important part of the competitive equation. Requiring ongoing assistance to the buyer of divested assets is also a frequently used tactic to ensure that the new competitor is viable. This assistance can include contract manufacturing or supply agreements, access to critical personnel or facilities, or a continued customer relationship. [Three specific FTC remedial actions are referred to as illustrations of innovative approaches to remedies.] Opening bottlenecks to competing firms and making spot fuel purchases transparent are the kinds of innovative remedies that are needed to preserve competitive opportunities as well as acquisition efficiencies.[28]

Industries undergoing liberalization are also examples where thought should be given to assisting consumers in switching suppliers. If switching costs are high enough, merely increasing the number of competitors through either behavioural or structural remedies may achieve very little in terms of restoring competition. As Waterson notes:

> …action to stimulate consumers is best employed in relatively mature industries where performance is habitually a long way short of competitive, so that there has been continuing dominance by indifferent players without significant entry being attracted. A particular instance is where the industry has traditionally been in state hands, so that consumers are not very used to exercising choice, industries such as electricity and telephone service. It is unlikely to be useful in dynamic industries, where consumers and suppliers are both experimenting with new forms of product and product delivery.[29]

Preserving efficiencies is relevant in designing remedies regardless of the type of merger under review. All competition authorities, whether their test focuses on consumers' surplus or takes a wider view of economic welfare, would likely agree with what Parker and Balto (2000, 2) wrote with reference to United States merger enforcement:

> If there are two remedial options, both equally effective (based on experience) and both equally likely to achieve their objective, but with different implications for preserving cognizable merger efficiencies, we should choose the one that is more likely to preserve efficiencies. They must be

> effective *based on experience*--theory alone may not be enough for the risk of a failed remedy to be shifted to consumers.

The relationship between efficiency considerations and remedies is particularly important and complex in rapidly evolving, intellectual property intensive markets.[30] In such industries behavioural remedies could be especially appropriate. As Parker and Balto (2000, 7) noted, citing the *Ciba/Sandoz* merger as an example:

> Because licensing is more flexible and can more easily be tailored to unusual fact situations, it may be the preferred remedy in innovation cases where divestiture could interrupt potentially successful research efforts. In this case, the majority of the Commission determined that the gene therapy research efforts, which contained a number of joint efforts with third parties, would be too difficult to disentangle from the merging firms, and would thus "not only … hamper efficiency but also could be less effective in restoring competition if it led to coordinated interaction or left the divested business at the mercy of the merged firm." (reference omitted)

A similar point was made by Frédéric Jenny in his article on merger remedies in high-tech industries.[31]

An example of an effective behavioural remedy in a fast changing market can be found in the *Borland/Ashton-Tate* merger. As described by Fazio and Stern (2000, 47), the threat to competition in this merger resulted from the interaction between IP rights and control over technological standards, i.e. between network externalities and IP protection.[32] The consent decree required Borland to agree, "…to forgo enforcement of potential copyright claims over the "look and feel" of the dBASE [sold by Ashton-Tate] software and to use its best efforts to settle Ashton-Tate's copyright infringement litigation based on these claims."[33] This behavioural remedy amounted to a partial divestiture of IPRs and was, according to Fazio and Stern, "…more powerful than anyone imagined at the time."[34]

Since our principal focus has been on structural remedies, there is an important design issue which has so far not been mentioned. This is the length of time for which a behavioural remedy ought to run. A policy in favour of indefinite terms would risk throwing away one of the advantages of a behavioural remedy, i.e. unlike a divestiture, a behavioural remedy need not have a permanent effect.

Continuing a behavioural remedy for an indefinite time may well prevent the merged entity from responding in an efficient manner to market developments unforeseen when the remedy was adopted.[35] Thus, either a fixed term should be adopted for a behavioural remedy, or provision should be made to review and, if necessary, revise a behavioural remedy at pre-determined times. Exactly how long a behavioural remedy should run must be decided on a case by case basis.

Before leaving the issue of remedy design, it is necessary to raise an institutional issue. The European Union, established in April 2001 a special unit to help devise and implement merger remedies. This was done a few months after publication of the European Commission's Notice on Merger Remedies. Both developments took place in the context of a steady growth in the number of merger clearances containing commitments. Wolfgang Mederer, the head of the unit, described its work as follows:

> The basic aim of the unit is to provide, within the [Merger Task Force], a structure for building up and pooling the expertise in the field of remedies, both in the negotiation phase prior to an Article 6 or Article 8 decision and in the implementation phase post decision and until full compliance of the parties with the commitments given. Beyond ensuring consistency, the most visible practical results of the unit for the "outside world" should be the development of a clear set of key elements for commitments which eventually will lead to the development of standard elements for commitments, ideally standard template texts. In addition, standard trustee agreements are being developed.[36]

The E.C.'s "Remedies nit was responsible for the Commission's recently published "Best Practice Guidelines" which includes model texts for divestiture commitments and trustee mandates.[37]

The USFTC has a Compliance Division whose attorneys work closely with the investigating team as soon as it appears that a settlement may be possible. The team thus considers, among other things: what relief is needed to address identified competitive harms; whether a divestiture proposal is adequate to address those harms; whether deviations from standard operating practices are appropriate; and whether the language is clear and enforceable. In this way, the Compliance Division contributes to consistency in USFTC merger remedies.

In addition to providing greater legal certainty and consistency in remedy design, a group like the European Commission's Remedies Unit might reap considerable economies of scale in developing relevant expertise. As Motta et al. (2002, 18) pointed out, the "tool box" needed to analyse a merger is probably different from what is needed to design an appropriate structural remedy since it concentrates not on potential threats to competition, but rather on identifying and evaluating, "…the competences, assets, know how, personnel and other common resources that must be packaged in the new entity to create a competitive enterprise."

Suggested Issues for Discussion

1. In terms of designing and implementing merger remedies, how important are notification requirements and/or the ability to impose interim measures aimed at either postponing closure or ensuring that assets are held separate post-merger pending examination by the competition authority?

2. Do delegates agree that divestiture is the generally preferred solution for problematic mergers but that this preference is stronger with horizontal as compared with vertical mergers? What are some market characteristics that might militate in favour of using behavioural instead of structural remedies?

3. Is the preference for structural as compared with behavioural remedies decreasing? If so, to what extent does this reflect a general trend towards greater enforcement actions against vertical mergers, a larger share of mergers taking place in rapidly changing sectors, and/or some other factor(s)?

4. In the context of structural remedies, , what are the pros and cons of insisting on the sale of an on going business? Can your competition authority include within a divestiture order assets not directly employed in markets where the merger threatens competition. If possible, please describe a good example of this being done.

5. To what extent does your competition authority follow a "clean sweep" policy in divestiture orders, i.e. transferring an ongoing business from one buyer to one seller rather than mixing assets from both acquiring and target firms and perhaps selling to a number of buyers? Has there been much criticism of this approach from small and medium sized business, and if so, what has been the response to that resistance?

6. What special challenges to remedy design are found in industries undergoing liberalization or in industries undergoing rapid technological change?

7. Are there any examples of remedies intended to lower switching costs either in industries being liberalized or other sectors.

8. What considerations influence the appropriate term and/or review period for behavioural remedies?

9. What are the advantages and disadvantages of having something like the European Commission's Remedies Unit or the USFTC's Compliance Division implicated in both remedy design and enforcement?

4. Implementation - Administrability and Enforceability Issues

Effectiveness is not the only feature desired in a remedy. Competition authorities must also strive for timely implementation at minimal cost in terms of institutional resources.

While structural remedies usually have an edge over behavioural remedies when it comes to clarity and simplicity, they have a still more obvious edge in lower post-merger monitoring and enforcement costs.[38]

Depending on the type of monitoring required, behavioural remedies may put the competition authority in the position of being an ongoing regulator. This is especially true of remedies designed to ensure that access to networks or other essential facilities is provided on terms attractive enough to encourage or maintain competition at satisfactory levels. Competition authorities by and large resist becoming *de facto* regulators via the backdoor route of merger remedies since they typically lack the staff, culture and set of instruments required of such a role.[39]

Despite a general unwillingness to become regulators, perhaps there could be exceptional circumstances in which competition authorities use merger review to institute regulation of a market. That possibility was provocatively suggested by Lexecon in the course of reviewing the recent *NewsCorp/Telepiù* merger.[40] This merger resulted in a monopoly satellite delivered pay-TV operator in Italy. The European Commission allowed the merger partly because of the dire financial straits of both parties, but the failing firm exception was not formally relied on. Many conditions were imposed, however, to ensure access to various potential bottlenecks that could restrict either intra- or inter-platform competition. Lexecon stated that imposing these conditions amounted to using merger review as a means of setting up a quasi-regulatory framework that could not otherwise have been established.[41]

The supposed superiority of structural over behavioural remedies has not gone unchallenged. Those arguing for greater use of behavioural remedies are quick to note the practical difficulties involved in both designing and implementing structural remedies.[42] Ensuring divested assets go to the right buyer or buyers is particularly difficult and tends to pit the competition authority against the seller and sometimes the buyer as well.

From the divesting seller's point of view the most appealing buyer could be one that is unlikely to make effective use of its purchase, even if such a buyer is unwilling to pay as much as a potentially more successful purchaser. The lower price received could be more than compensated by an enhanced ability to reap supra-competitive profits unrestrained by the new or strengthened competitor.[43] Even worse from the competition authority's point of view, a seller might not have to face a trade-off between selling price and strength of future competition. If the pre-merger market is characterized by some form of co-ordination, the firm willing to pay the highest price for the assets could be the one most able and willing to help continue the anti-competitive arrangements.[44] The highest price might also be offered by the buyer best placed to use the divested assets outside the markets where competition is most threatened by a merger.[45]

Several things can be done to ensure a timely sale of divested assets to a suitable purchaser. The simplest is to insist on a fix-it-first remedy, i.e. an appropriate divestment is made before the merger is consummated. The next most straightforward and reliable policy would be to require an up-front buyer. As mentioned in the previous section of this paper, the USFTC favours incorporating up-front buyer requirements in its divestiture remedies. Such a requirement means that before the USFTC accepts a proposed consent order, a buyer it finds acceptable must have executed a final agreement to purchase the divested assets. Whether or not an up-front buyer approach is taken, the competition authority in most cases should insist on approving the buyer.

Once a buyer is identified, a competition authority can ascertain whether it is able and willing to use the acquired assets to replace competition lost because of the merger.[46] This is frequently done by examining its current market position and its business plans, and by seeking the opinions of customers, suppliers and even competitors concerning how competition is likely to evolve post-merger. Seeking those outside views is sometimes referred to as "market testing" a remedy and is an essential step in estimating its likely effectiveness.

Assessing a buyer's ability to use acquired assets to replace competition lost because of a merger *might* extend to considering the price to be paid for the divested assets. If the price is below liquidation value, there is a risk that the buyer will in fact liquidate the assets and pull out of the market. On the other hand, if too much is offered, the risk is that the buyer will eventually be forced into bankruptcy or may lack sufficient working capital to be an effective competitor.

Despite their apparent risk reducing qualities, there can be situations where a fix-it-first approach or up-front buyer is deemed unnecessary. Speaking from the perspective of his experience at the USFTC, Ducore (2003, 23) remarks that:

> Offers to make post-order divestitures will always be considered, but any such proposal needs to show that the offered package has a high likelihood of success. The factors that are always considered include: 1) whether the package is self-contained, with all needed supply inputs, specialized employees (e.g. for research and development, and marketing) and customer relationships, 2) the history of prior sales of such assets in the industry, 3) the active interest of suitable buyers, 4) the parties' willingness to be bound by an order to maintain and hold the assets separate, and 5) a crown jewel provision. Particular cases may raise additional issues. The more the parties' offer represents a going concern, with any needed safeguards such as hold separates and crown jewels, the greater the likelihood will be that the staff will be comfortable with completing that divestiture post order, all else being equal.

Baer and Redcay described some procedural and substantive critiques that have been levelled at the up-front buyer requirement. The procedural objections boil down to increased uncertainty for merging parties, and an undesirable difference in treatment depending on whether the merger is reviewed by the USFTC or the United States Department of Justice (USDOJ). The latter makes more frequent use of the fix-it-first approach than does the USFTC.

There were also two substantive criticisms mentioned by Baer and Redcay: "(1) an up-front buyer is not needed where there are a number of highly qualified buyers, particularly where the divestiture is of an ongoing business, and (2) requiring an up-front buyer can impose a considerable cost on the merging parties."[47] Baer and Redcay expressed some sympathy for this objection and recommended:

> The agencies should reserve up-front buyers for situations where they are really needed. In circumstances where the respondents can show that there are several suitable purchasers and neither interim competitive harm nor dissipation of the business is a serious problem (or can be avoided through other, less costly means), the agency should not require an up-front buyer. In these cases, the marginal benefits to competition are outweighed by the risks. The FTC can achieve its legitimate remedial objectives by insisting on a prompt, post-closing sale of the divestiture package.[48]

Compared to the United States, the European Commission resorts less frequently to up-front buyer requirements. Writing in 2002, Holmes and Turnbull could cite only four examples from the European Union.[49] These four instances were treated as illustrating the type of situations where the Commission would require an up-front buyer, namely where: "the Commission is concerned that the divested business may be weakened pre-sale"; "the divestment package is not "stand-alone" but is a combination of assets

from the two parties merging and therefore it is difficult to assess the viability and attractiveness of the package"; "the Commission is not convinced that the divestiture proposed will attract a buyer"; and "the success of the remedy depends to a large extent on the identify of the proposed buyer".[50]

To reduce the risks of post-approval or post-closure divestitures, trustees can be appointed to ensure that assets are not commingled or devalued in some way prior to sale. This includes, in the case of divestments of target company assets, preventing the acquiring company from obtaining sensitive commercial information. Trustees can also be used to ensure the divestiture takes place within a specified time and to assist a competition authority in assessing the suitability of a purchaser.

How can a trustee be strengthened in terms of arranging the required divestiture? Parties' promises or "undertakings" to do certain things is one possibility, but competition authorities may justifiably be concerned that such undertakings are unenforceable. In common law jurisdictions, competition authorities may wish to deal with this problem by incorporating undertakings in consent orders which are then enforceable through contempt of court proceedings.

Another means of ensuring implementation of a chosen divestiture has already been mentioned. It is to identify a certain larger or more valuable group of assets, i.e. a "crown jewel", that the parties are legally committed to sell if a divestiture preferred by the parties does not take place by a specified time. The crown jewel should be fashioned to ensure it both constitutes an incentive to make the desired divestiture, and would in fact restore competition were it resorted to.

There is a downside to the use of crown jewels. Baer and Redcay point out that they:

> …create uncertainty as to whether assets subject to the provision will stay with the current owner or be divested. They may delay the integration of assets and the realization of efficiencies flowing from the underlying deal. So if crown jewels are to be part of the solution, they should be used only where really needed.[51]

Baer and Redcay also emphasise that crown jewels are probably not needed where there is an up-front buyer.

Holmes and Turnbull (2002, 509) could only identify two occasions when the European Commission imposed crown jewel requirements. Commissioner Monti described one of them as follows:

> The Nestlé/Ralston Purina case provides an example of the Commission accepting a proposal for alternative remedies, or what is informally referred to as "crown jewel". The possibility of accepting such "crown jewel" remedies is foreseen in paragraphs 22 and 23 of the Remedies Notice and it is a form of commitment which the Commission expects to see more of in the future. In this case, the first alternative was the licensing of Nestlé's Friskies brand in Spain. If this licensing alternative is not implemented either by a fixed date or the date on which the notified operation is closed, then the option to license Nestlé's Friskies brands would no longer be available to the parties and the second alternative ("the crown jewel") would have to be implemented. The second alternative, which involves the divestiture of the 50% shareholding of Ralston Purina in the Spanish joint venture with Agrolimen (Gallina Blanca Purina JV), consists of a larger and more easily saleable package compared to the licensing of Nestlé's Friskies brand.[52]

In some jurisdictions, a merger approval could be made conditional on a timely divestiture to an approved buyer. In the European Union for example, if such a "condition" were violated, the approval and the merger would become void and the parties could be liable as well to significant fines.[53] Given these

severe consequences, the European Commission may have little need of either up-front buyer or crown jewel requirements in order to ensure parties keep their promises.[54]

What has been said above applies as much to sales of soft assets, such as intellectual property rights (IPRs), as to physical plant and equipment, but as Parker and Balto (2000, 5) note, soft asset sales also present some special difficulties and challenges:

> They bring together…[the] respondent's incentive to limit the asset package, the buyer's informational disadvantage, the buyer's reliance on the respondent for technical assistance and transfer of know-how, and the respondent's incentives to engage in strategic behaviour. Another difficulty, because technology transfers often involve the divestiture of less than an ongoing business, is that the buyer may be at the bottom of the learning curve and thus starts with a disadvantage.

As earlier noted, behavioural remedies are hardly free from implementation difficulties. Most such remedies are employed in vertical mergers where the threat to competition stems from changes in information and incentives.

The *Eli Lilly/PCS Health Systems* merger provides a good illustration of some of the problems inherent in implementing behavioural remedies in a vertical merger. At the time of the merger, Lilly was a major pharmaceuticals manufacturer and PCS Health Systems operated a managed prescription drug benefit program ("PBM"). PBMs interact with many different pharmaceutical companies in putting together the drug formularies used by their clients. Writing when he was Chairman of the USFTC, Robert Pitofsky described some of the necessary background to this case:

> PBMs are new factors in the prescription drug field. They are organizations that operate as brokers between drug companies on the one hand and various payment groups on the other - for example managed care providers, corporations, labour unions, retirement systems, and federal and state employee plans. By aggregating buying power, they can obtain discounts from drug manufacturers. The PBMs select participating pharmacists and administer point of sale claims processing systems when insured consumers purchase prescription drugs. They also provide record keeping services and ensure quality control. Also, they select and describe drugs available to consumers through pharmacies, and negotiate quantity discounts - often very substantial - with pharmaceutical manufacturers.
>
> One important device that facilitates the negotiation of discounts from drug companies is the formulary - that is a PBM produced compendium of information about drug products listed by therapeutic category, along with cost information. Formularies are made available to physicians, pharmacies and third party payers and they help to guide the various parties in prescribing and selling drug products. PBMs often influence drug pricing by encouraging in various ways the most effective drug treatment - including substitution of generic or lower cost drugs to customers. Most doctors prescribe and most customers buy through "open" formularies which allow for reimbursement by the payment group of virtually any drug approved by FDA. A closed formulary limits reimbursement to specific drugs listed. Between open and closed formularies, there is a variety of hybrids that restrict the number of drugs listed.
>
> The key to the ability of PBMs to drive prices down in the drug market is the fact that drug companies will give larger discounts if they can be the provider of the sole drug or one of only a few drugs in a particular therapeutic category in the formulary. In effect, the drug companies pay for exclusive or near exclusive dealing. Services provided by PBMs have proved very popular so that over 125 million Americans currently purchase some or all of their drugs through a PBM and that

> number is expected to increase to 200 million by the year 2000. Some people believe that the rate of increase in drug prices has declined in recent years, and that is a result of the leverage exerted by these PBMs.
>
> While there are many PBMs, three of the largest were purchased by three large drug companies in the past few years. Most recently Eli Lilly acquired PCS, the largest PBM in the country. The FTC challenged the merger, alleging among other theories that PCS would be eliminated as an independent negotiator of prices and that other drug companies, particularly those supplying drugs that compete with Lilly, might be foreclosed from future PCS formularies.[55]

The *Eli Lilly/PCS Health Systems* merger displayed some characteristics tending to favour the use of behavioural remedies, namely vertical integration in a rapidly changing market where it was difficult to assess the importance and probability of the threats to competition, and a significant potential for efficiencies associated with the merger. The USFTC settled the case through a consent order which had as a crucial element the requirement Lilly maintain an open formulary. That seems quite straightforward until one begins to consider the various ways in which Lilly could make it ineffective. Hints of the complexities come through as Pitofsky describes some of the related conditions:

> Discounts offered to the open formulary must be accepted and accurately recorded in ranking drugs. Lilly may still offer payment groups a closed formulary where presumably more substantial discounts would lead to a lower total price package. A committee independent of Lilly and PCS - a so-called pharmacy and therapeutics committee - would decide which drugs to include in the open formulary on the basis of objective scientific criteria. There are antidiscrimination and fencing in provisions in the order, but the ones I have described were critical to the Commission's decision to authorize the transaction.[56]

This consent order illustrates that using behavioural restraints to reduce potential anti-competitive effects while preserving important efficiencies usually means giving a competition authority an ongoing supervisory role in the post-merger enterprise. Some of that role may be delegated as it was here to an independent committee, but the competition authority must still retain the power to make the behavioural restraints effective.

Two further aspects of the *Eli Lilly/PCS Health Systems* consent order deserve comment. The USFTC found it necessary to prevent Lilly's use of information that a PCS obtains in the normal course of business. Former USFTC Commissioner Christine Varney referred to this case to make some general points about such "firewalls":

> Because, by definition, vertical acquisitions involve companies making products one of which is a necessary complement to the other's, vertical acquisitions can give the combined entity the ability to obtain competitively sensitive information about competitors in either market. The information could involve non-public pricing information difficult to obtain elsewhere, in which case the competitive concern would be that collusion in one of the markets could be facilitated as a result of the merger. For example, in Lilly's acquisition of PCS, a pharmacy benefit management company, the Commission's proposed settlement requires that the merged entity construct a firewall to prevent Lilly from obtaining other drug manufacturers' bids, proposals, contracts, prices, rebates, discounts, or other terms and conditions of sale.[57]

The United States competition authorities have the power to review a merger at any time, unless it was the subject of a consent order or other court decision.[58] A type of exception to this generalization arises if a consent order explicitly specifies a power to re-visit the merger later. That is exactly what happened in *Eli Lilly/PCS Health Systems*. Pitofsky justified this as follows:

> In something of a break with past procedure, the Commission notified the parties that it would continue to monitor competitive effects of the transaction in the rapidly changing pharmaceutical industry, and would revisit questions about the effectiveness of the order, the effect of the transaction on other drug companies and on prices to consumers, and ultimately the legality of the underlying vertical merger, several years down the road.[59]

No time limit was cited for this review power.

Pitofsky pointed to the obvious advantages of this approach - it allows the parties to proceed with their merger and reap available efficiencies while giving the competition authority a wait and see power. Pitofsky also mentioned some other "indirect and more subtle possible advantages":

> First, parties claiming efficiencies or brushing off the possibility of anticompetitive practices may be induced in the years following the merger to pursue more aggressively the efficiencies or avoid more carefully anticompetitive effects. Second, lawyers, economists and others defending transactions may be a little more cautious in submitting extravagant claims if they know they will be called to account at a later date. Enforcement officials in Canada, where subsequent review has occurred for many years, report their sense that both indirect effects in fact have occurred.[60]

Pitofsky also listed, and generally rebutted, four arguments against explicitly retaining the power to monitor and possibly alter remedies:

1. Some will say that the continuing supervision entailed in this kind of review will dissipate Commission resources and may suggest that the Commission is acting more as a regulator than a law enforcer. The image might be of an administrative Big Brother looking over the shoulder of business people, constantly checking on their behaviour. I believe that mischaracterizes the approach. The Commission will not continuously supervise anything. It simply puts the parties on notice that at some future time - two, three or four years down the road - it intends to revisit the market segment and the transaction to see if the transaction and others like it led to anticompetitive effects. In the meantime, as always, Commission staff would investigate any complaints that anticompetitive effects had emerged.

2. It may be difficult several years later to identify cause and effect. For example, drug prices may go up or market share of the companies owning PBMs may increase, and yet it will be difficult to know whether those effects can be attributed to the merger or to one of a hundred other causes. But economic cause and effect is a constant problem in enforcing competition laws. That retrospective determination is no more difficult than a prediction that efficiencies will occur, entry barriers will be surmounted if prices go up, or a company will fail.

3. It could be claimed that effective subsequent review, as a practical matter, can only occur if there are provisions that the parties to the transaction will not dissipate or scramble the asset. For example, the parties may conclude six months before subsequent review that anticompetitive effects have occurred and therefore sell off key assets, move important staff to the parent company, or otherwise anticipate a negative government reaction. On the other hand, a provision preventing the parties from dissipating or integrating the assets may hamstring business people and prevent them from doing what they think is right for their acquired company. For the time being, there is no thought of doing any more than reviewing the transaction at a later date.

4. Finally, some may anticipate that this is only step one in the direction of a more intrusive approach. In Lilly/PCS, all the Commission did was put the parties on notice that it would take another look, something the agency had the power to do anyway. Examining the anticompetitive

> effects of a merger in light of post acquisition evidence and at the time of suit rather than at the time of the transaction is standard American antitrust law. Some may anticipate that the next step might be to clear the deal on condition that the Commission concludes several years later that it is satisfied that efficiencies were achieved or anticompetitive effects did not occur. I should add that any such approach would have to permit judicial review of the Commission's decision, or, in my view, it would be unacceptable. I am not sure at this point whether that sort of "conditional clearance" approach is justified.[61]

Suggested Issues for Discussion

1. How essential is it to employ monitoring and divestiture trustees to ensure that merger remedies are effectively implemented? What kinds of information and powers must the trustees have? Does your jurisdiction publish standard terms for monitoring and divestiture trusteeships?

2. How much does your competition authority rely on undertakings to ensure merger remedies are implemented? How successful has this proved to be?

3. How much does your competition authority rely on up-front buyers or a fix-it-first approach to divestitures? What, in your experience, are the pros and cons of these approaches?

4. What role, if any, should a competition authority play in the pricing of assets to be divested?

5. How often have crown jewels been included in your merger remedies, and how often has the sale of a crown jewel proved necessary? How have such remedies generally worked out?

6. What are the situations in which firewalls are most likely to be needed and what practical measures can be taken to make them effective?

7. What are the pros and cons of allowing competition authorities to revisit notified mergers which they did not oppose, or of competition authorities obtaining such a power in consent orders? Would such powers significantly assist competition authorities in ensuring that merging parties do not withhold or hide important information from the competition authority? What can be done to ensure that a power to re-open a merger review does not inordinately reduce parties' incentives to enter into consent agreements with the competition authority? Should there be an absolute time limit on the power to impose merger remedies, and should that depend on whether or not the merger has: a) been notified; and/or b) been the subject of a consent order?

8. What do delegates think of Lexecon's suggestion that merger control could be used as a means of introducing through the "back door", a form of ex ante regulation that could not be imposed through general competition law? In what sectors, if any, is that particularly likely?

5. International Co-operation and the Importance of Follow-Up

International co-operation and co-ordination in designing remedies are crucially important in mergers affecting markets that are international in geographical scope. This is also true, although to a lesser degree, of mergers affecting a number of separate national markets. It could happen in the multiple geographical market case that divestitures ordered by one competition authority could affect economies of scale and scope having effects going beyond its jurisdiction.

There are several differences across competition authorities that could make international co-operation difficult. Among them are differences in:

1. substantive tests governing whether a merger can be blocked;[62]

2. the role of efficiencies;[63]

3. time tables for considering mergers and the existence and nature of pre-notification requirements;[64]

4. pre-closing authorization requirements, if any, and the ability to re-visit an authorized merger; and;

5. role of courts in the remedy process.

Although this list appears to be formidable, it has apparently not stopped extensive co-operation on remedies, for example between the United States and European Union. It should be noted, however, that co-operation between those jurisdictions has been assisted by strong mutual interest in making co-operation work and considerable convergence in merger remedy policies. As Commissioner Monti acknowledged, the European Commission's Notice on Remedies took explicit account of practice in the United States and the results of the USFTC's Divestiture Study.[65] Nüesch (2001, 16) drew attention to six points of commonality between the Notice and the Study:

- the responsibility of proposing remedies rests exclusively with the parties – it is for them to identify the competitive issues and to consider what remedies are adequate;[66]

- the remedy must restore the pre-merger level of competition;

- structural remedies are preferred to behavioural remedies as they are more likely to be effective and require less ongoing monitoring. In vertical transactions, however, behavioural remedies may be accepted to reduce barriers to entry;

- Favoured structural remedies consist of the divestiture of an ongoing, stand-alone business (rather than of selected assets), in order to establish an effective competitor. Thereby, preference is given to a purchaser with experience in a related business, or to an up-front buyer. The latter allows the vetting of the buyer in advance and consequently reduces the risk of delayed or incomplete divestiture;[67]

- in order to assess the proposed remedies and conduct market testing, they are discussed with competitors, potential buyers of the divested business, and customers;

- on both sides of the Atlantic, concerns have been expressed that some proposed remedies are too complex for a true test of the market, and thus tend to discourage merger approvals. This is particularly true under EC merger control where procedural deadlines impose a severe time constraint on market investigations into remedies that are proposed at a late stage in the proceedings.

To the extent these points of commonality apply to a large number of other jurisdictions they should also promote co-operation on remedies among them.

To improve international co-operation, attention must be paid to both procedural and substantive issues. As Jenny (2002, 12) has noted:

> There is a great deal of consensus between the US FTC and the EU Commission on what constitutes the best merger remedies from a theoretical point of view and on how and when they should be used. Thus, possible differences between the practices of the two authorities are not primarily due to

> differences in their approach to merger remedies but [rather] to substantial differences in the US and the European antitrust laws.

There are some dangers in failing to reduce procedural and substantive differences affecting merger remedies (defined to include prohibition). In a post-*General Electric/Honeywell* speech, the Chairman of the USFTC stated:

> The ruling of the most restrictive jurisdiction with respect to a proposed merger ultimately will prevail. Consequently, disagreements among regulators may lead businesses to restrict their merger activity to transactions that will be acceptable to all jurisdictions. As a result, merger activity may fall to sub-optimal levels, as businesses are dissuaded from negotiating transactions that most jurisdictions would view as competitively benign, out of concern that the most restrictive jurisdiction would block those transactions.
>
> The "most restrictive ruling" phenomenon can be addressed and at least partially vitiated over time through enhanced cooperation and communication among enforcement agencies. At the threshold, the parties and their constituencies will profit from a clearer understanding of the differences in substantive approach employed by the various competition regimes. From this step, greater convergence can evolve. The drawing together of EU-U.S. merger policies concerning product market definition, unilateral effects/dominance and, lately, coordinated effects is illustrative. Thus, enhanced cooperation and renewed efforts at convergence should create greater agreement about the "right" approach to merger review, whatever that may be, thereby reducing disagreement.[68]

Convergence in both procedures and substance regarding merger review would be enhanced by systematic follow-up of merger remedies. Few if any competition authorities engage, however, in merger follow-up even on a non-systematic basis. The FTC Divestiture Study remains the exception rather than the rule even though it attests to the useful lessons that could be learned from remedy follow-up.[69]

The follow-up and possible revision of remedies is included in the general mandate of the European Commission's Remedies Unit.[70] Since Autumn 2002, the European Commission has been working on something analogous to the USFTC's Divestiture Study. The intention is to publish it sometime in 2004 and follow that up with a public consultation process that would inform future developments in merger remedies.

Suggested Issues for Discussion

1. Is there evidence that inadequate international co-operation on merger remedies is resulting in a significant loss of efficiencies from actual or potential mergers affecting more than one national market?

2. Do existing international differences in merger remedy policies have the effect of transferring power to the most restrictive competition authority?

3. Is there evidence that merging parties are engaging in strategic gaming because of imperfect co-ordination on merger remedies, including playing off one competition authority against another? If so, what should be done about that?

4. What legal obstacles, if any, would competition authorities have to surmount to suspend consideration of a merger in order to permit international co-operation on merger remedies? Could such suspensions be employed to grant one or possibly two competition authorities "lead agency" status in working out an appropriate remedy, while permitting the suspending authority(ies) eventually to reject or modify the resulting remedy?

NOTES

1. Motta et al. (2002, 2)

2. The European Commission's Notice on Remedies states that:

> There are…concentrations where remedies adequate to eliminate competition concerns within the common market cannot be found. In such circumstances, the only possibility is prohibition.

The Commission immediately added:

> Where the parties submit proposed remedies that are so extensive and complex that it is not possible for the Commission to determine with the required degree of certainty that effective competition will be restored in the market, an authorisation decision cannot be granted.

European Commission (2001, paras. 31 & 32, references omitted)

3. Majoras (2002, 3-6). Ms. Majoras is Deputy Assistant Attorney General, United States Department of Justice (Antitrust Division).

4. After critically surveying the mid-nineties increase in the use of consent orders in vertical mergers in the United States, Klass and Salinger (1995, 694) in part concluded:

> Merging parties are sometimes willing to make some concessions in return for quick agency approval, and the agencies can publicize these consents as evidence that they are minding the store. The effects of consents are not, however, well understood; and there should be no presumption that they are, at worst, innocuous. At worst, they can be anticompetitive.

5. See Monti (2002, 12-13)

6. Majoras (2002, 4)

7. See Jenny (2002, 4-5)

8. This list is based on Parker and Balto (2000, 2). The quoted material is also from page 2.

9. Ersboll (2001, 363) describes the latter as follows:

> Quasi-structural commitments include for example granting access to a network or infrastructure on non-discriminatory or favourable terms. While being behavioural, such commitments will change the structure of the market to some extent.

10. Baer and Redcay (2001, 1702) state:

> Merger remedies received little attention before Congress enacted the [*Hart-Scott-Rodino*] Act in 1976. Without premerger notification, companies were free to close their transaction before the agencies learned about it, and certainly before they learned enough to evaluate the antitrust problems and any proposed divestiture remedy for those problems. When the agencies sued to block a merger,

> the stakes most often were all or nothing—riding on the outcome of the preliminary injunction hearing. Only if the agency obtained a preliminary injunction did it have the time and leverage to negotiate a satisfactory divestiture. In cases where the agencies failed to win a preliminary injunction, but ultimately obtained a divestiture order after protracted litigation, so much time had passed that there often was such a significant scrambling of the businesses, employees and customers of the merged companies that the victory was, in the words of Congress, "Pyrrhic." (references omitted)

11. These examples, references to cases omitted, were complied from Neylan (2002, 20) and Campbell and Halladay (2002, 7).

12. United Kingdom (Department of Trade and Industry) (1998, 1)

13. European Commission (2001, paras. 13 & 14).

14. United States (Federal Trade Commission) (1999, iii)

15. Ibid., p. 8

16. Baer and Redcay (2001, 1705-1706, references omitted)

17. United States (Federal Trade Commission) (1999, 38)

18. Baer and Redcay (2001, 1701)

19. See United States (General Accounting Office) (2002).

20. See European Commission (2001, para. 18).

21. See United States (Federal Trade Commission) (2003).

22. See Motta et al. (2002, 8-9) For a putative example of heightened risk through increased symmetry, see the *Nestle/Perrier* case featured in Compte et al. (2002). Motta et al., at page 9, cite the *EDF/EnBW* merger as an example of a merger remedy that dangerously increased multi-market contacts.

23. Motta et al. (2002, 9)

24. Loc. Cit., reference omitted.

25. According to Morse (1998, 1247): "The imposition of divestiture requirements, the standard remedy in horizontal merger challenges, has been rare in the vertical cases." Wilcox (1995, 247-248) noted a rise in U.S. enforcement against vertical mergers and within that class found an increasing enthusiasm for using behavioural remedies.

26. European Commission (2001, para. 26).

27. Morse (1998, 1247-1248)

28. Balto and Mongoven (2001, 532) references omitted

29. Waterson (2003, 147)

30. For a general discussion of merger review in high innovation markets, see OECD (2002).

31. After noting several reasons why formulating remedies can be more difficult in high-tech industries, Jenny (2002, 11) concludes:

> Overall, it appears that in spite of a preference for simple divestitures, more complex remedies (and behavioral remedies which are quite complex to monitor) are routinely used in high tech industries both by the EU Commission and the Federal Trade Commission.

He went on to discuss a number of pertinent examples, i.e. AOL/Time Warner (the EC remedy), Vivendi/Canal+/ Seagram, and Silicon Graphics/Alias/Wavefront, and added, at page 12:

> Because the future of high tech industries is so uncertain and because of the potential efficiency benefits of mergers in those industries, behavioral remedies which are more flexible than structural remedies and may be imposed only for a transitory period may be more appropriate, or even the only possible remedies, even though they may require more costly monitoring by the antitrust authority.

32. Fazio and Stern (2000, 47) argued that in such situations:

> …there exists the significant possibility that a firm can create a "closed" standard and thereby achieve a monopoly, notwithstanding the fact that alternative (and perhaps superior) technologies are available or could be readily developed. Standing alone, IP rights allow an innovator to exclude other firms from using protected technology, but cannot forestall the introduction of competing products based on alternate technologies. Independently, network externalities may drive the market to converge on a single technological standard in which several firms can participate. When these two sources of market power interact, rather than moving towards a single technological standard in which several firms may participate, the market may tip to a single supplier, the owner of the intellectual property underlying the standard. In other words, a single firm's ability to exercise market power may be magnified by the interaction of IP and network externalities.

33. Fazio and Stern (2000, 49).

34. Loc. Cit. They added:

> Shortly after entry of the Borland/Ashton-Tate consent decree, Microsoft entered the RDBMS market employing backwards-compatible (and superior) technology acquired from Fox Software. Within a few years, Microsoft had captured a dominant position in the RDBMS market. Accordingly, while the *Borland* remedy prevented the merged firm from dominating the RDBMS standard and market, the remedy may also have been instrumental in opening the way for a powerful new competitor into that market.

35. The Australian Competition & Consumer Commission (1999, para. 7.9) includes in its list of reasons for preferring structural over behavioural remedies:

> The Commission is not likely to favour behavioural undertakings such as price, output, quality and/or service guarantees and obligations. Such undertakings may well interfere with the ongoing competitive process through their inflexibility and unresponsiveness to market changes. The duration of such undertakings is also highly problematic.

36. Mederer (2001, 3)

37. See European Commission (2003).

38. The European Commission's Notice on Remedies states: "…commitments which are structural in nature…are, as a rule, preferable from the point of view of the [Merger] Regulation's objective…and [do] not…require medium or long-term monitoring measures." European Commission (2001, para. 9). Lower

post-merger monitoring and enforcement costs also figure in the Australian merger guidelines expressed preference for structural remedies. See Australian Competition and Consumer Commission (1999, 7.10).

39. For further discussion of differences between regulators and competition authorities, see pp. 24-28 of the Background Paper contained in OECD (1999). As an example of competition authority aversion to monitoring, the European Commission's Notice on Remedies explicitly states: "Commitments [referring to both structural and behavioural remedies] should not require additional monitoring once they have been implemented." European Commission (2001, para. 10)

40. Lexecon served as an advisor to NewsCorp and Stream in this merger.

41. Lexecon (2003) states:

> It is interesting to note that industries which used to rely on *ex ante* regulation…are now moving to a combination of lighter *ex ante* regulation coupled with *ex post* regulation…through competition law, while industries such as pay-TV that essentially were subject to *ex* post regulation only through competition law, are now moving towards *ex ante* too. Merger control is being used to impose *ex ante* regulation that could not readily be imposed through general competition law.

42. See for example, Campbell and Halladay (2002,3) who maintain that: "…a "divestiture first" mentality is not warranted and…wider use of behavioural remedies in Canada should be considered."

43. The FTC Divestiture Study confirmed that left to their own devices sellers would indeed seek out "the most marginally acceptable buyer" and also "…take actions intended to make the divested assets less competitive, either as a result of indifference or as part of a planned strategy." See United States (Federal Trade Commission) (1999, 15).

44. See Motta et al. (2002, 7). For a sketchy reference to buyer incentives, see Farrell (2002).

45. The FTC Divestiture Study recognised both possibilities and observed:

> Methods must continue to be developed for reviewing divestitures to distinguish those buyers who are likely to compete from those who are likely either to cooperate or to use the assets for other purposes. [United States (Federal Trade Commission) (1999, 27)]

46. Parker and Balto (2000, 6), speaking from the perspective of the USFTC, note the advantages of requiring an up-front buyer:

> Up-front buyers are probably the most vital tool in assuring a successful divestiture. It enables us to better determine (a) whether a proposed package of assets that is not a stand-alone business is viable in the real world, (b) whether there is a buyer for the proposed divestiture assets, and (c) the likelihood that the proposed buyer will restore the competition that otherwise would be lost through the merger. This last factor is receiving careful scrutiny. The FTC seeks to assure not only that the buyer will successfully enter, but also that it can restore competition fully.
>
> Up-front buyers are now used in over 60 percent of the cases in which there is some form of non-behavioral relief. There might have been an impression that the up-front buyer policy is reserved for cases where assets may waste quickly, such as supermarkets. That is not the case. The Commission has used up-front buyers in pharmaceutical cases, in other health care products, industrial products such as refractories, acrylic polymers, lead smelters, industrial power sources, and consumer products. (See the appendix for a representative list of cases and markets.) In many cases where the parties have identified an up-front buyer at the beginning of the investigation, the Commission has been able to resolve its concerns and enter a proposed consent order in less than sixty days after the investigation began. The message is straightforward: parties must consider and be able to identify an up-front buyer as part of the merger planning process.

47. Baer and Redcay (2001, 1709)

48. Ibid., p. 1710

49. Holmes and Turnbull (2002, 507-508). This contrasts rather starkly with the extensive use of up-front buyers by the USFTC – see n. 20, *supra*. Holmes and Turnbull also pointed out that what the European Commission refers to as an up-front buyer is half-way between the U.S. fix-it-first and up-front buyer conditions. The EC's condition requires finding a suitable buyer sometime between the European Commission approving the merger and the deal being closed.

50. Holmes and Turnbull (2002, 508)

51. Baer and Redcay (2001, 1712)

52. Monti (2002, 6).

53. In describing the European Commission's Notice on Remedies, Nüesch (2001, 12) notes that the European Commission's Notice on Remedies:

> …addresses the possibility of the Commission enforcing commitments by making the authorization conditional on compliance. Thereby, it distinguishes between conditions and obligations: the former are considered as the requirement to achieve each proposed measure (e.g. the divestiture of a business), while the latter are deemed to be the steps necessary to arrive at this result (e.g. the appointment of a trustee to sell the business).
>
> The parties' breach of an obligation may result in a revocation of the clearance decision….In addition, the parties may be subject to fines and periodic penalty payments. In cases where a condition is not fulfilled, *i.e.* where a remedy does not materialize, the decision no longer stands, and the Commission can order any measure it deems appropriate to restore conditions of effective competition….Again, the parties may be subject to additional fines.

54. This is especially so if a divestiture trustee has an irrevocable power to sell at no minimum price if the seller is unable to find an acceptable buyer by a certain time. Monti (2002, 3) notes that such a mandate is given in the majority of European Commission ordered divestitures.

55. Pitofsky (1995, 2)

56. Loc. Cit.

57. Varney (1995, 4)

58. The classic illustration of the infinite duration of Section 7 authority: the United States made General Motors divest its stock holdings in Dupont over twenty years after they were acquired.

59. Pitofsky (1995, 1)

60. Ibid., page 3

61. Ibid., pp. 3-4

62. See OECD (2003) for a consideration of the different tests used in merger review.

63. Jenny (2002, 5) makes an interesting distinction between objective of preserving competition or enhancing efficiency. If the former is the objective there is a greater chance that mergers will simply be prohibited.

If the latter, remedies will be sought to allow the merger to go through in order to reap associated efficiencies. Jenny also noted in his conclusions (at 13):

> Whatever one's views on the usefulness of merger remedies, it is clear that the most urgent reform of the EU merger regulation should be to rewrite article 2 of the merger regulation in such a way that the efficiency benefits of mergers can be taken into consideration in merger analysis. This would go a long way toward bringing the European merger control more in line both with economic reasoning and with the US approach to merger control. This would also contribute to the convergence of the practices of the US FTC and the EU Commission with respect to merger remedies. Such a convergence would be highly desirable for parties to transnational mergers even though it must be recognized that because a merger may have different effects in different geographical markets, appropriate remedies for a merger need not be always the same across jurisdiction.

64. For example, in the U.S. parties can notify mergers before having entered into a binding agreement. This is not the case in the European Union although the Commission's proposed reforms of the Merger Regulation would change that. In addition, after notification is submitted, a timetable begins in the European Union, that is generally shorter and certainly less flexible than in the U.S.

65. See Monti (2002, 2)

66. Nüesch did not mention it, but there may well be a gap between *de facto* and formally stated policies on this matter. At least in the United States the competition authorities can state what they would require rather than merely react to parties' proposals.

67. Nüesch's point should have been nuanced to note that competition authorities can, and frequently do, insist on vetting buyers even if the divestiture takes place after the merger has been consummated.

68. Muris (2001, 10-11, references omitted)

69. Jenny (2002, 13-14) observed:

> It is remarkable that there are so few empirical studies on the effects of merger control and of merger remedies. Competition authorities have been very reluctant to engage in systematic reviews of their merger decisions a few years after they have been taken. Yet such systematic reviews could shed light both on the relevance of the prospective analysis underlying their decisions and on the appropriateness of the merger remedies they accepted to alleviate the competition problems created by the merger. The obligation to undertake such a review whenever the competition authority has undertaken a full fledged competition analysis before handing down its decision would seem to be necessary for a minimal quality control of merger control mechanisms.

70. See Monti (2002, 4)

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NOTE DE RÉFÉRENCE

> …les mesures correctives – y compris les mesures structurelles – modifient la mission de la Task –Force « Contrôle des concentrations entre entreprises » (MTF) [de la Commission européenne], faisant d'elle un organisme de réglementation plus qu'une autorité de la concurrence. Cette constatation est intrinsèquement liée à la nature même des mesures correctives qui visent à modifier la structure de l'industrie, et survient en dépit du fait que la MTF…fait tout, et elle a raison, pour ne pas se transformer en organisme de réglementation….[C]es différentes tâches posent objectivement des défis à la CE, et…la théorie économique ne lui a été jusqu'à présent que de peu de secours (à elle comme à d'autres autorités de la concurrence, d'ailleurs) : il faudrait d'autres travaux dans ce domaine.[1]

1. Introduction

Le processus d'examen d'une fusion consiste en fait à répondre à deux questions : la fusion examinée est-elle de nature à menacer la concurrence ; si oui, quelle est la meilleure manière d'éliminer cette menace ? La présente contribution est axée sur la seconde question, mais évite d'entrer dans les détails juridiques qui seraient nécessaires pour bien comprendre la manière dont un système juridique donné aborde les mesures correctives. Ces détails juridiques, de même que de longs exemples, seront fournis dans les contributions nationales à la table ronde.

Les autorités de la concurrence disposent principalement de trois méthodes pour réagir aux fusions anti-concurrentielles. La première consiste purement et simplement à les interdire. Il arrive que cette décision soit la seule mesure efficace.[2] Le deuxième type de mesures, probablement le plus courant, est la cession, soit une mesure corrective de type structurel. Troisièmement, il y a les mesures comportementales qui, au lieu de transférer les droits patrimoniaux, en restreignent l'utilisation. On trouvera plus de détails dans la section suivante sur l'éventail des mesures correctives disponibles, qu'elles soient structurelles ou comportementales.

Dans tous les régimes d'examen des fusions, on retrouve un certain nombre de principes généraux applicables à la mise au point de mesures correctives, principes dont on peut penser qu'ils sont valables dans la plupart, sinon dans la totalité des systèmes juridiques. Les quatre prochains paragraphes reprennent en les développant quatre principes généraux énoncés par Deborah Majoras lors d'une récente allocution.[3]

1.1 Les mesures correctives ne doivent être appliquées que si la concurrence est effectivement menacée

Il semble évident que les mesures correctives ne s'imposent que si l'on peut en démontrer la nécessité. Du point de vue juridique, il s'agit probablement d'une exigence de forme. Dans la réalité de l'examen des fusions, toutefois, les mesures correctives sont appliquées en réponse à des problèmes de concurrence *potentiels* et incertains, ce qui confère effectivement une discrétion considérable à l'autorité de la concurrence.

Les autorités de la concurrence sont soumises à des pressions constantes, les obligeant à économiser des moyens limités en matière d'enquête sans compromettre pour autant le devoir qui est le leur de protéger l'intérêt public s'agissant de concurrence. Par ailleurs, les parties à la fusion sont généralement

très impatientes de réaliser leur opération. Il peut donc être dans l'intérêt des autorités de la concurrence comme dans celui des parties à la fusion de convenir relativement vite de mesures correctives qui pèchent par excès de rigueur. L'inconvénient de cette tendance, s'il existe, tient au fait que des mesures correctives trop strictes, voire inutiles, peuvent en fin de compte être préjudiciables aux consommateurs en limitant les efficiences attendues de la fusion ou en protégeant les concurrents plutôt que la concurrence. [4]

Dans certains systèmes juridiques, par ex. dans l'Union européenne, le processus d'examen des fusions fait l'objet d'un calendrier strict. Dans ces conditions, toute tendance à adopter des mesures correctives trop strictes pourrait être encore plus forte. Quand un tel calendrier existe, il est particulièrement indiqué d'accorder aux parties à la fusion l'occasion de sonder informellement l'autorité de la concurrence avant le dépôt de leur dossier pour connaître ses vues préliminaires, ce qui leur permet de commencer à travailler sur des mesures correctives le plus rapidement possible. La Communication de la Commission européenne relative aux mesures correctives prévoit explicitement cette éventualité. En outre, la CE envisage d'adopter des dispositions suspensives (d'arrêt de la pendule) en vue d'améliorer sa procédure de formulation et d'approbation de mesures correctives.[5]

1.2 Les mesures correctives doivent être le moyen le moins restrictif de résoudre effectivement le ou les problèmes de concurrence posés par une fusion

Ce principe peut être légalement obligatoire dans certains systèmes juridiques mais même lorsqu'il ne l'est pas, il comporte bien des mérites. Dans l'examen des fusions, les autorités de la concurrence ont affaire à des éventualités, et non à des certitudes observables ; par conséquent, il convient d'adopter une vision minimaliste de la résolution des problèmes de concurrence potentiels, en particulier du fait qu'une telle démarche donnera aux parties davantage de liberté pour profiter des synergies de la fusion et répondre aux évolutions futures.

1.3 Les autorités de la concurrence n'ont généralement pas mandat pour profiter de l'examen d'une fusion pour faire de la planification industrielle, ce qui vient conforter l'argument précédent

Comme Majoras (2002, 3-4) l'a indiqué :

> « …une fois l'infraction prouvée, l'objectif n'est pas d'étudier le marché et de décider de la manière dont il fonctionnerait au mieux. Le but consiste plutôt à remédier efficacement à la violation constatée, dans l'intérêt du consommateur et en maintenant la concurrence au même niveau qu'avant la fusion. Une fois la situation corrigée, c'est la concurrence qui décidera du fonctionnement du marché, notamment par le choix des gagnants et des perdants. »

1.4 Les autorités de la concurrence « …doivent faire preuve de souplesse et de créativité dans la formulation des mesures correctives…. »[6]

Cet élément s'applique tout particulièrement aux fusions non horizontales en général et aux fusions sur des marchés en mutation rapide en particulier.

Il convient de se poser la question de savoir si, aux quatre principes généraux mentionnés ci-dessus, il ne faudrait pas ajouter que, dans certaines situations, il est peut-être préférable de renoncer à imposer des mesures correctives avant la fusion et de recourir plutôt aux mesures correctives *ex post* pour résoudre les problèmes éventuels. Cette solution est rendue possible par le libre-arbitre fondamental dont bénéficie l'autorité de la concurrence face à des menaces prévisibles plutôt qu'avérées pour la concurrence.

Pour déterminer s'il faut ou non privilégier les mesures *ex post*, il convient d'envisager des facteurs tels que la nature et le degré d'incertitude de la menace pour la concurrence, les mesures correctives effectivement disponibles après la fusion, les coûts relatifs de l'imposition d'une mesure correctrice par rapport aux coûts d'une surveillance des comportements après la fusion et l'importance des efficiences auxquelles l'on risque de devoir renoncer en rejetant la fusion ou en la subordonnant au respect de certaines conditions.[7]

Supposons par exemple que la menace pour la concurrence soit un risque accru de collusion. Il faut alors privilégier l'adoption d'une mesure corrective, vraisemblablement d'ordre structurel, étant donné que la collusion est extrêmement difficile à détecter et qu'il peut s'avérer pratiquement impossible de remédier à une collusion tacite, si ce n'est en imposant un véritable contrôle des prix ou en ordonnant une cession. On s'orientera d'autant plus vers une mesure correctrice préalable à la fusion si l'atteinte à la concurrence relève de la création ou du renforcement d'un mécanisme de fixation monopolistique ou oligopolistique des prix, c'est-à-dire un phénomène d'établissement de prix supra concurrentiels risquant d'apparaître sans aucune entente illicite entre les concurrents. En revanche, si l'on redoute que la fusion ne favorise les accords d'exclusivité, dans ce cas, le meilleur moyen de répondre à la menace consiste peut-être à recourir tout simplement à une ordonnance d'interdiction *ex post*.

La décision de recourir aux mesures correctives *ex post* après la fusion ne signifie pas nécessairement que l'on s'en remettra exclusivement de ce type de méthodes. On peut exiger des parties qu'elles acceptent que la fusion fasse l'objet d'un réexamen subséquent et qu'elle soit assujettie à des mesures correctives ordinaires si les mesures correctives *ex post* traditionnelles devaient s'avérer insuffisantes. On pourrait également les contraindre à fournir régulièrement certaines informations susceptibles d'aider une autorité de la concurrence à déterminer s'il y a eu ou non abus de position dominante ou conclusion d'un accord anti-concurrentiel quelconque.

Dans la suite de notre contribution, nous verrons successivement les mesures correctives dont disposent les autorités de la concurrence (les outils dans la boîte à outils), la formulation des mesures correctives (décider des outils à utiliser) et la mise en oeuvre (veiller à ce que les outils utilisés fonctionnent comme prévu).

Une grande partie de la suite de notre contribution concerne les mesures correctives appliquées en cas de fusions comme dans les autres cas. Toutefois, nous traiterons davantage des mesures correctives comportementales que des mesures correctives structurelles. Rares sont les autorités de la concurrence qui ont le pouvoir d'ordonner des cessions en dehors du cadre d'une fusion, et celles qui l'ont, n'en font usage que très rarement.

Thèmes de discussion proposés

1. Les délégués sont-ils d'accord avec les quatre principes généraux susmentionnés? Conviendrait-il de les élargir à la question du bien-fondé de mesures correctives ex-post en cas d'éventuels problèmes de concurrence ? Dans quelles circonstances serait-il acceptable de recourir aux mesures correctives ex-post ?

2. Peut-il arriver que les autorités de la concurrence et les parties à la fusion conviennent de mesures correctives trop sévères et, si oui, dans quelle mesure ? Dans quels cas ce risque est-il susceptible d'être particulièrement élevé et que peut-on faire, le cas échéant, pour l'atténuer ?

3. Les délégués peuvent-ils fournir des exemples de fusions où ils ont opté pour des interdictions et des sanctions classiques après la fusion, plutôt que d'imposer ex ante des mesures structurelles ou comportementales face à des menaces particulièrement incertaines ou faibles pour la concurrence ? Les

parties ont-elles été, dans ce cas, assujetties à de quelconques obligations en matière d'information ? Comment les fusions se sont-elles déroulées ?

2. Description des mesures correctives disponibles

Voici une classification sommaire des mesures correctives structurelles ou comportementales disponibles :

1. cession d'une entreprise ou d'une activité autonome existante et des actifs y afférents ;

2. cession d'une partie d'une entreprise ou activité autonome existante ;

3. arrangements contractuels « …comme l'exploitation sous licence de droits de propriété intellectuelle, voire d'un accord d'approvisionnement »; et

4. autres mesures correctives comportementales.[8]

La distinction entre mesures structurelles et mesures comportementales ne signifie pas que les deux catégories de mesures s'excluent l'une l'autre. Il est parfois nécessaire de panacher les deux types d'instruments, et certaines mesures comportementales peuvent être considérées comme quasi-structurelles.[9]

Les mesures correctives structurelles ou comportementales peuvent être complétées par un certain nombre de mesures provisoires que les autorités de la concurrence peuvent prendre pour veiller à ce que la mesure corrective choisie ait l'effet recherché, comme :

1. des injonctions de report de la fusion ou des ordonnances de séparation des actifs pour veiller à ce que la gamme complète des mesures correctives reste disponible jusqu'au moment où l'on pourra arrêter une décision éclairée ; et

2. diverses mesures, dont la désignation d'un mandataire de contrôle pour faire en sorte que les actifs gardent leur valeur commerciale en attendant la cession.

Les mesures provisoires sont très utiles pour aider l'autorité de la concurrence à conserver ses moyens d'action dans la négociation d'une mesure corrective en l'absence d'une interdiction statutaire de clôture dans l'attente d'un examen par l'autorité. Une fois que la fusion a eu lieu et que les actifs ont été confondus, il peut s'avérer impossible de « démêler l'écheveau », c'est-à-dire d'ordonner une vente d'actifs qui éliminerait la menace pour la concurrence sans mettre en péril la viabilité de l'entreprise ayant procédé à la cession. Dans ces conditions, on peut véritablement considérer les exigences de notification préalable comme une partie essentielle du processus de formulation des mesures correctives.[10]

S'agissant plus particulièrement des mesures correctives comportementales, la liste suivante tirée de l'expérience canadienne suffit à démontrer que ces mesures peuvent prendre une multiplicité de formes et de dimensions différentes :

3. exiger d'une entreprise acquérante qu'elle recherche des remises et des réductions de tarifs ;

4. restreindre le partage d'informations entre les parties à la co-entreprise (un exemple de « pare-feux ») ;

5. exiger l'approvisionnement de tierces parties à des conditions justes et raisonnables ;

6. exiger l'adhésion à des codes de conduite envers les fournisseurs, les clients et les concurrents ;

7. exiger que les entreprises dominantes fournissent des données aux réseaux de données concurrents dans le cadre de la réalisation d'opérations avec les entreprises dominantes ;

8. limiter l'exercice en amont de la puissance de marché par un contrôle des remises, des créances clients et autres conditions commerciales ;

9. interdire que les services afférents à un produit soient liés à la vente de ce produit ;

10. ouvrir l'accès aux réseaux de données afin de faciliter l'offre de nouveaux services ;

11. empêcher le recours aux barrières contractuelles à l'entrée visant à conserver le contrôle d'une base d'équipement installée ; et

12. empêcher le recours aux barrières contractuelles à l'entrée visant à lier l'offre d'un intrant d'information critique (et exiger la fourniture d'informations historiques).[11]

Outre les mesures correctives classiques, structurelles ou comportementales, il existe également une mesure rarement utilisée et quelque peu controversée, qui pourrait s'avérer des plus utiles dans certains cas. On pourrait utiliser pour la décrire le terme de « mesure contingente », une mesure qui n'est imposée après la fusion que si les conditions de concurrence se détériorent. On peut en trouver un exemple dans le cadre d'une co-entreprise entre la Peninsular and Oriental Steam Navigation Company (P & O) et Stena Line AB concernant une proposition d'entreprise commune visant à fournir des services de transbordeur sur les « Short Sea Routes » reliant les deux rives de la Manche. P & O et Stena se sont engagées à ce que la co-entreprise soit assujettie à un plafond de prix sur les tarifs facturés aux passagers dans les conditions suivantes :

(i) lorsque [le Directeur général de la concurrence - DGFT] estime que la co-entreprise et Eurotunnel détiennent au moins 90 pour cent du marché des véhicules de tourisme sur les Short Sea Routes et la co-entreprise, au moins 30 pour cent ; et après
(ii) la fin des ventes en franchise de droits de douanes ;
(iii) l'expiration de toute exemption individuelle initiale accordée par la Commission européenne en vertu de l'[Article 81(3)] du Traité de la CE….

. . . . . .

P & O et Stena [se sont par ailleurs engagées] à ce que, dans ces conditions, la co-entreprise :

notifie à la DGFT à l'avance toute réduction permanente du nombre de bâtiments qu'elle envisage d'exploiter sur la ligne Douvres-Calais ou Newhaven-Dieppe, afin que la DGFT puisse examiner l'exploitation des entreprises ;

eu égard aux normes de qualité, s'efforce d'obtenir une Accréditation ISO 9002 pour toutes les parties de son activité.

P & O…s'est en outre [engagée] à fournir à la DGFT toute information qu'elle jugerait nécessaire pour lui permettre de surveiller les…prix…et…les marchés sur les lignes desservies par la co-entreprise.[12]

Thèmes de discussion proposés :

Les délégués ont-ils des exemples à fournir de mesures correctives contingentes ? Si oui, leur a-t-il été difficile de définir un événement déclenchant suffisamment objectif et comment la mesure a-t-elle fonctionné ?

3. La formulation des mesures correctives – la question de l'efficacité

Une mesure correctrice doit être à la fois efficace et administrable (elle doit notamment pouvoir être appliquée). Dans cette section, nous nous concentrerons sur la question de l'efficacité. Nous aborderons les aspects liés à l'administration des mesures dans la section suivante.

Le point de départ s'agissant de la conception ou de la formulation d'une mesure correctrice consiste à préciser clairement la nature de la menace qui pèse sur la concurrence, notamment son degré de probabilité et de durabilité. Une fois que cette analyse a été effectuée et que les résultats en ont été diffusés, les parties seront vraisemblablement en mesure de proposer des mesures correctives.

Les autorités de la concurrence préfèrent généralement imposer des mesures correctives structurelles pour résoudre les problèmes liés à un changement structurel. Comme on peut le lire dans la Communication de la Commission européenne concernant les mesures structurelles :

> Lorsqu'un projet de concentration menace de créer ou de renforcer une position dominante qui entraverait une concurrence effective, le moyen le plus efficace de préserver cette concurrence, hormis l'interdiction, est de créer les conditions nécessaires à l'émergence d'une nouvelle entité concurrentielle ou au renforcement des concurrents existants par le biais d'une cession.
>
> Les éléments cédés doivent constituer une activité viable qui, si elle est exploitée par un acquéreur approprié, devra pouvoir concurrencer effectivement et durablement la nouvelle entité. Normalement, une activité viable est une activité existante, susceptible d'être exploitée de façon autonome, c'est-à-dire indépendamment des parties à la concentration pour ce qui est de la fourniture de matières premières ou d'autres formes de coopération, sauf pendant une période transitoire.[13]

La Commission fédérale du commerce des Etats-Unis (« la FTC ») a fait une contribution majeure au processus de conception des mesures correctives grâce à une étude des cessions ordonnées de 1990 à 1994. Cette « Etude de la FTC sur les cessions » avait pour but de « …déterminer s'il existait des raisons systémiques susceptibles d'expliquer que certaines des cessions décidées après la [*Loi Hart-Scott-Rodino*] n'aient pas permis d'atteindre les objectifs de la Commission en matière d'actions correctrices.»[14] Trois conclusions générales se dégagent de cette Etude :

1. la plupart des cessions semblent avoir donné naissance à des concurrents viables sur le marché intéressant la Commission ;

2. les parties ont tendance à rechercher des acquéreurs tout juste acceptables et elles peuvent se livrer à des conduites stratégiques pour empêcher le repreneur de réussir ; et

3. …la plupart des acquéreurs d'actifs cédés n'ont pas accès à une quantité d'informations suffisante pour leur éviter les erreurs dans le cadre de leurs acquisitions.[15]

La FTC s'est déclarée surprise de ce troisième constat, puisque qu'elle était jusque-là partie du principe que les acquéreurs d'actifs cédés seraient en mesure de se protéger, en dépit de problèmes évidents liés au fait que les vendeurs ne souhaitent pas contribuer à la naissance de nouveaux concurrents ou au renforcement de concurrents existants. Il convient par ailleurs de ne pas oublier qu'acquéreurs et

vendeurs pourraient bien avoir un intérêt commun à ne pas renforcer la concurrence sur le marché. Nous reviendrons sur ce point dans notre section suivante.

Baer et Redcay ont fourni une bonne synthèse des conclusions plus détaillées de l'Etude de la FTC sur les cessions :

> Soixante-quinze pour cent des cessions analysées (28 sur 37) ont réussi le test en « donnant naissance à des activités viables sur le marché concerné. » On enregistre un pourcentage plus élevé (19 sur 22) de cessions réussies ayant fait intervenir la vente d'une activité existante dans sa totalité. Sur les cessions ayant fait intervenir la vente d'actifs plus limités, quarante pour cent (6 sur 15) ont échoué. Cet écart a conduit les responsables à conclure « que la cession d'une activité existante a plus de chances de réussir que celle d'un ensemble plus étroitement défini d'actifs et corrobore la constatation de bon sens selon laquelle la Commission devrait donner la préférence à la cession d'une activité existante. » Cette conclusion, ajoutée aux deux autres constats de l'étude, a conforté la Commission dans sa conviction que sa politique révisée en matière de mesures correctives était justifiée.
>
> Dans le cas des cessions ayant échoué, l'étude a conclu que de nombreuses parties s'étaient livrées à une conduite visant à gêner l'acquéreur d'actifs cédés pour l'empêcher de réussir. Ces constatations n'ont rien d'étonnant. L'étude a montré que les parties négocient le plus possible pour limiter les ensembles à céder. Une fois l'accord amiable conclu, elles ont tendance à opter pour des acquéreurs relativement faibles, c'est-à-dire, ceux qui semblent le moins susceptibles de constituer une menace sérieuse à la concurrence. L'étude sur les cessions a également recensé une série de comportements stratégiques adoptés par les entreprises en vue de nuire à la réussite de l'acquéreur.
>
> De l'autre côté de la transaction, l'étude sur les cessions a conclu que les acquéreurs étaient moins complexes et plus enclins aux erreurs qu'on aurait pu le penser. Il leur manque souvent l'information dont ils auraient besoin pour faire tourner l'entreprise. Ils ont l'impression de ne pas avoir, face à la partie adverse, le pouvoir de négociation dont ils auraient besoin pour négocier des conditions acceptables. Les acquéreurs rechignent par ailleurs à faire appel à l'aide de la FTC pour en cas de problèmes avec la partie adverse. Enfin, certains acquéreurs ont dans la transaction des intérêts différents de ceux de la FTC ; par exemple, certains souhaiteraient que les actifs acquis rivalisent sur des marchés autres que celui où la FTC cherche à remédier à ses craintes en matière de concurrence.[16]

L'une des observations sommaires de l'étude de la FTC sur les cessions souligne l'importance de ce qui avait été constaté au sujet des acquéreurs :

> Le programme de cession doit tenir compte du fait que la partie concernée dispose presque toujours, au sujet de l'activité à céder, de plus d'informations que l'acquéreur ou le personnel [de la FTC]. La cession doit réduire ou supprimer cette asymétrie et protéger la viabilité de l'activité cédée avant et pendant la cession. L'expérience de plus en plus importante dont on dispose s'agissant des accords de séparation d'actifs, de la cession forcée d'une entité-phare (les « joyaux de la Couronne »), du droit de visite des installations des parties, des droits de recrutement du personnel et des mandataires indique qu'il s'agit-là d'autant d'outils importants que l'on peut utiliser pour remédier en partie à l'asymétrie d'information et faciliter les transferts.[17]

Baer et Redcay ont noté que l'étude de la FTC sur les cessions corroborait la préférence de la FTC pour : « …les acquéreurs initiaux, la vente de la totalité d'une activité en exploitation et la vente des joyaux de la Couronne. »[18] Le thème des acquéreurs initiaux et de les joyaux de la Couronne sera abordé

au chapitre suivant étant donné qu'il concerne davantage la mise en œuvre que la formulation des mesures correctives.

Le fait que la FTC préfère que l'on vende une activité en exploitation dans son intégralité plutôt que de limiter la cession aux lignes d'activité où des problèmes de concurrence sont attendus est directement lié à l'objectif qu'elle s'est fixée de rétablir la concurrence détruite par la fusion. Le simple fait d'éliminer les chevauchements ne permet pas nécessairement d'atteindre cet objectif. Un concurrent reste perdu et non remplacé à moins que le ou les acquéreurs n'utilisent les actifs cédés pour concurrencer effectivement l'entité issue de la fusion.

La cession d'une activité en exploitation viable suppose parfois la cession d'actifs employés sur des marchés qui ne pâtissent pas de la fusion. Tel pourrait être le cas, par exemple, lorsqu'un concurrent n'est pas viable à moins de pouvoir réaliser d'importantes économies d'échelle et de gamme. Cette situation peut également se produire s'il faut un ensemble plus important d'actifs pour que l'acquéreur ne soit pas dépendant à l'avenir de la bonne volonté et de la coopération du vendeur. Une telle dépendance serait bien peu propice à une concurrence vigoureuse.

On a reproché à la Commission fédérale du commerce certaines cessions ordonnées sur des marchés de fusion au détail.[19] Cette critique était en partie liée à la préférence de la FTC pour la démarche dite de « la table rase », par opposition à la cession d'une combinaison d'actifs de l'acquéreur et de la société cible. C'est une préférence que partage la Commission européenne.[20] La politique de la «table rase» suppose par ailleurs la vente des actifs à un acquéreur unique plutôt qu'à une série d'acquéreurs différents. La stratégie de la table rase est motivée par la volonté de multiplier les chances que la cession permette de maintenir la concurrence à son niveau d'avant la fusion. Elle peut cependant avoir pour effet de décourager la vente de tout ou partie des actifs de plus petites entreprises. Tout peut (ou non) dépendre du droit des fusions applicable et des réalités politiques de chaque système juridique. Il est intéressant de constater que la Commission européenne partage la préférence de la FTC pour la démarche de la table rase.

Les autorités de la concurrence peuvent quelquefois être en mesure d'accepter la cession d'actifs qui ne correspondent pas tout à fait à ceux d'une activité autonome viable, pourvu que les actifs cédés puissent être utilisés par un acquéreur pour renforcer sa capacité à rivaliser sur les marchés concernés. Ce type de cession est forcément un peu plus risqué du point de vue de l'autorité de la concurrence que celle d'une activité viable autonome.

Quatre ans après son étude sur les cessions, la Commission fédérale du commerce des Etats-Unis a publié une déclaration sur la négociation des mesures correctives.[21] On trouve dans cette communication un certain nombre de détails sur des éléments tels que le choix des actifs à céder, la recherche d'un acquéreur convenable et les dispositions à inclure dans un accord de cession (notamment afin de veiller à ce que les actifs à céder restent commercialisables). Malgré son titre général (« Négociation des mesures correctives en cas de fusions»), la déclaration ne traite que de la question des cessions. Les autres dispositions comportementales sont simplement abordées à titre d'ordonnances accessoires possibles.

Les autorités de la concurrence doivent veiller à ne pas aggraver la situation par inadvertance lorsqu'elles prononcent leurs ordonnances de cession. C'est un point que soulignent Motta *et al* (2002), en faisant valoir qu'une cession peut finir par favoriser la collusion en donnant aux entreprises des dimensions plus symétriques ou en multipliant les contacts entre plusieurs marchés.[22] Ils notent également que si la cession profite à une entreprise en place depuis longtemps, les chances que l'entreprise cédée accède à l'indépendance sont nettement réduites.[23] Pour cette raison entre autres, l'effet de toute cession quelle qu'elle soit sur la concurrence ne peut être apprécié que lorsque l'acquéreur est connu de l'autorité de la concurrence. Motta *et al* en déduisent ainsi que : « …l'obligation de trouver un acquéreur initial doit être

systématique et non occasionnelle. »[24] Comme nous le verrons, il existe également des raisons de préférer la solution de l'acquéreur initial qui sont liées à l'application de la loi.

Bien que la cession soit généralement la mesure corrective privilégiée lors de fusions horizontales problématiques, cette préférence n'est pas aussi nette s'agissant des fusions verticales menaçant la concurrence.[25] Les mesures correctives comportementales peuvent être utilisées (et elles le sont) pour garantir l'accès, à des conditions acceptables, aux actifs les plus importants d'une entreprise intégrée verticalement ou pour empêcher l'usage à mauvais escient d'informations sensibles. Les mesures correctives comportementales sont aussi particulièrement indiquées dans le cas des fusions horizontales ou verticales pour lesquelles il n'est pas possible de trouver d'acquéreur convenable ou lorsque « …les problèmes de concurrence peuvent être dus à des facteurs spécifiques tels l'existence d'accords exclusifs, la combinaison de réseaux…ou la combinaison de brevets importants. »[26]

S'agissant de la question du recours aux mesures comportementales, plus fréquent dans le cadre des fusions verticales que dans celui des fusions horizontales, Morse estime :

> On ne sait pas si cette différence résulte du fait que les organismes de la concurrence sont en position de faiblesse dans la négociation en raison de l'incertitude des théories verticales ou de leur sympathie à l'égard des intérêts des parties à préserver les efficiences issues de l'intégration verticale.[27]

Les efficiences sont manifestement importantes dans les secteurs en cours de libéralisation. Balto et Mongoven, par exemple, citent l'exemple du secteur du gaz naturel aux Etats-Unis, où la libéralisation a entraîné l'abandon du modèle de l'intégration verticale depuis le gisement jusqu'aux portes de la ville. Dans ces conditions, la cession n'est pas nécessairement la mesure corrective la plus efficace qui soit :

> En cas de cession, on risque de perdre le bénéfice des efficiences horizontales et verticales qui motivent nombre de fusions et s'il est possible d'éviter le risque d'effets anti-concurrentiels par d'autres moyens, le recours à la cession n'est pas nécessairement justifié. L'octroi de licences, bien que peu courant dans le domaine du gaz naturel, peut être envisagé lorsque d'importants droits de propriété intellectuelle constituent une part substantielle de l'équation concurrentielle. Exiger une assistance permanente à l'acquéreur des actifs cédés est une autre tactique fréquemment utilisée pour garantir la viabilité du nouveau concurrent. Cette aide peut prendre la forme d'accords de fabrication ou de fourniture sous contrat, d'un accès à des personnels ou à des installations critiques ou de la poursuite d'une relation client. [Trois actions correctrices spécifiques de la FTC sont décrites à titre d'illustrations d'approches originales des mesures correctives.] Ouvrir les goulots d'étranglement aux entreprises concurrentes et rendre transparents les achats de combustible au comptant constituent des exemples de mesures correctives novatrices exigées pour préserver les possibilités de concurrence, de même que les synergies issues de l'acquisition.[28]

Dans les secteurs en cours de libéralisation, il faudrait également envisager d'aider les consommateurs à changer de fournisseurs. Si les coûts de mutation sont suffisamment élevés, le simple fait d'accroître le nombre de concurrents au moyen de mesures correctives structurelles ou comportementales risque de ne pas vraiment contribuer au rétablissement de la concurrence. Ainsi que le note Waterson :

> …les mesures visant à stimuler les consommateurs sont surtout efficaces dans les secteurs relativement mûrs où la situation est le plus souvent loin d'être concurrentielle, de sorte que l'on a assisté à la domination permanente d'acteurs indifférents sans aucune entrée significative. Les secteurs traditionnellement placés entre les mains de l'Etat constituent un cas à part, dans la mesure où les consommateurs ne sont guère habitués à faire un choix, comme dans l'électricité ou le téléphone. Ces mesures seront vraisemblablement inutiles dans les secteurs dynamiques, où

> consommateurs et fournisseurs font l'expérience de nouvelles formes de produits et de présentation de produits.[29]

Le critère de la préservation des efficiences intervient dans la formulation des mesures correctives indépendamment du type de fusion examiné. Toutes les autorités de la concurrence, que leur test soit axé sur le surplus des consommateurs ou qu'elles aient une vision plus large du bien-être économique, seraient probablement d'accord avec ce que Parker et Balto (2000, 2) ont écrit au sujet de l'exécution des fusions par les Etats-Unis (2000, 2) :

> S'il existe deux types de mesures correctives envisageables, également efficaces (en fonction de l'expérience) et également susceptibles d'atteindre leur objectif, mais avec des conséquences différentes pour la préservation des synergies de la fusion, nous opterions pour celui qui a le plus de chances de préserver ces efficiences. Ces mesures doivent être efficaces *d'après l'expérience*—la théorie seule ne suffira peut-être pas pour que le risque d'une mesure ayant échoué soit répercuté sur le consommateur.

La relation entre les considérations relatives aux efficiences et les mesures correctives est particulièrement importante et complexe sur des marchés à forte intensité de propriété intellectuelle, qui évoluent vite.[30] Les mesures comportementales pourraient s'avérer particulièrement indiquées dans ces circonstances. Comme Parker et Balto (2000, 7) l'ont relevé en citant l'exemple de la fusion *Ciba/Sandoz* :

> L'octroi de licences étant plus souple et plus facilement adaptable à des situations de fait inhabituelles, il peut constituer la mesure corrective de prédilection dans les affaires d'innovation où la cession risque de compromettre des efforts de recherche potentiellement fructueux. Dans ce cas, la majorité de la Commission a décidé que les différentes initiatives de recherche en thérapie génique, qui font intervenir un certain nombre d'efforts conjoints avec des tierces parties, seraient trop difficiles à distinguer dans l'ensemble des entités ayant fusionné et auraient donc pour effet, « non seulement … de nuire à l'efficience mais pourraient aussi être moins efficaces s'agissant du rétablissement de la concurrence s'ils devaient conduire à une interaction coordonnée ou laisser l'activité cédée à la merci de la nouvelle entité issue de la fusion. » (référence omise)

Frédéric Jenny a soulevé la même question dans son article sur les mesures correctives dans les industries de hautes technologies.[31]

On trouve dans le cas de la fusion *Borland/Ashton-Tate* un exemple de mesure comportementale efficace sur un marché en évolution rapide. Comme l'ont indiqué Fazio et Stern (2000, 47), la menace pour la concurrence provenait ici de l'interaction entre droits de propriété intellectuelle et contrôle des normes technologiques, c'est-à-dire, entre externalités de réseau et protection de la propriété intellectuelle.[32] Le décret de consentement exigeait de l'entreprise Borland qu'elle accepte, « …de renoncer à revendiquer des droits d'auteurs sur « l'aspect et le toucher » du logiciel dBASE [vendu par Ashton-Tate] et de faire de son mieux pour régler l'action intentée par Ashton-Tate pour atteinte aux droits d'auteur sur cette base. »[33] Cette mesure comportementale revenait à une cession partielle de droits de propriété intellectuelle, « …plus puissante que quiconque ne l'avait imaginé à l'époque » aux dires de Fazio et Stern.[34]

Etant donné que nous nous sommes principalement concentrés sur les mesures correctives, il reste un aspect important de la formulation de ces mesures que nous n'avons pas encore abordé. Il s'agit de la durée pendant laquelle une mesure comportementale doit rester en vigueur. L'application pendant une durée indéterminée risquerait de détruire l'un des avantages même de la mesure comportementale, à savoir le fait que, contrairement à la cession, elle n'a pas besoin d'avoir un effet permanent.

Imposer une mesure correctrice comportementale pendant une durée indéterminée risque aussi d'empêcher l'entité issue de la fusion de réagir efficacement aux évolutions du marché, imprévues au moment de l'adoption de la dite mesure.[35] Par conséquent, la mesure correctrice comportementale ne doit s'appliquer que pendant une durée déterminée, prévue à l'avance ou alors, il convient d'inclure une disposition prévoyant le réexamen et, le cas échéant, la révision de la mesure en question à une date déterminée d'avance. La durée exacte d'application d'une mesure corrective à caractère comportemental doit être fixée au cas par cas.

Avant de quitter le thème de la mise au point des mesures correctives, un aspect d'ordre institutionnel mérite d'être soulevé. L'Union Européenne a créé en avril 2001 une cellule spéciale chargée de contribuer à la formulation et à la mise en œuvre des mesures correctives. Cette création est intervenue quelques mois après la publication de la Communication de la Commission concernant les mesures correctives. Ces deux événements ont eu lieu dans le contexte d'une augmentation régulière du nombre des autorisations de fusions assorties d'engagements. Wolfang Mederer, à la tête de cette cellule, a décrit son travail comme suit :

> L'objectif principal de notre cellule est de fournir, au sein de la [Task Force « Contrôle des concentrations »], une structure capable de former et de réunir des compétences dans le domaine des mesures correctives, que ce soit lors de la phase de négociation avant une décision au titre de l'Article 6 ou de l'Article 8 ou dans la phase de mise en œuvre après la décision et jusqu'à ce que les parties aient intégralement respecté leurs engagements. Outre un travail d'harmonisation et de mise en cohérence, les fruits concrets du travail de la cellule les plus visibles pour le « monde extérieur » doivent être l'élaboration d'un ensemble clair d'éléments clés relatifs aux engagements, qui finiront pas mener à la mise au point d'éléments communs s'agissant des engagements, idéalement des modèles de textes d'engagements. En outre, des modèles d'accords avec les mandataires sont en cours d'élaboration.[36]

C'est la cellule de la CE sur les mesures correctives qui est responsable du document publié récemment par la Commission, intitulé «Best Practice Guidelines », où l'on trouve des modèles de textes d'engagements en matière de cessions et de mandats confiés aux mandataires.[37]

Il existe au sein de la FTC une Division du respect des règles, dont les avocats travaillent en étroite collaboration avec l'équipe d'enquêteurs dès lors qu'il apparaît qu'un règlement est possible. L'équipe se penche alors sur un certain nombre d'éléments, notamment les moyens dont on pourrait remédier aux atteintes à la concurrence identifiées et la question de savoir si une proposition de cession permettrait de pallier ces difficultés. Convient-il de déroger aux pratiques d'exploitation ordinaires ? La formulation est-elle claire et applicable ? Par conséquent, la Division du respect des règles contribue à la cohérence des mesures correctives de la FTC des Etats-Unis.

Outre le fait qu'il apporte davantage de certitude et de cohérence juridiques à la formulation des mesures correctives, un groupe comme l'Unité de la Commission européenne sur les mesures correctives peut réaliser de considérables économies d'échelle dans le cadre de son processus de regroupement des compétences nécessaires. Pour reprendre les termes de Motta *et al* (2002, 18), la « boîte à outils » nécessaire pour étudier une fusion n'est probablement pas identique à celle dont on a besoin pour concevoir une mesure corrective structurelle adaptée puisque, dans le premier cas, on se concentre non pas sur les atteintes potentielles à la concurrence, mais plutôt sur l'identification et l'évaluation, « …des compétences, des actifs, du savoir-faire, du personnel et autres ressources communes qui doivent être réunis dans la nouvelle entité pour donner naissance à une entreprise concurrentielle. »

Thèmes de discussion proposés

1. S'agissant de la formulation et de la mise en œuvre des mesures correctives, quelle est l'importance des exigences en matière de notification ou de la capacité à imposer des mesures provisoires visant soit à reporter la clôture, soit à garantir la séparation des actifs après la fusion dans l'attente d'un examen par l'autorité de la concurrence?

2. Les délégués sont-ils d'accord pour reconnaître que la cession est la solution généralement adoptée dans les fusions problématiques, mais que cette préférence est encore plus nette pour les fusions horizontales que pour les fusions verticales ? Quelles sont les caractéristiques de marché qui pourraient militer en faveur d'un recours à des mesures comportementales plutôt que structurelles ?

3. La préférence pour les mesures structurelles par opposition aux mesures à caractère comportemental s'atténue-t-elle ? Si oui, dans quelle mesure cette évolution traduit-elle une tendance générale à une multiplication des mesures coercitives à l'encontre des fusions verticales ? Est-elle due au fait qu'un nombre plus important de fusions intervient dans des secteurs qui évoluent rapidement ou à d'autres facteurs ?

4. S'agissant des mesures correctives structurelles, quels sont les avantages et les inconvénients de la politique qui consiste à insister sur la vente d'une entreprise existante ? Votre autorité de la concurrence a-t-elle le pouvoir d'inclure dans une ordonnance de cession des actifs qui ne sont pas directement utilisés sur les marchés où la fusion menace la concurrence ? Si possible, veuillez fournir un bon exemple de ce type de situation.

5. Dans quelle mesure votre autorité de la concurrence a-t-elle adopté la politique de la « table rase » dans le contexte de ses ordonnances de cession, c'est.-à-dire, transférer une entreprise existante d'un acquéreur à un vendeur plutôt que de mêler les actifs de l'acquéreur et de l'entreprise cible, voire vendre à plusieurs acquéreurs? Cette démarche a-t-elle suscité de nombreuses critiques de la part des PME ? Si oui, quelle a été la réaction à cette opposition ?

6. Quels sont les défis particuliers que pose la conception de mesures correctives dans les secteurs en voie de libéralisation ou dans les secteurs marqués par une évolution technologique rapide?

7. Avez-vous des exemples de mesures correctives visant à réduire les coûts de mutation, dans les industries en cours de libéralisation ou dans d'autres secteurs?

8. Quelles sont les considérations qui influent sur la durée appropriée ou sur la période de révision des mesures correctives comportementales ?

9. Quels sont les avantages et les inconvénients d'une unité comme celle de la Commission européenne sur les mesures correctives ou la Division du respect des règles de la FTC, qui participent à la fois à la conception des mesures et à leur exécution ?

4. Mise en oeuvre – administration et mise en application

L'efficacité n'est pas la seule caractéristique que doit posséder une mesure corrective. Les autorités de la concurrence doivent également faire en sorte que la mesure puisse être appliquée en temps opportun et à un coût aussi faible que possible au vu des moyens de l'institution.

Si les mesures correctives structurelles ont généralement le mérite d'être plus claires et plus simples que les mesures à caractère comportemental, elles possèdent un avantage encore plus évident en ceci qu'elles supposent des coûts moins élevés de contrôle et de mise en application après la fusion.[38]

En fonction du type de contrôle nécessaire, les mesures correctives comportementales peuvent obliger l'autorité de la concurrence à jouer le rôle d'un organisme de réglementation permanent, en particulier lorsque ces mesures visent à assurer l'accès à des réseaux ou à d'autres installations essentielles à des

conditions suffisamment attrayantes pour encourager ou maintenir la concurrence à des niveaux satisfaisants. Les autorités de la concurrence rechignent généralement à se transformer en organismes de réglementation *de facto* du fait des mesures correctives, car il leur manque le plus souvent le personnel, la culture et les outils requis pour tenir un tel rôle.[39]

Même si, d'une manière générale, les autorités de la concurrence se refusent à faire office d'organismes de réglementation, il peut y avoir des circonstances exceptionnelles dans lesquelles elles utilisent l'examen d'une fusion pour instituer la régulation d'un marché. Cette possibilité a été évoquée de manière assez provocante par Lexecon dans le cadre de l'examen de la récente fusion *NewsCorp/Telepiù*.[40] Cette fusion s'est traduite par la naissance en Italie d'un opérateur de télévision payante par satellite en position de monopole. La Commission européenne a autorisé la fusion en partie en raison des difficultés financières des deux parties en présence, mais l'exception de l'entreprise en sérieuse difficulté n'a pas été officiellement invoquée. De multiples conditions ont été imposées toutefois pour garantir l'accès à divers goulets d'étranglement potentiels susceptibles de restreindre la concurrence à l'intérieur d'une même plate-forme ou entre les plates-formes. Lexecon a indiqué que l'imposition de ces conditions revenait à utiliser l'examen de la fusion comme un moyen d'instituer un cadre quasi-réglementaire qui n'aurait pas pu être établi autrement.[41]

La supériorité supposée des mesures correctives structurelles par rapport aux mesures comportementales n'a pas manqué d'être contestée. Les partisans d'un recours accru aux mesures correctives comportementales s'empressent de relever les difficultés pratiques inhérentes à la formulation comme à la mise en œuvre des mesures correctives structurelles.[42] Veiller à ce que les actifs cédés aillent au bon acquéreur ou aux bons acquéreurs est particulièrement difficile et tend à monter l'autorité de la concurrence contre le vendeur, voire contre l'acquéreur.

Du point de vue de l'entreprise qui cède ses actifs, l'acquéreur le plus intéressant n'est pas nécessairement celui qui est susceptible de faire un usage efficace de son achat, même s'il n'est pas disposé à payer autant qu'un acquéreur ayant de meilleures chances de réussite. Le fait que le vendeur perçoive moins peut être plus que compensé par le fait qu'il a davantage de possibilité de réaliser des profits supra concurrentiels, non limités par le concurrent nouveau ou renforcé.[43] Élément encore plus négatif du point de vue de l'autorité de la concurrence, un vendeur n'est pas nécessairement contraint de choisir entre prix de vente et dynamisme de la concurrence future. Si le marché avant la fusion était marqué par une certaine forme de coordination, l'entreprise prête à payer les actifs au prix le plus élevé pourrait être la plus capable et la plus disposée à perpétuer les arrangements anticoncurrentiels.[44] Le prix le plus élevé peut également être proposé par l'acquéreur le mieux placé pour utiliser les actifs cédés en dehors des marchés où la concurrence est la plus menacée par une fusion.[45]

Il existe plusieurs moyens de garantir la vente en temps opportun des actifs cédés à un acquéreur convenable. Le plus simple consiste à insister sur une mesure dite de « mise en ordre préalable », c'est-à-dire insister pour qu'une cession acceptable intervienne avant que la fusion ne se concrétise. Ensuite, le moyen le plus simple et le plus fiable serait d'exiger un acquéreur initial. Comme nous l'avons indiqué dans le chapitre précédent, la Commission fédérale du commerce des Etats-Unis préfère intégrer les exigences concernant l'acquéreur initial dans ses mesures correctives en cas de cession. Une telle exigence signifie que, avant que la FTC n'accepte une proposition de règlement amiable, un acquéreur agréé par elle doit avoir exécuté un accord final d'acheter les actifs cédés. Que l'on opte ou non pour la solution de l'acquéreur initial, l'autorité de la concurrence devrait, dans la plupart des cas, insister pour donner son approbation au choix de l'acquéreur.

Une fois l'acquéreur trouvé, l'autorité de la concurrence peut vérifier s'il est capable et disposé à utiliser les actifs acquis pour rétablir la concurrence perdue du fait de la fusion.[46] C'est une vérification à laquelle elle procède souvent en examinant sa position actuelle sur le marché et ses plans d'affaires et

consultant ses clients, ses fournisseurs et même ses concurrents sur la manière dont la concurrence est susceptible d'évoluer après la fusion. On parle parfois, pour désigner cet exercice, de « consultation des acteurs du marché », étape essentielle pour apprécier l'efficacité probable d'une mesure correctrice.

Pour évaluer la capacité d'un repreneur potentiel à utiliser les actifs achetés pour rétablir la concurrence détruite du fait de la fusion *peut* aller jusqu'à étudier le prix à payer pour les actifs cédés. Si ce prix est inférieur à la valeur de liquidation, il existe un risque que l'acquéreur ne liquide en fait les actifs et se retire du marché. Par ailleurs, si le prix proposé est trop élevé, on peut craindre que l'acquéreur ne finisse par être contraint de déposer le bilan ou manque de fonds de roulement pour être un concurrent efficace.

Au-delà de leurs mérites apparents s'agissant de la réduction du risque, il peut y avoir des situations dans lesquelles la politique de la « mise en ordre préalable » ou celle de l'acquéreur initial sont jugées inutiles. Évoquant son expérience à la FTC des Etats-Unis, Ducore (2003, 23) fait remarquer :

> Les offres de cessions postérieures à l'ordonnance seront toujours examinées, mais toute proposition de ce type doit prouver que le montage proposé a de grandes chances de succès. Les facteurs qui sont toujours pris en compte sont notamment les suivants : 1) le montage est-il indépendant, avec tous les sources d'approvisionnement, les employés spécialisés (par ex., pour la recherche-développement et le marketing) et la relation client nécessaires ; 2) les antécédents de ventes d'actifs comparables dans le secteur ; 3) l'intérêt actif d'acquéreurs convenables ; 4) la disposition des parties à être liées par une ordonnance de séparation des actifs ; et 5) une disposition relative à la cession des « joyaux de la Couronne ». Certains cas particuliers peuvent poser d'autres problèmes. Plus l'offre des parties concerne une entreprise en exploitation, avec toutes les sauvegardes voulues comme la séparation des actifs et les dispositions relatives aux « joyaux de la Couronne », plus les chances sont grandes que le personnel soit disposé à effectuer la cession après l'ordonnance, toutes choses étant égales par ailleurs.

Baer et Redcay ont évoqué quelques-unes des critiques de procédure et de fond formulées à l'encontre de l'exigence de l'acquéreur initial. Les objections d'ordre procédural se résument au fait que cette disposition accroît l'incertitude pour les parties à la fusion, et à une différence de traitement selon que la fusion est examinée par la FTC ou par le Ministère de la Justice des Etats-Unis. Ce dernier a en effet tendance à utiliser la politique de la « mise en ordre préalable » plus souvent que la FTC.

Deux autres critiques de fond ont également été mentionnées par Baer et Redcay : « 1) un acquéreur initial n'est pas nécessaire lorsqu'il existe un certain nombre d'acquéreurs très qualifiés, particulièrement si la cession porte sur une entreprise en exploitation ; 2) exiger un acquéreur initial peut faire supporter un coût considérable aux parties à la fusion. »[47] Baer et Redcay partagent quelque peu cette objection et recommandent :

> Les organismes de la concurrence ne devraient recourir aux acquéreurs initiaux qu'en cas de véritable nécessité. Si les parties peuvent démontrer l'existence de plusieurs acquéreurs potentiels convenables et s'il n'y a pas de risque d'atteinte à la concurrence dans l'intervalle ou de dilapidation de l'entreprise (ou si ce risque peut être évité par d'autres moyens moins coûteux), l'autorité de la concurrence ne doit pas exiger d'acquéreur initial. Dans ces cas, les risques pour la concurrence sont plus importants que les avantages marginaux. La FTC peut atteindre ses objectifs légitimes en matière de mesures correctives en exigeant une vente rapide, après la clôture, de l'ensemble à céder.[48]

La Commission européenne a moins tendance que les Etats-Unis à exiger un acquéreur initial. En 2002, Holmes et Turnbull n'ont pu citer que quatre exemples concernant l'Union européenne.[49] Ces quatre

cas ont été utilisés pour illustrer le type de situations dans lesquelles la Commission exigerait un acquéreur initial, à savoir lorsque : « la Commission craint que l'entreprise cédée ne soit affaiblie avant la vente » ; « l'ensemble à céder n'est pas « autonome, indépendant », mais constitue un mélange d'actifs des deux parties à la fusion et, par conséquent, il est difficile d'apprécier la viabilité et l'intérêt de l'ensemble à céder » ; « lorsque la Commission n'est pas convaincue que la cession proposée permettra d'attirer un acquéreur » ; et « lorsque le succès de la mesure corrective dépend en grande partie de l'identité de l'acquéreur proposé.»[50]

Pour réduire les risques de cessions après l'autorisation ou la clôture de la fusion, on peut choisir de désigner des mandataires qui veilleront à ce que les actifs ne soient pas confondus ou dépréciés d'une quelconque manière avant la vente. Il faudra notamment, dans le cas des cessions d'actifs de l'entreprise cible, empêcher l'acquéreur de se procurer des informations commerciales sensibles. Les mandataires peuvent également veiller à ce que la cession se fasse dans un délai donné et aider l'autorité de la concurrence à procéder à l'évaluation des acquéreurs potentiels.

Comment renforcer les moyens dont le mandataire dispose s'agissant de l'arrangement de la cession ? Les promesses ou les « engagements » des parties de faire certaines choses sont une possibilité, mais les autorités de la concurrence peuvent redouter, à juste titre, que ces engagements s'avèrent inapplicables. Dans les pays de « common law », les autorités de la concurrence peuvent souhaiter régler ce problème en intégrant les engagements aux règlements amiables, qui sont alors applicables par la procédure d'atteinte à l'autorité du tribunal.

Il existe un autre moyen de garantir la mise en œuvre d'une cession donnée, qui a déjà été mentionné. Il consiste à définir un certain groupe d'actifs plus importants ou de plus de valeur, soit un « joyau de la Couronne » que les parties sont juridiquement tenues de vendre si une cession privilégiée par les parties n'intervient pas dans un délai donné. Le « joyau de la Couronne » doit être préparé de manière à constituer une incitation à la cession et à rétablir la concurrence si on devait y recourir.

L'outil du joyau de la Couronne comporte cependant un inconvénient. Baer et Redcay soulignent que :

> …il crée une incertitude quant à la question de savoir si les actifs qui en font partie resteront chez leur propriétaire actuel ou s'ils seront cédés. Il peut aussi retarder l'intégration d'actifs et la réalisation de synergies découlant de la transaction sous-jacente. Par conséquent, si le joyau de la Couronne doit faire partie de la solution, il ne doit être utilisé qu'en cas de véritable nécessité.[51]

Baer et Redcay font également ressortir le fait que l'outil des joyaux de la Couronne n'est vraisemblablement pas nécessaire dans les cas où l'on a trouvé un acquéreur initial.

Holmes et Turnbull (2002, 509) n'ont pu retrouver que deux cas dans lesquels la Commission européenne a imposé le recours à la vente forcée d'une entité-phare (« joyau de la Couronne »). Le Commissaire Monti décrit en ces termes l'un des ces deux cas :

> L'affaire Nestlé/Ralston Purina est un exemple de cas où la Commission a accepté une proposition de mesures correctives différentes, comme on les surnomme, de « joyaux de la Couronne ». La possibilité d'accepter ce type de mesures correctrices est prévue aux paragraphes 22 et 23 de la Communication de la Commission relative aux mesures correctives recevables, et il s'agit d'une forme d'engagement dont la Commission pense qu'elle va se répandre à l'avenir. Dans l'affaire en cause, la première possibilité était l'exploitation sous licence de la marque Friskies de Nestlé en Espagne. Si cette possibilité d'exploitation sous licence n'est pas utilisée avant une certaine date ou à la date de clôture de l'opération notifiée, les parties ne pourront plus recourir à l'option d'exploiter

> sous licence les marques Friskies de Nestlé, et la deuxième solution de rechange (les « joyaux de la Couronne ») devra être mise en œuvre. Cette deuxième possibilité, qui suppose la cession de 50 % des actions de Ralston Purina dans la co-entreprise espagnole avec Agrolimen (Gallina Blanca Purina JV), concerne un ensemble d'actifs plus important et plus facile à vendre que l'exploitation sous licence de la marque Friskies de Nestlé.[52]

Dans certains pays, une décision d'autoriser une fusion peut être subordonnée à la réalisation d'une cession en temps opportun à un acquéreur agréé. Dans l'Union européenne par exemple, en cas d'infraction à cette « condition », l'autorisation et la fusion deviennent nulles et non avenues, et les parties sont par ailleurs passibles d'amendes considérables.[53] Etant donné ces graves conséquences, il est possible que la Commission européenne n'ait guère besoin d'exiger un acquéreur initial ou des joyaux de la Couronne pour contraindre les parties à tenir leurs promesses.[54]

Ces différentes constatations s'appliquent aussi bien aux ventes d'actifs tels les droits de propriété intellectuelle (DPI) qu'aux installations et aux matériels mais, comme Parker et Balto le font remarquer (2000, 5), les ventes d'actifs dits « mous » comportent en plus certaines difficultés et défis particuliers :

> Ils font intervenir à la fois …[l'] intérêt de la partie concernée à limiter l'ensemble d'actifs, le désavantage de l'acquéreur sur le plan de l'information, la dépendance de ce même acquéreur à l'égard du vendeur s'agissant d'assistance technique et de transfert de savoir-faire et les incitations du vendeur à se livrer à ces conduites stratégiques. Une autre difficulté se pose, dans la mesure où les transferts de technologie portent souvent sur des ensembles qui ne sont pas des entreprises à part entière et tient au fait que l'acquéreur peut se trouver en bas de la courbe d'apprentissage et de ce fait être désavantagé.

Comme nous l'avons indiqué précédemment, les mesures correctives comportementales ne sont pas sans poser nombre de difficultés d'application et de mise en œuvre. La plupart de ces mesures concernent les fusions verticales, où la menace pour la concurrence provient des modifications d'informations et d'incitations.

La fusion *Eli Lilly/PCS Health Systems* illustre bien certains des problèmes inhérents à la mise en œuvre de mesures correctives comportementales dans une fusion verticale. Au moment de la fusion, Lilly était un grand fabricant de produits pharmaceutiques, et PCS Health Systems une société de gestion de soins pharmacothérapeutiques (Pharmacy Benefit Managers ou PBM). Les PBM travaillent avec un grand nombre de laboratoires pharmaceutiques différents à l'élaboration des listes de médicaments utilisés par leurs clients. Alors qu'il était président de la FTC, Robert Pitofsky a évoqué quelques-uns des éléments nécessaires à la compréhension de cette affaire :

> Les PBM sont des acteurs récents dans le domaine du médicament délivré sur ordonnance. Il s'agit d'organisations qui jouent le rôle d'intermédiaires entre les laboratoires pharmaceutiques d'une part, et les différents groupes de paiement, d'autre part – ainsi, les fournisseurs de soins intégrés, les entreprises privées, les syndicats, les régimes de retraite et les plans fédéraux et étatiques d'employés. En mutualisant leur pouvoir d'achat, les PBM sont en mesure d'obtenir des remises de la part des fabricants de médicaments. Ils choisissent les pharmaciens participants et gèrent les systèmes de traitement des demandes sur les points de vente lorsque les consommateurs assurés achètent des médicaments sur ordonnance. Ils assurent également des services de tenue de dossiers et veillent au contrôle de la qualité. Par ailleurs, les PBM choisissent et décrivent les médicaments mis à la disposition des consommateurs par l'intermédiaire des pharmacies et négocient des remises de gros - souvent très importantes - avec les laboratoires pharmaceutiques.

> Un outil important qui facilite la négociation de remises avec les laboratoires pharmaceutiques est la liste de médicaments – il s'agit d'un compendium, élaboré par les PBM, d'informations sur les médicaments recensés par catégorie thérapeutique, avec des renseignements en matière de coûts. Ces listes sont mises à la disposition des médecins, des pharmacies et des tiers payeurs, et elles aident les diverses parties prenantes à décrire et à vendre les médicaments. Les PBM pèsent souvent sur le processus de fixation du prix du médicament en encourageant de diverses manières le traitement thérapeutique le plus adapté – y compris en proposant aux clients des génériques ou des médicaments moins coûteux. La plupart des docteurs prescrivent et la plupart des clients achètent par l'intermédiaire de listes « ouvertes », qui permettent le remboursement par le groupe de paiement de la quasi-totalité des médicaments autorisés par la FDA. Une liste fermée limite le remboursement à certains médicaments seulement. Entre les listes ouvertes et les listes fermées, on trouve toute une série de situations intermédiaires, où le nombre de médicaments recensés est limité.
>
> La capacité des PBM à faire baisser les prix sur le marché du médicament tient essentiellement au fait que les laboratoires pharmaceutiques accordent des remises plus importantes si elles peuvent être le fournisseur du seul médicament ou de quelques médicaments seulement à l'intérieur d'une catégorie thérapeutique particulière figurant sur la liste. En effet, les laboratoires pharmaceutiques paient pour obtenir l'exclusivité ou la quasi-exclusivité. Les services offerts par les PBM se sont avérés très populaires, de sorte que plus de 125 millions d'Américains achètent désormais certains ou tous leurs médicaments par l'intermédiaire d'un PBM, un chiffre qui devrait atteindre les 200 millions d'ici 2000. Certains estiment que le rythme de progression du prix du médicament a diminué ces dernières années du fait de l'influence exercée par ces PBM.
>
> S'il existe de nombreux PBM, trois parmi les plus importants d'entre eux ont été rachetés par trois grands laboratoires pharmaceutiques au cours des quelques dernières années. Le dernier en date a été le rachat par Lilly de PCS, premier PBM en volume du pays. La FTC a contesté cette fusion, faisant valoir entre autres théories que PCS disparaîtrait de la scène des négociateurs de prix indépendants et que d'autres laboratoires pharmaceutiques, notamment ceux qui fournissent des médicaments concurrents de ceux de Lilly, risquaient d'être exclus des futures listes de PCS.[55]

La fusion *Eli Lilly/PCS Health Systems* comportait certaines caractéristiques tendant à favoriser le recours aux mesures correctives comportementales, notamment l'intégration verticale sur un marché en évolution rapide, où il est difficile d'apprécier l'importance et l'éventualité des menaces à la concurrence et un nombre important d'efficiences susceptibles de découler de la fusion. La FTC a statué en prenant une décision de règlement amiable prévoyant, entre autres éléments cruciaux, l'obligation pour Lilly de maintenir une liste ouverte ouverte. Cette situation peut paraître assez simple tant que l'on n'a pas commencé à se pencher sur les divers moyens dont Lilly aurait pu l'invalider. La lecture des propos de Pitosfky au sujet de certaines des conditions annexes donne une idée des complexités de cette affaire :

> Les remises proposées s'agissant de la liste ouverte doivent être acceptées et soigneusement consignées dans le classement des médicaments. Lilly peut continuer de proposer aux groupes de paiement une liste fermée où des remises vraisemblablement plus élevées donneraient un prix global moins élevé. Un comité indépendant de Lilly et de PCS - dit de « pharmacie et de thérapeutique » – déciderait des médicaments à faire figurer sur la liste ouverte sur la base de critères scientifiques objectifs. On trouve des dispositions de lutte contre la discrimination et de cloisonnement dans l'ordonnance, mais celles que j'ai décrites ont joué un rôle décisif dans la décision de la Commission d'autoriser la transaction.[56]

Ce règlement amiable montre que le recours à des restrictions sur les agissements pour réduire les effets possibles d'atteinte à la concurrence tout en préservant d'importantes efficiences signifie généralement que l'on donne à une autorité de la concurrence un rôle de contrôle permanent dans

l'entreprise issue de la fusion. Une partie de ce rôle peut être déléguée comme elle l'a été ici à un comité indépendant, mais l'autorité de la concurrence doit néanmoins conserver le pouvoir de faire exécuter les contraintes de comportement.

Deux autres aspects du règlement amiable *Eli Lilly/PCS Health Systems* méritent commentaire. La FTC a jugé utile d'empêcher Lilly d'utiliser l'information qu'un PCS obtient dans le cadre de la conduite ordinaire des activités. Christine Varney, ancien commissaire de la FTC, s'est reportée à cette affaire pour énoncer quelques propos d'ordre général sur ces « pare-feux » :

> Etant donné que, par définition, les acquisitions verticales portent sur des entreprises qui fabriquent des produits dont l'un est le complément nécessaire de l'autre, elles peuvent conférer à l'entité issue de la fusion la capacité de se procurer des informations sensibles au plan de la concurrence au sujet des concurrents sur l'un ou l'autre marché. Ces renseignements peuvent concerner des informations de prix non publiques, difficiles à obtenir ailleurs, auquel cas la crainte pour la concurrence serait que la fusion ne facilite une collusion sur l'un des marchés. Ainsi dans le cas de l'acquisition par Lilly de PCS, un groupe de gestion de la politique du médicament, le règlement proposé par la Commission exige que l'entité issue de la fusion érige un pare-feu pour empêcher Lilly d'avoir connaissance des appels d'offres, des propositions, des contrats, des rabais, des remises ou autres termes et conditions de vente d'autres fabricants de médicaments.[57]

Aux Etats-Unis, les autorités de la concurrence ont la possibilité d'examiner une fusion à n'importe que moment, à moins que celle-ci ait fait l'objet d'un règlement amiable ou d'une autre décision de justice.[58] Il existe une catégorie d'exception à cette généralisation si le règlement amiable stipule explicitement la possibilité pour l'autorité de la concurrence de revoir la fusion à une date ultérieure. C'est exactement ce qui s'est produit dans l'affaire *Eli Lilly/PCS Health Systems*, une situation que Pitofsky a justifiée en ces termes :

> Rompant quelque peu avec la procédure passée, la Commission a indiqué aux parties qu'elles continuerait de surveiller les effets sur la concurrence de la transaction dans le secteur en évolution rapide de l'industrie pharmaceutique et qu'elle reviendrait sur certaines points relatifs à l'efficacité du jugement, à l'incidence de la transaction sur les autres laboratoires pharmaceutiques et aux prix facturés aux consommateurs et, en dernière analyse, à la légalité de la fusion verticale sous-jacente, et ce d'ici plusieurs années.[59]

Aucune limite dans le temps n'a été fixée en ce qui concerne ce pouvoir de réexamen.

Pitofsky a souligné les avantages évidents de cette démarche – elle permet aux parties de procéder à leur fusion et de profiter des efficiences qui en découlent, tout en donnant à l'autorité de la concurrence un pouvoir d'attentisme. Il a également mentionné certains autres avantages « possibles, indirects et plus subtils » :

> Premièrement, les parties revendiquant des efficiences ou rejetant l'éventualité de pratiques anticoncurrentielles peuvent être amenées, dans les années suivant la fusion, à rechercher les synergies avec davantage d'agressivité ou à éviter plus soigneusement les effets anticoncurrentiels. Deuxièmement, les avocats, les économistes et les autres personnes appelées à défendre des transactions pourront faire preuve de plus de prudence lorsqu'ils soumettront des demandes extravagantes s'ils savent qu'ils auront des comptes à rendre par la suite. Les responsables de l'application des lois au Canada, où le réexamen se pratique depuis de nombreuses années, estiment avoir le sentiment que ces deux conséquences indirectes se sont en effet matérialisées.[60]

Pitofsky a également recensé et généralement réfuté quatre arguments contre le fait que l'autorité de la concurrence conserve explicitement le pouvoir de contrôler l'application des mesures correctives, voire de les modifier :

1. Certains diront que le contrôle permanent que suppose ce type d'examen va contribuer à un gaspillage des moyens de la Commission et peut donner l'impression que la Commission agit davantage comme un organisme de réglementation que comme un organisme d'application de la loi. L'image pourrait être celle d'un grand frère administratif surveillant les entreprises par-dessus leur épaule pour contrôler en permanence leur comportement. Je pense qu'il s'agit-là d'une mauvaise description de la démarche. La Commission ne fera pas de surveillance permanente. Elle signale simplement aux parties qu'à une date déterminée – d'ici deux, trois ou quatre ans – elle compte revoir le segment de marché et la transaction pour voir si cette dernière et d'autres comme elles ont eu des effets anticoncurrentiels. Dans l'intervalle et comme toujours, le personnel de la Commission continuera d'enquêter sur toute plainte déposée indiquant que des effets anticoncurrentiels ont été constatés.

2. Il peut être difficile, plusieurs années plus tard, de distinguer la cause de l'effet. Ainsi, les prix des médicaments ou la part de marché des entreprises possédant des PBM peuvent augmenter ; pourtant, il sera difficile de savoir si ces deux effets sont imputables à la fusion ou à une autre cause parmi cent autres possibles. Mais la cause et l'effet économiques constituent un problème permanent dans l'application du droit de la concurrence. Cette détermination rétrospective n'est pas plus difficile que le fait de prédire que des efficiences vont apparaître, que les barrières à l'entrée vont être surmontées si les prix montent ou qu'une entreprise fera faillite.

3. On pourrait faire valoir qu'un examen subséquent réel, sur un plan pratique, ne peut intervenir que s'il existe des dispositions prévoyant que les parties à la transaction ne gaspilleront ni ne mélangeront les actifs. Par exemple, les parties peuvent conclure six mois avant l'examen subséquent que des effets anticoncurrentiels ont eu lieu et, par conséquent, vendre des actifs décisifs, déplacer des personnels importants en direction de la société mère ou anticiper par d'autres moyens une réaction négative de la part des pouvoirs publics. Par ailleurs, une disposition empêchant les parties de gaspiller ou d'intégrer les actifs peut paralyser les entrepreneurs et les empêcher de faire ce qu'ils estiment devoir faire pour la société qu'ils ont acquise. Pour l'instant, rien d'autre n'est envisagé que de revoir la transaction à une date ultérieure.

4. Enfin, certains peuvent penser qu'il ne s'agit-là que d'une étape vers une démarche plus intrusive. Dans l'affaire Lilly/PCS, la Commission n'a rien fait de plus que de signifier aux parties qu'elle reviendrait sur leur dossier, ce que l'autorité de la concurrence a le pouvoir de faire de toutes façons. Examiner les effets anticoncurrentiels d'une fusion à la lumière des données postérieures à l'acquisition et au moment de l'affaire et non au moment de la transaction est une pratique courante en droit antitrust américain. Certains peuvent penser que l'étape suivante pourrait être d'autoriser la transaction à la condition que la Commission décide plusieurs années plus tard qu'elle est convaincue que des efficiences ont été réalisées ou qu'il n'y a pas eu d'effets anticoncurrentiels. Je dois ajouter qu'une telle approche devrait permettre un examen judiciaire de la décision de la Commission autrement, elle serait à mon avis inacceptable. Je ne suis pas certain, à ce stade, que ce type de démarche fondée sur une « autorisation conditionnelle » se justifie.[61]

Thèmes de discussion proposés

1. Dans quelle mesure est-il capital de faire appel à des mandataires de contrôle et de cession pour veiller à ce que les mesures correctives soient effectivement mises en œuvre? Quels genres d'informations et de pouvoirs les mandataires doivent-ils posséder? Votre pays publie-t-il des termes modèles pour les mandats de contrôle et de cession?

2. Dans quelle mesure votre autorité de la concurrence a-t-elle recours aux engagements pour vérifier que les mesures correctives sont mises en oeuvre? Quel a été le succès de cette démarche?

3. Dans quelle mesure votre autorité de la concurrence a-t-elle recours aux acquéreurs initiaux ou à la démarche de la «mise en ordre préalable» dans le cadre des cessions? Quels sont, compte tenu de votre expérience, les avantages et les inconvénients de ces démarches?

4. Quel rôle, le cas échéant, une autorité de la concurrence doit-elle jouer dans la détermination du prix des actifs à céder?

5. A quelle fréquence les « joyaux de la Couronne » ont-ils fait partie de vos mesures correctives et la vente d'un joyau de la Couronne s'est-elle souvent avérée nécessaire? Quel a été le succès de telles mesures correctives d'une manière générale ?

6. Dans quels cas les pare-feux sont-ils les plus susceptibles d'être nécessaires et quelles mesures pratiques peut-on prendre pour les rendre opératoires?

7. Quels sont les avantages et les inconvénients de la politique qui consiste à autoriser les autorités de la concurrence à revenir sur des fusions notifiées auxquelles elles ne se sont pas opposées ou de leur conférer un tel pouvoir dans les ordonnances de consentement ? De tels pouvoirs aideraient-ils notablement les autorités de la concurrence à faire en sorte que les parties à la fusion ne conservent ou ne cachent des informations importantes à l'autorité de la concurrence? Que peut-on faire pour veiller à ce qu'un pouvoir de rouvrir un examen de fusion ne réduise pas de manière exagérée l'incitation des parties à passer des accords de consentement avec l'autorité de la concurrence? Faudrait-il absolument limiter dans le temps le pouvoir d'imposer des mesures correctives, selon que la fusion a ou non : a) été notifiée ; et/ou b) fait l'objet d'un règlement amiable ?

8. Que pensent les délégués de la suggestion de Lexecon que le contrôle des fusions pourrait être un moyen détourné d'imposer une réglementation ex ante impossible à imposer par le droit général de la concurrence? Dans quels secteurs ceci est-il particulièrement susceptible de se produire, le cas échéant ?

5. Coopération internationale et importance du suivi

La coopération et la coordination internationales en matière de conception des mesures correctives sont d'une importance cruciale dans les fusions affectant des marchés de portée géographique internationale. Il en va également de même, bien que dans une moindre mesure, des fusions affectant un certain nombre de marchés nationaux séparés. Il peut arriver dans le cas des marchés géographiques multiples que les cessions ordonnées par une autorité de la concurrence puissent affecter les économies d'échelle et de gamme ayant des effets au-delà de sa juridiction.

Il existe plusieurs différences entre autorités de la concurrence qui pourraient rendre la coopération internationale difficile. Il existe notamment des différences aux niveaux suivants :

1. les critères et les tests fondamentaux utilisés pour décider si une fusion peut ou non être bloquée ;[62]

2. le rôle des efficiences ;[63]

3. les calendriers d'examen des fusions et l'existence et la nature des prescriptions en matière de notification préalable ;[64]

4. les exigences en matière d'autorisation avant la clôture, le cas échéant et la capacité à revoir une fusion autorisée ; et

5. le rôle des tribunaux dans le processus des mesures correctives.

Aussi impressionnante qu'elle puisse paraître, cette liste ne semble pas avoir empêché une vaste coopération sur les mesures correctives, par exemple entre les Etats-Unis et l'Union européenne. Il faut noter toutefois que la coopération entre ces deux entités a été facilitée par d'importants intérêts communs et par une grande convergence des politiques en matière de mesures correctives en cas de fusions. Comme le Commissaire Monti l'a reconnu, la Communication de la Commission européenne relative aux mesures correctives a tenu explicitement compte de la pratique aux Etats-Unis et des résultats de l'étude de la FTC sur les cessions.[65] Nüesch (2001, 16) a attiré l'attention sur six points communs entre la Communication et l'Etude :

- la responsabilité de proposer des mesures correctives incombe exclusivement aux parties – c'est à elles qu'incombe le devoir d'identifier les problèmes de concurrence et les mesures correctives adéquates ;[66]

- la mesure corrective doit rétablir le niveau de concurrence d'avant la fusion ;

- on préfère les mesures correctives structurelles aux mesures correctives comportementales car elles sont plus susceptibles d'être efficaces et nécessitent moins de contrôle permanent. Dans les transactions verticales, toutefois, les mesures correctives comportementales peuvent être acceptées pour réduire les barrières à l'entrée ;

- Les mesures correctives structurelles de prédilection sont la cession d'une entreprise autonome en exploitation (plutôt que d'actifs choisis), afin de contribuer à l'apparition sur le marché d'un véritable concurrent. Par conséquent, on donne la préférence à un acquéreur ayant une expérience dans une activité connexe ou à un acquéreur initial. Dans ce dernier cas, on peut vérifier l'acquéreur à l'avance et réduire ainsi le risque d'une cession retardée ou incomplète ;[67]

- afin d'évaluer les mesures correctives proposées et de procéder à la consultation des acteurs du marché, ces mesures sont discutées avec les concurrents, les acquéreurs potentiels de l'activité cédée et des clients ;

- de part et d'autre de l'Atlantique, des craintes ont été formulées que certaines mesures correctives proposées ne soient trop complexes pour une véritable consultation des acteurs du marché et tendent donc à décourager les autorisations de fusion. Ceci est particulièrement vrai dans le cadre du contrôle des fusions au sein de la CE, où les délais de procédure imposent une limite stricte dans le temps aux exercices de consultations du marché sur les mesures correctives proposées à un stade ultérieur de la procédure.

Dans la mesure où ces points communs s'appliquent à un grand nombre d'autres systèmes juridiques, ils devraient également les inciter à coopérer sur la question des mesures correctives.

Pour améliorer la coopération internationale, il convient de porter attention aux questions de procédure et de fond. Ainsi que Jenny (2002, 12) l'a noté :

> Il existe un consensus important entre la FTC et la Commission de l'UE sur les meilleures mesures correctives d'un point de vue théorique, ainsi que sur la manière et le moment auquel elles doivent être utilisées. Ainsi, les éventuelles différences entre la pratique des deux autorités ne sont pas essentiellement dues à des différences de vision des mesures correctives mais [plutôt] à des différences substantielles entre le droit antitrust américain et la législation européenne.

Ne pas réussir à aplanir les différences de procédure et de fond en matière de mesures correctives (définies de manière à inclure l'interdiction) comporte un certain nombre de dangers. Dans un discours prononcé après la fusion *General Electric/Honeywell*, le Président de la FTC a indiqué :

> La décision de l'instance juridique la plus restrictive eu égard à une fusion proposée finira par l'emporter. Par conséquent, les désaccords entre organismes de réglementation peuvent amener les entreprises à limiter leurs activités de fusions aux seules opérations dont elles savent qu'elles seront acceptées dans tous les systèmes juridiques. C'est ainsi que le nombre de fusions peut chuter à des niveaux dangereux, si les entreprises sont dissuadées de négocier des opérations que la plupart des systèmes juridiques considéreraient comme anodines pour la concurrence, par crainte que le système le plus restrictive ne bloque ces transactions.
>
> Le phénomène du « jugement le plus restrictif » peut être abordé et du moins en partie limité dans le temps grâce à une coopération et à une communication renforcées entre les organismes chargés de l'application de la loi. A la limite, les diverses parties prenantes bénéficieront d'une meilleure compréhension des divergences dans les démarches fondamentales adoptées par les diverses autorités de la concurrence. A partir de ce moment-là, on pourra attendre davantage de convergence. Le rapprochement des politiques des Etats-Unis et de l'UE en matière de définition des marchés de produits, des effets unilatéraux et de la domination et, récemment, des effets coordonnés est tout à fait indicatif. Ainsi, une coopération accrue et des efforts de convergence renforcés devraient favoriser un accord plus important sur la « bonne » approche de l'examen des fusions, quelle qu'elle soit, ce qui aura pour effet d'atténuer les divergences.[68]

La convergence en matière de procédures comme sur le fond dans le domaine de l'examen des fusions serait favorisée par un suivi systématique des mesures correctives. Rares sont toutefois les autorités de la concurrence qui procèdent à un suivi des fusions, même de manière non systématique. L'étude de la FTC sur les cessions reste l'exception plus que la règle, même si elle contient des enseignements utiles s'agissant de l'intérêt d'un suivi des mesures correctives.[69]

Le suivi et l'éventuelle révision des mesures correctives font partie du mandat général de l'unité de la Commission européenne sur les mesures correctives.[70] Depuis l'automne 2002, la Commission européenne travaille sur un document analogue à celui de l'étude de la FTC sur les cessions. L'intention serait de le publier en 2004 et de le faire suivre d'un processus de consultations publiques qui servirait de fondement aux évolutions futures dans le domaine des mesures correctives.

5.1 Thèmes de discussion proposés

1. *Vous semble-t-il qu'un manque de coopération internationale en matière de mesures correctives se traduise par une forte baisse des efficiences susceptibles d'être réalisées lors de fusions réelles ou potentielles concernant plus d'un marché national?*
2. *Les différences internationales en matière de mesures correctives ont-elles pour effet de transférer le pouvoir à l'autorité de la concurrence la plus restrictive ?*

3. *Existe-t-il des raisons de penser que les parties à la fusion se livrent à des jeux stratégiques du fait du manque de coordination sur les mesures correctives, y compris en essayant de monter une autorité de la concurrence contre une autre? Si oui, que faudrait-il faire à ce sujet ?*

4. *Quels obstacles juridiques les autorités de la concurrence auraient-elles à surmonter, le cas échéant, pour suspendre l'examen d'une fusion dans l'attente d'une coopération internationale en matière de mesures correctives? De telles suspensions pourraient-elles être utilisées pour accorder à une, voire à deux autorités de la concurrence, le statut d'organismes « pilotes » chargés d'élaborer une mesure corrective adaptée, tout en donnant la possibilité aux autorités ayant prononcé la suspension de finir par rejeter ou modifier la mesure corrective en question ?*

NOTES

1. Motta et al. (2002, 2)

2. La Communication de la Commission européenne concernant les mesures correctives indique que :

> Il arrive toutefois, dans certaines affaires, qu'aucune mesure correctrice suffisante pour éliminer les problèmes de concurrence à l'intérieur du marché commun ne soit envisageable. La seule solution possible en l'occurrence est l'interdiction.

La Commission ajoute immédiatement :

> Quand les parties proposent des mesures correctives d'une ampleur et d'une complexité telles que la Commission se trouve dans l'impossibilité de déterminer avec le degré de certitude voulu qu'une concurrence effective sera rétablie sur le marché, une décision d'autorisation ne peut être rendue.

Commission européenne (2001, para. 31 & 32, références omises)

3. Majoras (2002, 3-6). Mme Majoras est adjointe au Procureur général, au Ministère de la Justice des Etats-Unis (Division Anti-trust).

4. Après avoir procédé à une analyse critique de l'augmentation, constatée vers le milieu des années 90, du nombre de règlements amiables dans les affaires de fusions verticales aux Etats-Unis, Klass et Salinger (1995, 694) ont conclu en partie :

> Les parties à la fusion sont parfois disposées à faire certaines concessions en contrepartie d'une autorisation rapide de leur opération, et les organismes de la concurrence peuvent faire état de ces décisions d'autorisation pour montrer qu'elles « veillent au grain ». Cependant, les effets de ces autorisations ne sont pas bien compris ; et il ne faut pas présumer qu'elles sont, dans le pire des cas, inoffensives. Au contraire, elles peuvent être anticoncurrentielles.

5. Voir Monti (2002, 12-13)

6. Majoras (2002, 4)

7. Voir Jenny (2002, 4-5)

8. Cette liste est extraite de Parker et Balto (2000, 2). Les citations proviennent également de la page 2.

9. Ersboll (2001, 363) évoque ce point en ces termes :

> Les engagements quasi-structurels consistent, par exemple, à accorder l'accès à un réseau ou à une infrastructure à des conditions non discriminatoires ou favorables. Tout en étant de caractère comportemental, de tels engagements auront également pour effet de modifier la structure du marché dans une certaine mesure.

10. Baer et Redcay (2001, 1702) indiquent :

> Les mesures correctives ne suscitaient que peu d'intérêt avant l'adoption par le Congrès de la Loi [*Hart-Scott-Rodino*] en 1976. En l'absence d'obligation de notifier les fusions à l'avance, les entreprises étaient libres de boucler leur transaction avant que les autorités de la concurrence n'en soient informées et certainement avant qu'elles n'en apprennent assez pour apprécier les problèmes de concurrence et examiner les cessions proposées pour y remédier. Lorsque les autorités de la concurrence entamaient une action pour bloquer une fusion, tout dépendait de l'issue de l'audience de l'injonction préliminaire. C'est uniquement lorsque les autorités de la concurrence obtenaient une injonction préliminaire qu'elles avaient le temps et les moyens de négocier une cession satisfaisante. Lorsqu'elles ne parvenaient pas à remporter une injonction préliminaire mais qu'elles finissaient par obtenir une ordonnance de cession au terme d'une longue procédure, il s'était écoulé tant de temps qu'il y avait souvent une enchevêtrement important des activités, des employés et des clients des entreprises ayant fusionné que l'on pouvait parler comme le Congrès de « victoire à la Pyrrhus ». » (références omises)

11. Ces exemples, où les références de cas ont été omises, sont extraits de Neylan (2002, 20) et Campbell et Halladay (2002, 7).

12. Royaume-Uni (Ministère du Commerce et de l'Industrie) (1998, 1)

13. Commission européenne (2001, para. 13 & 14).

14. Etats-Unis (Commission fédérale du commerce) (1999, iii)

15. Ibid., p. 8

16. Baer et Redcay (2001, 1705-1706, références omises)

17. Etats-Unis (Commission fédérale du commerce) (1999, 38)

18. Baer et Redcay (2001, 1701)

19. Voir Etats-Unis (General Accounting Office) (2002).

20. Voir la Commission européenne (2001, para. 18).

21. Voir Etats-Unis (Commission fédérale du commerce) (2003).

22. Voir Motta *et a.* (2002, 8-9). Pour un exemple putatif d'accroissement du risque en cas d'augmentation de la symétrie des entreprises, on se reportera à l'affaire *Nestlé/Perrier* décrite dans Compte *et al* (2002). Page 9, Motta *et al* citent le cas de la fusion *EDF/EnBW* à titre d'exemple de mesure corrective ayant dangereusement multiplié les contacts entre les marchés.

23. Motta *et al* (2002, 9)

24. Loc. Cit., référence omise.

25. D'après Morse (1998, 1247) : « L'imposition d'exigences en matière de cession, la mesure corrective classique en cas de fusions horizontales problématiques, est rare dans les cas de fusions verticales. » Wilcox (1995, 247-248) a constaté une hausse des mesures coercitives des Etats-Unis à l'encontre des fusions verticales et dans cette catégorie, note un enthousiasme croissant pour le recours aux mesures correctives comportementales.

26. Commission européenne (2001, para. 26).

27. Morse (1998, 1247-1248)

28. Balto et Mongoven (2001, 532) références omises

29. Waterson (2003, 147)

30. Pour un débat général sur l'examen des fusions sur les marchés très innovants, voir OCDE (2002).

31. Après avoir noté plusieurs raisons pour lesquelles la formulation de mesures correctives peut être plus difficile dans les industries à hautes technologies, Jenny (2002, 11) conclut :

> Dans l'ensemble, il apparaît que, au-delà d'une préférence pour les simples cessions, des mesures correctives plus complexes (et des mesures comportementales assez complexes à surveiller) sont régulièrement utilisées dans les industries à hautes technologies, tant par la Commission de l'UE que par la FTC.

Jenny évoque ensuite quelques exemples pertinents, à savoir AOL/Time Warner (la mesure corrective CE), Vivendi/Canal+/ Seagram et Silicon Graphics/Alias/Wavefront, en ajoutant page 12 :

> Etant donné que l'avenir des industries de hautes technologies est à ce point incertain et en raison des avantages de synergies potentielles des fusions dans ces secteurs, les mesures correctives comportementales qui sont plus souples que les mesures structurelles et peuvent n'être imposées que provisoirement sont peut-être plus indiquées ; je dirais même qu'elles sont peut-être les seules possibles, même si elles nécessitent peut-être une surveillance plus coûteuse de la part de l'autorité de la concurrence.

32. Fazio et Stern (2000, 47) font valoir dans de telles situations :

> …il n'est pas du tout impossible pour une entreprise de créer une norme « fermée » et, partant, d'accéder ainsi au monopole, indépendamment du fait que d'autres technologies (même supérieures) existent ou seraient faciles à mettre au point. A eux seuls, les droits de propriété intellectuelle permettent à un inventeur d'empêcher d'autres entreprises d'utiliser une technologie protégée mais ils ne peuvent pas anticiper l'introduction de produits concurrents basés sur d'autres technologies. Par ailleurs, les externalités de réseau peuvent orienter le marché vers une norme technologique unique que plusieurs entreprises peuvent adopter. Lorsque ces deux sources de puissance sur le marché interagissent, le marché peut tendre vers un fournisseur unique, le détenteur de la propriété intellectuelle qui sous-tend la norme. En d'autres termes, la capacité d'une seule entreprise à exercer une puissance sur le marché peut être amplifiée par l'interaction entre propriété intellectuelle et externalités de réseaux.

33. Fazio et Stern (2000, 49).

34. Loc. Cit. Ils ont ajouté :

> Peu après le décret de consentement Borland/Ashton-Tate, Microsoft est entré sur le marché des SGBDR en utilisant une technologie à compatibilité ascendante (et supérieure) achetée à Fox Software. Au bout de quelques années, Microsoft avait conquis une position dominante sur le marché des SGBDR. Par conséquent, si la mesure correctrice *Borland* empêchait la nouvelle entité de dominer la norme et le marché SGBDR, la mesure correctrice a elle-même peut-être contribué à ouvrir la voie à un nouveau concurrent puissant sur ce marché.

35. La Commission australienne de la concurrence et de la consommation (1999, para. 7.9) inclut dans sa liste de raisons de préférer les mesures structurelles aux mesures comportementales :

> La Commission n'est pas susceptible de favoriser les engagements de comportements comme les garanties et les obligations en matière de prix, de production, de qualité ou de service. De telles mesures risqueraient d'entraver le processus concurrentiel en cours par leur rigidité et leur manque de réactivité aux évolutions du marché. La durée d'application de ces mesures constitue par ailleurs un grave problème.

36. Mederer (2001, 3)

37. Voir Commission européenne (2003).

38. La Communication de la Commission européenne sur les mesures correctives indique : « …les engagements de type structurel…sont généralement préférables du point de vue de l'objectif défini dans le Règlement [sur les fusions] …et [ne] nécessitent…en outre pas de mesures de contrôle à moyen ou à long terme. » Commission européenne (2001, para. 9). L'argument des coûts de contrôle et d'exécution moins élevés après la fusion figure également dans les lignes directrices en matière de fusion publiées par l'Australie, qui montrent une préférence pour les mesures correctives structurelles. Voir la Commission australienne de la concurrence et de la consommation (1999, 7.10).

39. Pour une discussion plus approfondie des différences entre organismes de réglementation et autorités de la concurrence, voir pp. 24-28 du document de référence de l'OCDE (1999). A titre d'exemple de l'aversion des autorités de la concurrence pour le contrôle, la Communication de la Commission européenne sur les mesures correctives énonce explicitement : « Les engagements [sous-entendu structurels et à caractère comportemental] ne devraient pas nécessiter de contrôle ultérieur une fois qu'ils ont été mis en oeuvre. » Commission européenne (2001, para. 10)

40. Lexecon a servi de conseiller à NewsCorp et Stream dans cette fusion.

41. Lexecon (2003) déclare :

> Il est intéressant de noter que les secteurs qui ne comptaient auparavant que sur la réglementation *ex ante*…s'acheminent à présent vers un mélange de réglementation *ex ante* plus légère associée à une réglementation *ex post*…par le droit de la concurrence, tandis que les secteurs comme celui de la télévision payante, principalement assujettis à une réglementation *ex* post uniquement par le droit de la concurrence, vont désormais, eux aussi, vers la réglementation *ex ante*. Le contrôle des fusions est utilisé pour imposer une réglementation *ex ante* difficilement imposable par le droit général de la concurrence.

42. Voir par exemple Campbell et Halladay (2002,3) qui affirment : « …la politique dite de la « cession d'abord » n'est pas justifiée et…il conviendrait d'envisager au Canada un recours plus important aux mesures correctives à caractère comportemental. »

43. L'Etude de la FTC sur les cessions a confirmé que, livrés à eux-mêmes, les vendeurs rechercheraient effectivement « l'acquéreur le plus moyennement acceptable », de même qu'ils « …prendraient des mesures visant à rendre les actifs cédés moins concurrentiels, soit par l'indifférence, soit dans le cadre d'une stratégie planifiée. » Voir Etats-Unis (Commission fédérale du commerce) (1999, 15).

44. Voir Motta *et al* (2002, 7). Pour une référence sommaire aux incitations données aux acquéreurs, voir Farrell (2002).

45. L'Etude de la FTC sur les cessions reconnaissait les deux possibilités et observait :

> Il faut continuer de développer les méthodes d'examen des cessions pour distinguer les acquéreurs susceptibles de jouer vraiment le jeu de la concurrence de ceux qui risquent de coopérer ou d'utiliser les actifs à d'autres fins. [Etats-Unis (Commission fédérale du Commerce) (1999, 27)]

46. Parker et Balto (2000, 6), s'exprimant au nom de la FTC, notent les avantages que comporte la politique de l'acquéreur initial :

> Les acquéreurs initiaux sont probablement l'outil le plus important pour garantir le succès de la cession. Cet instrument permet de mieux déterminer : a) si un ensemble proposé d'actifs à céder qui ne constituent pas une activité autonome à part entière sera viable dans la réalité ; b) s'il existe un acquéreur pour les actifs proposés à la cession ; c) la probabilité que l'acquéreur proposé rétablisse la concurrence qui serait autrement détruite par la fusion. Ce dernier facteur fait l'objet d'un examen attentif. La FTC cherche à garantir, non seulement que l'acquéreur réussira son entrée sur le marché, mais aussi qu'il sera en mesure de rétablir pleinement la concurrence.
>
> Les acquéreurs initiaux sont désormais utilisés dans plus de 60 pour cent des cas où il y a une certaine forme de mesure non comportementale. On pourrait avoir eu le sentiment que la politique de l'acquéreur initial est réservée aux cas où les actifs risquent d'être rapidement perdus comme dans le cas des supermarchés. Or, tel n'est pas le cas. La FTC a utilisé les acquéreurs initiaux dans des fusions pharmaceutiques, dans le domaine des produits de soins de santé, dans celui des produits industriels comme les réfractaires, les polymères acryliques, les hauts-fourneaux pour le plomb, les sources d'énergie industrielle et les produits de consommation. (Voir à l'annexe une liste représentative de cas et de marchés.) Dans bien des cas où les parties ont trouvé un acquéreur initial au début de l'enquête, la Commission a pu remédier à ses craintes et adopter une proposition de règlement amiable moins de soixante jours après le début de l'enquête. Le message est simple : les parties doivent envisager et être capables de trouver un acquéreur initial dans le cadre du processus de planification de la fusion.

47. Baer et Redcay (2001, 1709)

48. Ibid., p. 1710

49. Holmes et Turnbull (2002, 507-508). Il y a là une différence assez nette avec la FTC, aux Etats-Unis, qui a souvent recours à l'acquéreur initial – voir la note 20 ci-dessus. Holmes et Turnbull ont également souligné que ce que la Commission européenne désigne sous l'appellation d'acquéreur initial est à mi-chemin entre la démarche de la « mise en ordre préalable » des Etats-Unis et les conditions de l'acquéreur initial. La condition de la CE exige de trouver un acquéreur convenable entre le moment où elle autorise la fusion et le moment où la transaction est close.

50. Holmes et Turnbull (2002, 508)

51. Baer et Redcay (2001, 1712)

52. Monti (2002, 6).

53. En décrivant la Commission de la Commission européenne sur les mesures correctives, Nüesch (2001, 12) note que cette Communication de la Commission européenne sur les mesures correctives :

> …aborde la possibilité que la Commission fasse appliquer les engagements en assujettissant son autorisation au respect des textes. Ainsi, elle distingue entre conditions et obligations : les conditions sont considérées comme l'obligation de parvenir à chaque mesure proposée (par ex., la cession d'une activité), tandis que les secondes sont réputées être les étapes nécessaire pour parvenir à ce résultat (par ex., la désignation d'un mandataire chargé de vendre l'entreprise).
>
> Le fait pour les parties de manquer à une obligation peut entraîner une révocation de la décision d'autorisation….En outre, les parties peuvent être passibles d'amendes et d'astreintes. Si une condition n'est pas respectée, *c.-à-d.* lorsqu'une mesure corrective ne se matérialise pas, la décision ne vaut plus, et la Commission peut ordonner toute mesure qu'elle juge appropriée pour rétablir les conditions d'une concurrence effective….Encore une fois, les parties peuvent faire l'objet d'amendes supplémentaires.

54. Ceci est particulièrement le cas si le mandataire de cession a un pouvoir irrévocable de vendre sans prix minimum si le vendeur ne réussit pas à trouver un acquéreur convenable dans un délai donné. Monti (2002, 3) note qu'un tel mandat est donné dans la majorité des cessions ordonnées par la Commission européenne.

55. Pitofsky (1995, 2)

56. Loc. Cit.

57. Varney (1995, 4)

58. L'illustration classique de la durée indéfinie d'application de l'Article 7 : les Etats-Unis ont obligé General Motors à se défaire de ses parts dans Dupont plus de vingt ans après leur acquisition.

59. Pitofsky (1995, 1)

60. Ibid., page 3

61. Ibid., pp. 3-4

62. Voir OCDE (2003) pour un examen des différents tests utilisés dans le cadre de l'examen des fusions.

63. Jenny (2002, 5) fait une intéressante distinction entre l'objectif de préservation de la concurrence et celui de l'amélioration des efficiences Si le but visé est la préservation de la concurrence, il est plus probable que les fusions seront carrément interdites. S'il s'agit au contraire d'améliorer les synergies, des mesures correctives seront recherchées pour permettre à la fusion de se faire et aux synergies prévues d'être mises en œuvre. Jenny note également dans ses conclusions (à 13):

> Quoi qu'on pense de l'utilité des mesures correctives, il est clair que la réforme la plus urgente de la réglementation de l'UE en matière des fusions devrait consister à réécrire l'article 2 du règlement sur les fusions de manière à ce que les avantages des fusions en termes d'efficiences puissent être pris en compte dans l'analyse de la fusion. Ceci contribuerait largement à mettre le droit européen du contrôle des fusions plus en harmonie avec le raisonnement économique et avec la démarche des Etats-Unis en la matière. Ceci contribuerait également à la convergence des pratiques de la FTC des EU et de la Commission de l'UE en matière de mesures correctives. Cette convergence serait tout à fait souhaitable pour les parties à des fusions transnationales, même s'il faut reconnaître que, dans la mesure où une fusion peut avoir des effets différents selon les marchés géographiques, les mesures correctives adoptées n'ont pas à être nécessairement les mêmes dans tous les systèmes juridiques.

64. Par exemple, aux Etats-Unis, les parties peuvent notifier les fusions avant d'avoir conclu un accord ayant force obligatoire. Tel ne serait pas le cas dans l'Union européenne, malgré les réformes proposées par la Commission au règlement sur les fusions. En outre, une fois la notification soumise, des échéances commencent à courir dans l'Union européenne, qui sont généralement plus courtes et certainement moins souples qu'aux Etats-Unis.

65. Voir Monti (2002, 2)

66. Nüesch ne l'a pas mentionné, mais il pourrait bien y avoir un écart entre les politiques *de facto* et les politiques officielles énoncées sur cette question. Du moins aux Etats-Unis, les autorités de la concurrence peuvent énoncer ce qu'elles exigeraient au lieu de simplement réagir aux propositions des parties.

67. L'argument de Nüesch aurait dû être nuancé pour relever que les autorités de la concurrence peuvent (et elles le font souvent) insister pour vérifier les acquéreurs, même si la cession a lieu après la fusion.

68. Muris (2001, 10-11, références omises)

69. Jenny (2002, 13-14) observe :

> Il est étonnant de constater qu'il existe aussi peu d'études empiriques sur les effets du contrôle des fusions et des mesures correctives. Les autorités de la concurrence ont été très réticentes à procéder à un examen systématiques de leurs décisions en matière de fusion quelques années après les avoir prises. Pourtant, un tel exercice pourrait éclairer à la fois a pertinence de l'analyse prospective ayant présidé à leurs décisions et le bien-fondé des mesures qu'elles ont acceptées pour remédier aux problèmes de concurrence issus de la fusion. L'obligation de procéder à un tel examen dès lors que l'autorité de la concurrence a effectué une analyse en bonne et due forme de la concurrence avant de rendre sa décision semblerait nécessaire pour assurer un contrôle de qualité minimal des mécanismes de contrôle des fusions.

70. Voir Monti (2002, 4)

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AUSTRALIA

1. Overview of Australia's Merger Law

Australia's merger law is contained in section 50 of the *Trade Practices Act 1974* (TP Act). Section 50 generally prohibits mergers or acquisitions that would have the effect or likely effect of substantially lessening competition in a substantial market for goods or services. Australia does not have a system of compulsory merger notification. Instead, a system has evolved under which the ACCC provides informal clearances for proposed mergers which it considers would not be in breach of section 50.

In addition, the TP Act allows Australia's competition enforcement agency, the Australian Competition and Consumer Commission (ACCC), or the Australian Competition Tribunal on review, to exempt mergers from the application of section 50 where they would result, or be likely to result, in such a benefit to the public that they should be allowed to take place. This process is known as authorisation and is a subsequent and separate step from the competition assessment contained in section 50.

2. General Principles for Devising Remedies[1]

2.1 The OECD raises four general principles for devising remedies that would likely apply in most jurisdictions. They are:

- remedies should not be applied unless there is in fact a threat to competition;
- remedies should be the least restrictive means to effectively eliminate the competition problem(s) posed by a merger;
- reinforcing the previous point, competition authorities typically have no mandate to use merger review to engage in industrial planning; and
- competition authorities "…must be flexible and creative in devising remedies...".[2]

Australia actively pursues each of the four principles in its merger remedies. However, under the TP Act, the ACCC is somewhat constrained in its ability to devise merger remedies as suggested in the fourth principle.

However, under the TP Act, the ACCC is not in a position to devise merger remedies as suggested in the fourth general principle above. In cases where, following its inquiries into a proposed acquisition, the ACCC forms the view that the proposed acquisition is likely to substantially lessen competition in breach of section 50, it will provide the parties with reasons for that view. Parties may then choose to offer to the ACCC undertakings intended to restructure the proposal in such a way as to reduce or eliminate the competition concerns.

In these circumstances the offer of such an undertaking designed to address the competition concerns is a matter for strategic decision by the parties to the acquisition. There are other options open to the parties, such as challenging the ACCC in court, seeking authorisation, revising the proposal without

undertakings, or even abandoning the proposal. It is not the policy or practice of the ACCC to demand undertakings; instead it endeavours to work with parties and communicate its competition concerns so that parties may propose undertakings which are likely to address those concerns to the best extent possible.

Should the remedies be expanded to consider the adequacy of relying on post-merger remedies to take care of competition problems if and when they actually arise?

If post-merger remedies are adequate to take care of any competition problems arising from a proposed merger, then no substantial lessening of competition is likely in the first place.

However, to the extent that a merger results in an increased incentive and/or ability for firms to engage in anti-competitive conduct which may be covered elsewhere in the TP Act, it is appropriate to consider the extent to which it will be possible to prevent the conduct following the merger, or failing this to detect and prove the conduct if it does occur. If a merger significantly enhances the incentive and ability for firms to engage in anti-competitive conduct it will often be the case that it substantially lessens competition and is therefore prohibited under the TP Act.

Under what conditions would it be acceptable to rely on post-merger remedies?

If the merger itself is not likely to result in a substantial lessening of competition then the ACCC will not oppose it and will instead rely on the existing provisions of the TP Act to deter, detect and punish anti-competitive conduct.

Where a merger is likely to result in a substantial lessening of competition and thus contravene the TP Act, unless Authorisation is granted, the ACCC would oppose the merger (ultimately by way of application to the Federal Court) unless the parties provide satisfactory undertakings.

How significant, if at all, is the possibility that competition authorities and merging parties will agree to remedies that err on the overly strict side?

Given that many merger parties are very concerned with gaining regulatory approval for their mergers in a timely manner and with a minimum of publicity, there may be a temptation to offer undertakings which exceed those necessary to prevent a substantial lessening of competition.

The ACCC is mindful of this possibility in assessing any undertakings offered by parties and has, on occasion, declined certain undertakings because they are not necessary to address the competition concerns arising from the merger. The ACCC endorses the view that in merger review, competition authorities are dealing in future probabilities not observable certainties, so a minimalist approach to eliminating potential competition problems is wise especially since it will grant parties greater freedom to reap available efficiencies and respond to future developments.

In what situations are such risks likely to be especially high and what, if anything, can be done to reduce them?

The risks are likely to be highest where parties are particularly anxious about timing or publicity, or where parties believe they would suffer damage if the merger is opposed. These risks are countered by the requirements for the ACCC to adhere to the TP Act and by the parties' right to proceed to court (for a declaration that the merger is not likely to substantially lessen competition) if they believe such undertakings are unnecessary.

Merger parties may be tempted, on occasion, to offer as undertakings courses of action which they already intended to take for commercial gain and which do not address any competition issues. For

instance, an acquirer may intend to divest certain parts of its business for commercial reasons following an acquisition. The ACCC is mindful of this possibility and before any undertaking is accepted it is carefully examined to ensure that it relates to specific competition concerns.

3. Design Issues - Effectiveness

In terms of designing and implementing merger remedies, how important are notification requirements and/or the ability to impose interim measures aimed at either postponing closure or ensuring that assets are held separate post-merger pending examination by the competition authority?

There is no formal requirement that parties to a proposed acquisition advise the ACCC prior to entering into an agreement to effect an acquisition (unless the parties seek to formally apply for authorisation). However, the ACCC is commonly advised of such proposals.

Parties anticipating the need to offer undertakings to overcome competition problems arising from a merger would be wise to consult the ACCC early enough to allow themselves time to devise suitable undertakings without unduly delaying their commercial timetables.

The ability to impose interim measures to ensure that anti-competitive transactions do not proceed is crucial in merger regulation. The TP Act provides for court orders and injunctions to prevent the merger taking place.

Do delegates agree that divestiture is the generally preferred solution for problematic mergers but that this preference is stronger with horizontal as compared with vertical mergers? What are some market characteristics that might militate in favour of using behavioural instead of structural remedies?

The ACCC is not likely to favour behavioural undertakings such as price, output, quality and/or service guarantees and obligations. Such undertakings may well interfere with the ongoing competitive process through their inflexibility and unresponsiveness to market changes. The duration of such undertakings is also highly problematic.

Preferred undertakings are those which address structural issues in the relevant market(s). Structural solutions provide an ongoing basis for the operation of competitive markets. The regulatory costs are one-off rather than a permanent burden.

For example, divestiture of particular divisions of the merged company may remove competitive concerns from the merger, while leaving the merger an attractive proposition for the parties Undertakings were accepted in the Village/Austereo merger, which resulted in the divestiture of certain capital city radio stations, in order to maintain competition in those markets.

In the Sigma/QDL acquisition, the ACCC accepted an undertaking from Sigma that if it obtained control of QDL it would move to sell QDL's business in Victoria, in order to maintain competition in that State.

In the acquisition of Smiths Snackfoods by Frito-Lay, undertakings were accepted which resulted in the divestiture of a package of brands, manufacturing facilities and staff comprising 'Snack Brands Australia'.

A vertical merger may involve the integration of a party in a competitive market with a party which has a natural monopoly, for example a gas pipeline. This will usually raise concerns about access, access pricing and protection of confidential information.

In some cases, the competition concerns may be able to be addressed by way of quasi-structural undertakings like ring fencing and access undertakings.[3] For example, in considering a number of port privatisations the ACCC has accepted undertakings regarding non-discriminatory access. In other cases there may be existing regulation designed to address vertical integration concerns with respect to essential facilities.[4]

However, it should be well understood that the ACCC will view any such option sceptically as a set of undertakings are never capable of replacing the operation of a competitive market. For example, in 1995 the ACCC rejected undertakings proposed by GrainCorp and the Australian Wheat Board in relation to a proposal to enter into a joint venture to buy and sell NSW grain in the domestic market. The proposal was considered to be likely to substantially lessen competition in the NSW markets for the storage and handling of grain and for grain trading. Following widespread industry consultation the ACCC concluded that the proposed undertakings did not address issues of access including internal transfer pricing, availability of capacity, preferential reservation of capacity and priority of access. They did not provide a satisfactory framework for preventing the flow of commercially sensitive information between the parties. There was no mechanism for monitoring, arbitrating and enforcing the undertakings. The ACCC concluded that there was little real prospect that the structural concerns could be satisfactorily resolved by behavioural undertakings.

Overall then, there is a strong preference for structural undertakings to remedy competition problems arising from mergers but will consider other remedies in certain circumstances.

Is the preference for structural as compared with behavioural remedies decreasing? If so, to what extent does this reflect a general trend towards greater enforcement actions against vertical mergers, a larger share of mergers taking place in rapidly changing sectors, and/or some other factor(s)?

No, the ACCC's strong preference for structural rather than behavioural remedies is undiminished. As previously discussed, the ACCC does not favour behavioural undertakings.

In the context of structural remedies, what are the pros and cons of insisting on the sale of an on-going business? Can your competition authority include within a divestiture order assets not directly employed in markets where the merger threatens competition. If possible, please describe a good example of this being done.

The necessity and even desirability of insisting on the sale of an ongoing business will depend on the nature of the industry in which the acquisition occurs and the nature of the anti-competitive detriment arising from the merger.

An example of the divestiture of an ongoing business arose from the acquisition of Smiths Snackfoods by Frito-Lay. The ACCC accepted the merger parties' undertakings which resulted in the divestiture of a package of brands, manufacturing facilities and staff comprising 'Snack Brands Australia'.

While the sale of an ongoing business may lead to a strong competitor being introduced to the market, but the insistence on this may be impractical in some cases and the inability to find a buyer for an ongoing business may unnecessarily prevent an efficiency enhancing merger.

Accordingly, it may be more appropriate in such cases for alternative remedies to be devised, such as the sale of a number of specific sites or product lines. For example, the recent merger of Pfizer and Pharmacia followed divestiture of certain product lines which of themselves may not have constituted an ongoing business but which, when sold to a suitable buyer, allowed their buyer to operate as an effective constraint on the merged entity.

Where divestiture is an appropriate remedy, the ACCC will be concerned to ensure that the assets are sold to an effective competitor. It will also wish to ensure that the process is undertaken within a realistic time frame and that appropriate sanctions by way of speedy compulsory divestiture of assets can apply, should firms fail in their obligations to comply with the undertakings they have provided.

To what extent does your competition authority follow a "clean sweep" policy in divestiture orders, i.e. transferring an ongoing business from one buyer to one seller rather than mixing assets from both acquiring and target firms and perhaps selling to a number of buyers? Has there been much criticism of this approach from small and medium sized business, and if so, what has been the response to that resistance?

The ACCC has adopted both approaches in different circumstances and is of the opinion that the appropriate divestiture will depend on the nature of the lessening of competition arising from the merger.

For instance, the 2001 sale of Franklins, Australia's third largest supermarket chain, saw Franklins stores bought by two new entrants to eastern Australian grocery retailers, the greatest number of stores going to independent retailers via a controlled sell-down, with the remaining stores bought by the two largest established supermarket chains.

This achieved the best possible outcome for competition, since it would have been impossible for any of the smaller competitors to absorb the entirety of the Franklins business, but it was also considered undesirable to transfer such a large amount of market share to one of the two large chains.

Where economies of scale for the potential purchaser are important, the ACCC may insist on a clean sweep in order to ensure that the divestiture leads to a sufficient constraint on the merged entity.

What special challenges to remedy design are found in industries undergoing liberalization or in industries undergoing rapid technological change?

Competition regulators must be particularly aware of the importance of dynamic efficiency effects and their ability to enhance consumer welfare in the longer term.

The ACCC's guidelines provide direction on how it is likely to consider the dynamic characteristics of the market in the context of a merger proposal, including its consideration of remedies.

- Whether a market is growing or declining can have significant implications for the potential erosion of market power over time. Markets which are growing rapidly are more likely to see new entry and the erosion of market shares over time. Markets which are characterised by rapid product innovation may see market leaders rapidly replaced. However, in some differentiated product markets, first mover advantages and brand loyalty can resist such advances. Historical information on changing market shares will be informative here.

- Regulatory or technological changes may change market boundaries or lower barriers to imports or new entry in the foreseeable future (see paragraphs 3.6 and 3.7). For example, deregulation may remove geographic restrictions on distribution, remove import quotas or reduce tariffs, or increase the number of potential entrants through the removal of restrictive licensing requirements. New technology may increase supply side substitution between products, facilitate global distribution of services, or facilitate new small scale entry into a market.

- A merger may involve the acquisition of technology, intellectual and industrial property and/or research and development facilities, which may in turn affect the competitive dynamics of the relevant market. For example, the acquisition of a fledgling entrant with a new product and/or technology by an incumbent firm may prevent or hinder the injection of new competition into the market. By contrast a merger may combine complementary technologies in such a way as to create a stronger competitor and enhance competition in the market. Whether or not competition is enhanced there may still be efficiency gains which could be considered in the context of an application for authorisation.

Sometimes when there is one merger or joint venture in a market, the consequent realignment of competitive positions may result in further mergers and/or joint ventures. In these circumstances the ACCC will consider the flow on effects of the original merger when evaluating its competitive impact on the market.

Clearly it is important that remedies in markets undergoing liberalisation and/or rapid change are designed carefully to account for the market's changing nature. Static market share may not be a good indication of what will be important to constraining the merged entity in future.

Are there any examples of remedies intended to lower switching costs either in industries being liberalized or other sectors.

Certain remedies have concerned non-discriminatory access in respect to essential facilities. For example, in considering a number of port privatisations the ACCC has accepted undertakings regarding non-discriminatory access. In other cases there may be existing regulation designed to address vertical integration concerns with respect to essential facilities.

What considerations influence the appropriate term and/or review period for behavioural remedies?

The term of behavioural undertakings will depend on the nature of the anti-competitive detriment arising from the merger. For instance, where this detriment may be alleviated by the entry or growth of one or more viable competitors, behavioural undertakings should apply for a period long enough to allow the new entrants to become established as an effective constraint on the merged entity.

If the undertakings apply for too short a period, this may lead to the failure of the new entrant to gain sufficient scale and custom to constrain the merged entity, or even to its collapse. On the other hand, a period that is too long will give the new entrant an extended period of protection which may deprive the market of the competitive discipline necessary to establish a strong constraint on the merged firm. The seriousness and likelihood of these dangers must be weighed up in setting the duration of behavioural remedies, and some flexibility to adjust this duration may give regulators and business more confidence that the desired result will be achieved.

Undertakings clauses often include provision for a review of undertakings during their life to ensure that they are necessary and effective.

What are the advantages and disadvantages of having something like the European Commission's Remedies Unit or the USFTC's Compliance Division implicated in both remedy design and enforcement?

The establishment of such a unit would consume a large amount of resources and may be inappropriate in the context of smaller jurisdictions such as Australia. Although these units have potential

to develop expertise and experience in the design of remedies, smaller agencies have the ability to develop a high degree of expertise in merger remedies and compliance within their existing work groups.

4. Implementation – Administrability and Enforceability issues

How essential is it to employ monitoring and divestiture trustees to ensure that merger remedies are effectively implemented? What kinds of information and powers must the trustees have? Does your jurisdiction publish standard terms for monitoring and divestiture trusteeships?

Monitoring is essential if merger remedies are to overcome the anti-competitive detriment arising from a merger. If monitoring of undertakings is inadequate or absent, merger parties may have strong incentives to deviate from their responsibilities in order to maximise profit. For this reason, it is essential that undertakings are transparent and auditable so that any breach can be clearly and unequivocally identified, and that there are penalties sufficient to deter parties from reneging on their undertakings. Under the TP Act, merger undertakings accepted by the ACCC are enforceable in the Federal Court.

How much does your competition authority rely on undertakings to ensure merger remedies are implemented? How successful has this proved to be?

The ACCC is heavily reliant on undertakings to ensure compliance with merger remedies. In the absence of undertakings, the ACCC's only alternative would be to oppose the merger outright, which is the reason remedies are necessary in the first place. Without effective, enforceable undertakings merger remedies would be unworkable.

How much does your competition authority rely on up-front buyers or a fix-it-first approach to divestitures? What, in your experience, are the pros and cons of these approaches?

Up-front buyers are obviously preferable since an acceptable up-front buyer gives certainty that the asset will pass to a viable competitor and the lessening of competition arising from the acquisition will be remedied.

What role, if any, should a competition authority play in the pricing of assets to be divested?

The ACCC would be reluctant to be involved in determining the price of assets to be divested, and endeavours to allow parties to sell divested assets at fair market values and has in the past assisted parties to do so by agreeing not to disclose deadlines by which assets must be sold in order that the bargaining power of the seller should not be unnecessarily diminished.

How often have crown jewels been included in your merger remedies, and how often has the sale of a crown jewel proved necessary? How have such remedies generally worked out?

The ACCC has not adopted "crown jewel" provisions in any merger remedies in the past and would be reluctant to do so. Only those undertakings that are both necessary and sufficient to ensure that a merger does not result in a substantial lessening of competition are accepted. There is some concern that crown jewel provisions, which force the merged entity to divest a wider group of assets if it fails to fulfil its initial obligation to divest certain assets, may result in a remedy which goes beyond that which is necessary to prevent a substantial lessening of competition.

What are the situations in which firewalls are most likely to be needed and what practical measures can be taken to make them effective?

Firewalls usually arise for consideration in situations where sensitive commercial operating information may pass from one party to the other in circumstances where the information could be used in upstream or downstream competitive markets.

They have not been used as part of long term merger remedies in Australia to date but have been used to limit access to sensitive information during the sale process, for example during the joint acquisition of Email by Smorgon and OneSteel.

The Commission has some familiarity with the use of firewalls in relation to its regulatory role with the energy sector.

What are the pros and cons of allowing competition authorities to revisit notified mergers which they did not oppose, or of competition authorities obtaining such a power in consent orders? Would such powers significantly assist competition authorities in ensuring that merging parties do not withhold or hide important information from the competition authority? What can be done to ensure that a power to re-open a merger review does not inordinately reduce parties' incentives to enter into consent agreements with the competition authority? Should there be an absolute time limit on the power to impose merger remedies, and should that depend on whether or not the merger has: a) been notified; and/or b) been the subject of a consent order?

Under the present informal merger clearance system, the ACCC retains the ability to revisit mergers which it did not oppose. Indeed, when notifying parties that it does not intend to oppose a transaction, it normally specifies that should new information come to the ACCC's attention, or should it become aware that some of the information that has been provided by the parties is incorrect or incomplete, it reserves the right to reopen the matter.

5. International Cooperation and the Importance of Follow-up

Is there evidence that inadequate international co-operation on merger remedies is resulting in a significant loss of efficiencies from actual or potential mergers affecting more than one national market?

No. Cooperation on mergers and on remedies continues to improve. A recent example of close cooperation between the ACCC and its international counterparts was provided by the merger of Pfizer and Pharmacia, where numerous agencies were involved worldwide. Agencies were able to cooperate not only on their assessment of the likely competitive effects of the merger but also on the local impact of remedies imposed in other jurisdictions.

Although differing merger laws in different jurisdictions may have the effect of deterring some international companies from engaging in efficiency enhancing mergers, the ACCC sees no evidence of mergers being stifled by a lack of international cooperation on remedies.

Do existing international differences in merger remedy policies have the effect of transferring power to the most restrictive competition authority?

In assessing the acquisition of Pharmacia by Pfizer the ACCC cooperated with its counterparts in the US, New Zealand and Europe. Remedies offered by the merger parties in other jurisdictions were sufficient to allay many of the competition concerns about the impact of the merger in Australia, and as a

consequence the remedies imposed in Australia were less complex than might otherwise have been necessary.

This was an example of cooperation between competition agencies resulting in the preservation of efficiencies in a merger while ensuring no substantial lessening of competition.

Is there evidence that merging parties are engaging in strategic gaming because of imperfect co-ordination on merger remedies, including playing off one competition authority against another? If so, what should be done about that?

There appears to be little opportunity to play off one competition authority against another since the ACCC has a collaborative approach to working with its overseas counterparts. Indeed, as noted above, remedies obtained by overseas competitors have in the past been helpful in allaying competition concerns arising in Australia.

What legal obstacles, if any, would competition authorities have to surmount to suspend consideration of a merger in order to permit international co-operation on merger remedies? Could such suspensions be employed to grant one or possibly two competition authorities "lead agency" status in working out an appropriate remedy, while permitting the suspending authority(ies) eventually to reject or modify the resulting remedy?

Presently the ACCC provides parties with indicative timings for assessment but is not subject to a strictly binding timetable and is therefore relatively free to consult internationally on decisions and on merger remedies. Without granting any authority lead status, on occasion the timing of decisions in various jurisdictions varies and as a result the ACCC's assessment of the impact of a merger may be influenced by the outcome of merger remedies agreed to overseas. In such situations it is often prudent to await the outcome of assessments by overseas competition agencies before arriving on a final decision with respect to the appropriate remedies in Australia.

NOTES

1. Majoras (2002, 3-6). Ms. Majoras is Deputy Assistant Attorney General, United States Department of Justice (Antitrust Division).

2. Majoras (2002, 4)

3. There has recently been a greater use of the consent decrees or undertakings approach to vertical mergers in the United States. See *United States v AT & T Corp* 59 Fed. Reg. 44,158; *United States v MCI Communications* 59 Fed. Reg. 33,009; *United States v Tele-Communications, Inc* 59 Fed. Reg. 24,723; *Martin Marietta Corp* . 59 Fed. Reg. 17,379.

4. The ACCC has published guidelines on the new access regime: *Access Regime — a guide to Part IIIA of the Trade Practices Ac*t, November 1995.

BRAZIL

(CADE)

COMMENTS FROM CADE ABOUT THE PROCESS OF MERGER REVIEW

1. Introduction

The process of merger review is one of the most complex tasks of antitrust action. This is primarily due to the fact that, usually, the analysis is not based on past events. It is instead based on facts that probably will occur in the future due to the specific configuration of the market structure.

In order to better examine this subject, the structure of this paper follows the sequence of described topics on the paper sent by the OECD[1]. The sections focus the following issues:

6. in which situations the merger, in fact, generates harmful effects to the consumers' welfare;

7. how the efficiency gains may be incorporated to the decision;

8. which measures the antitrust authority may apply and the cost/benefits related to their implementation;

9. the importance of international cooperation for the analysis process and the formulation of punishment measures for operations with transnational impacts;

The last section has, as its objective, the formulation of some final considerations.

2. Mergers and competition: when to apply the remedy

According to traditional microeconomic theory, the ideal market structure is perfect competition, where the optimal relationship between costs and private and social benefits are the natural results of Adam Smith invisible hand; however, perfect competition is a limited situation; usually, the markets are imperfect, and consequently, in several situations, the market's invisible hand may bring divergences between the public and private interests. The most evident example are monopolies which, according to conventional vision, tend to generate social costs – not only resulting in income redistribution from the consumer to the producer, but also causing social damage: the quantity produced and sold by a monopoly is inferior to the level of social efficiency. This loss is known as deadweight loss.

Maybe the most famous critic regarding the benefits of the perfect competition is Schumpeter. In his work *Capitalism, Socialism and Democracy*, Schumpeter reaches the following conclusions:

- Perfect and general price flexibility makes the economy potentially unstable; moreover, the perfectly competitive firm is considered inferior in terms of internal efficiency, especially in technological terms;

- Monopolistic practices are mechanisms of protection for investments in technological innovations; monopolistic prices are not necessarily higher, nor the production lower than the prices and the competitive production; moreover, monopolies have higher productive and administrative efficiencies;
- In the realities of capitalism, what prevails is not only the competition by way of prices, but also the search for new goods, technological, organizational, strategic innovations, etc (creative destruction process);
- The consumers' welfare must be seen in a dynamic perspective. Greater innovation efforts demand more concentrated market structures and forms of protection which, often, are similar to monopolistic practices, illegal in terms of antitrust concerns. Therefore, the lessened consumers' welfare, in the short term, resulting from this practices, will have, on the other hand, lower prices in a medium term, in addition to higher quality and diversification.

More recently, specialists have understood that neither perfect competition, nor monopolies can be considered ideal structures – neither from the static nor dynamic efficiency point of view. According to Scherer & Ross[2], technical progress is typical of market structures with monopolistic and competitive elements, especially when there are technological opportunities. There is optimal balance between the number of rivals and technological progress if, on the one hand, a greater number of rivals divide the potential benefits of innovation reducing the gains of each firm; on the other hand, a greater number of them stimulates innovation more rapidly.

The issue is that there is not a simple relationship between a greater number of competitors and social welfare, at least from the dynamic point of view. From the static point of view, consumers have greater benefits depending on the proximity of the market from a state of perfect competition. From the perspective of the innovation process, although competition is desirable, a large number of enterprises does not necessarily produce better results for society.

As stated previously, the problem for antitrust authorities is that decisions involving mergers generally do not seek to correct the past, but to guide economic agents regarding probable future behaviours. In some situations, the *ex ante* analysis does not always provide guarantees about probabilities related to these behaviours. An example is the question whether increased mergers would facilitate or not collusive behaviours. In oligopolised markets, collusion and rivalry are two resulting factors. In this case, a restrictive decision, in the expectation of reducing the probability of collusion (for example, through the partial sale of assets), could, on the contrary, exercise negative effects on the competition and on the innovation progress. If the restrictive decision, *ex ante* does not produce, on probability terms, clear social benefits, the antitrust institution can always act *a posteriori*, regulating concrete behaviours, through the institution of an administrative process.

3. Considerations about efficiency gains

A very plausible objective of antitrust policy is to guarantee the efficient allocation of resources through competition. However, in some situations, some transactions or agreements, although apparently restrictive, provide the efficient allocation of resources. Some of these restrictions are pro-competition – such as the merger of two smaller firms into a single firm, which makes them more competitive compared to larger firms, or agreements between producers and distributors that restrict the competition within the same brand to stimulate the competition among brands.

Other situations, more complex from the antitrust analysis point of view, are relative to restrictive transactions or agreements which produce anticompetitive effects, but result in the more efficient utilization of resources. The typical example occurs when two firms which merged obtain economies of scale or scope, but achieve a dominant position, which could imply larger profit margins and prices.

Usually, efficiency gains are larger in vertical transactions. Firstly, the vertical integration can reduce transaction costs, meaning the bargaining and negotiating costs with other economic agents. Using the market (not integrating) has costs, such as selecting vendors and negotiating contracts. These costs will increase with the probability of future opportunistic behaviours[3]. Other reasons are related to the possibility of obtaining technological gains, eliminating successive monopolies, within the vertical network, or eliminating bargaining without resolution between bilateral monopolies.

In Brazil, although the fact that the efficiency gains play an important role in the decisions of antitrust authorities, the incorporation of this concern has legal limitations. According to the article 54 of the Law nº 8.884/94, mergers which damage the competition can be approved only if they obey the following conditions:

I – they must have as an objective, accumulating or alternating:

a) increasing productivity;

b) improving the quality of goods or services; and/or

c) stimulating the efficiency and technological or economic development;

II – the resulting benefits must be distributed between the merger participants and the consumers in an equitable way;

III – they must not imply the elimination of competition of a substantial part of the relevant market of goods and services; and

IV – they must respect the strict necessary limits to reach the merger objectives.

According to the Brazilian legislation, anticompetitive mergers should be approved if they attend to the four conditions above, with some exemptions[4].

The first condition is related to the existence of efficiency gains. The parties should demonstrate, clearly and in a convincing way, that the merger generates efficiencies. Some efficiency gains are difficult to demonstrate – for example, management efficiencies – and should not be accepted. Moreover, these efficiencies could be obtained in another way.

The second condition demands considerations of a distributive nature. The traditional cost/benefit economic analysis ignores mergers' redistribution consequences. This perspective, also known as the "Williamson approach", would accept smaller competition if the total social surplus (consumer's surplus plus the producer's surplus) were larger – in other words, if the firms gains (or its' shareholders) were larger than the consumers' losses. This approach is not permitted by the Brazilian legislation.

Another approach, more consistent with the Brazilian legislation, accepts the reduction of competition if the efficiency gains are so high that the liquid effect related to the consumers' surplus would be positive or, at least, would not be reduced. In this case, obviously, the objective is to avoid welfare transfer from the consumers to the enterprises involved in the merger through the increase of prices. This demands the demonstration that the efficiency gains will be high enough to annul the price-effect. In the case of the Williamson approach, the level of demand for the attainment of efficiency would be much more modest. It is important to point out that the Brazilian legislation is so severe as to require not only that the consumers do not suffer damages, but also that there is sharing of equitable merger benefits between enterprises and consumers.

According to the third condition, the existence of efficiency gains and their sharing with the consumers is not sufficient. It is also necessary to prove that the merger does not eliminate a substantial part of the relevant market. In this case, the Brazilian law follows the international experience, which recognizes that it is difficult to prove the existence of efficiency gains sufficient to compensate for substantial damage to the competition.

The last condition also provides limitations to the incorporation of efficiency gains into the antitrust analysis. Efficiencies that could be obtained in an alternative and in a less anticompetitive manner cannot be considered in the analysis.

Even with restrictions, efficiency gains must be incorporated in the antitrust decision. In the Brazilian legislation, competition is more of an instrument than an objective in itself. If the efficiency gains are substantial and compensate the anticompetitive effects, the returns to the social welfare will be positive, which is the most important antitrust policy objective.

4. Possible remedies and implementation

Eventually, the antitrust authority could adopt measures which preserve efficiencies and minimize the merger's anticompetitive effects. These measures could diverge in terms of effectiveness as well as in terms of implementation and monitoring costs. The array of remedies at the disposal of the antitrust authority is very ample, and can be summarized by the categories above:

1. *Structural measures*. These are structures related to disposal and sale of assets, licensing of brands, etc., which have, as their objective, the reduction of barriers to entry and which would be reasonably capable, if not to maintain conditions for competition, to at least create opportunities for the entry of potential competitors. As presumed by the structure-conduct-performance model[5], there is a strong causal relationship between the market structure, the firms' conduct and economic performance. Thus, decisions which would alter the market structure would permit the emergence of market behaviours considered to be desirable, from a competition point of view, without the necessity of incurring high monitoring costs.

2. *Behavioural Measures*. These measures can be divided in two groups:

   a) Measures which have, as their objective, to assure determined benefits alleged by the petitioner and which justify the merger approval or social nature clauses, such as investment objectives, productivity gains and the repassing of these gains to prices, maintenance of the product offering, sales commitments to the internal/external markets, quality of products, professional qualification and maintenance of employment levels;

   b) Measures which have, as their objective, to avoid abusive conducts which could potentially harm the competition such as non-discrimination of prices and services among customers, elimination of exclusive relationships or commitment not to undercut prices below cost.

Experience with accompanying decisions has demonstrated that behavioural measures related to the compulsory maintenance of the benefits which were promised by the enterprises (type "a") tend not to be very efficient due to the following reasons:

a) *Informational asymmetry*. Due to the informational asymmetry between the arbitrator and the antitrust institution; even if the information is submitted for external auditing, which ensures veracity of the information supplied, several reasonable hypotheses could be given for lack of compliances such as reduction in productivity and rise in costs among other reasons.

b) *Macroeconomic dynamic*. Various efficiencies take into consideration determined expectations concerning future market behaviour and of the economy in general which, often, cannot be realized.

c) *Excessive interventionism*. The imposition of governmental targets on prices and investments is a direct intervention on typical market decisions, typically disconsidering variables of strategic and commercial nature. These variables are dynamic in time, and their commitment is characterized by rigidity in order to guarantee greater legal security. Thus, behavioural measures can cause perverse effects on the competition process, which would be a typical case of unexpected consequences of the antitrust policies.

Other behavioural measures (type "b"), which have the objective of interrupting determined conducts so as not to harm the competition or improve it, tend to present more positive results. These kinds of measures tend to be accompanied by other economic agents – competitors, costumers and suppliers – interested in complying – which reduces the information asymmetry and the possibility of moral risk[6] – and contributes to a greater effectiveness of the supervisory function of the institution.

5. Brazil: implemented measures

During the two first years of application of the Brazilian competition law, (Law nº 8.884/94) behavioural restrictions were predominant. All of the restriction decisions aimed to guarantee, basically, the welfare gains promised by the enterprises as resulting from the merger – price reduction as result of economies at scale or introduction of new products and technologies. Therefore, the commitments undertaken with CADE (Administrative Council for Economic Defence) included not only investment targets, productivity gains and the repassing of these gains to prices, but also the maintenance of the products offering, the commitment to sales to the internal/external markets, in addition to product quality, the employee qualification and the maintenance of the employment levels, considering that most mergers and acquisitions normally cause demissions.

Despite the apparently greater than usual interventionism at CADE between 1994 and 1996, the use of antitrust regulation mechanisms, particularly in situations involving mergers and acquisition operations, tended to be inefficient because they did not attack the origin of the competition restrictions. Moreover, as they sought to intervene directly in economic decisions – which should always be in tune with the macroeconomic conjuncture variations -, several times led to less than rational results, which could harm consumer welfare. Obviously, enterprises do not want to take irrational economic decisions, even under commitment to CADE. On the other hand, CADE was not interested in obliging the enterprises to take decisions which could harm themselves as well as the market, due to commitments assumed in the past.

On the few last years, despite the generally lower level of intervention, since the judgment of the Kolynos/Colgate case, in 1997, the CADE interventions have sought greater accuracy on "surgical" efficiency, and the imposed restrictions have presented important qualitative changes. Since 1997, the decisions of CADE have presented a greater emphasis on the formulation of structural measures.

From the point of view of the developing countries, it is also important to emphasize that the effective performance of competition policy seek to generate juridical security, which favours investments. The great intensity and coverage of pro-market economic reforms, including economic liberalization and privatizations, demand greater preoccupation with the efficient regulation of the market through the competition policy. Beyond being accurate, when the intervention occurs, it must also generate effective results.

This does not mean that structural measures are exempted of costs or problems of formulation and monitoring. First of all, it is difficult to calculate the "size" of the remedy, which could be merely the sale of the brand, up to the sale of a set of assets that could constitute a complete negotiation. Secondly, the material assets sale, without appropriate auditing, presents the risk of the selling of assets already depreciated and technologically limited. Finally, the sale of assets should be directed to the "right purchasers", which means, those which effectively will imply a greater rivalry.

Often, the antitrust institution can simply impose structural measures, determining the partial assets sale or the cessation of the negotiations. However, usually, the antitrust institution and the company or companies make a commitment to implement measures by an instrument, cited in article 58 of Law nº 8.884/94, known as *Performance Commitment Term* (TCD). Through the TCD, the companies involved in the merger commit to take specific measures, on previously established terms. If this commitment is not fulfilled, CADE can deny authorization to the transaction. The solutions are negotiated between the antitrust institution and the companies; therefore, they tend to be more flexible. Moreover, usually, the companies prefer to adhere to such commitments due to the high judicial costs involved in appeals to the Judiciary against CADE decisions that would not authorize the mergers.

5.1 Horizontal Mergers

In Brazil, when horizontal mergers are involved, there is a recent tendency to implement structural measures which have the objective to reduce the barriers to entry currently existing and which are capable enough to establish the previous competition conditions. It is important to highlight in recent years the obligation to make public offering of toothpaste by Kolynos (1997), the prohibition for White Martins to dispute new sources of carbonic gas "by products" (1999), the sale of the Bavária trademark factories, and the obligation of sharing the distribution system imposed upon AmBev (2002).

Kolynos/Colgate (Merger nº 27/95)

This operation was the result of an overseas purchase through which Colgate acquired part of the worldwide American Home Products mouthwash business.

The merger presented effects on the four relevant products in dental hygiene: toothpaste, toothbrushes, dental floss, and mouthwash. However, only the toothpaste market was therefore considered to be a serious threat to competition, considering its 78,1% market share. The Herfindahl Hirchsman Rate - HHI increase accrued as a result of the merger was also substantial, reaching 2691,5 in a market yet considered highly concentrated.

The relevant geographical market was characterized as national, considering the low importing volume.

The most important barrier to entry detected referred to the product differentiation, based on the trademark, due, mostly, to the strong consumers' loyalty. High marketing expenses would have been necessary to introduce a new brand on the market. Moreover, it would demand a strong distribution system and the overcoming of the retailer's resistance in supplying space on the shelves to toothpastes that have smaller sales.

On the other hand, the barriers related to the physical scale of production and the access to technologies and raw materials were considered to be low. Therefore, the finding determined that any intervention measure in the market should focus on the trademark.

Therefore, three alternatives were considered:

1. Temporary suspension of the Kolynos trademark utilization;
2. Exclusive license to third party of the Kolynos trademark;
3. Disposal of the Kolynos trademark.

In all three of the alternatives, the objective was to open space to new competitors, lessening, at least temporarily, the barrier represented by the trademark.

The option adopted by Colgate was the suspension, at least for the period of 4 years, of the Kolynos trademark. Another important element of the *Performance Commitment Term* was the public offering for production by order of 20% of the market of toothpaste (equivalent to 14 thousand tons) to existing or potential competitors.

White Martins/Unigases (Merger Act nº 78/96)

This merger act is related to the acquisition of the controlling shares of the American enterprise CBI Industries Inc., which controls the Liquid Carbonic Co., by the enterprise Praxair Inc., which controls White Martins. The CADE Plenary Council determined that the transaction generated market power to White Martins on the carbonic gas market (CO_2), in such a way that the act was only approved by the *Performance Commitment Term* signing.

The most important measures, among others, determined by the decision, were the following:

1. renunciation, by the petitioners, of any dispute by any new source of the CO_2 sub products of CO_2 in the Southeast Region including Paraná State for the next six years;
2. the sale of products, at normal prices, to competitors or distributors;
3. exclusion of any preference or exclusivity clause on the gas supply.

The determinations above have, as their objective, the reduction of the merger level in the CO_2 market, assuring equal opportunities between the leader enterprise and the smaller ones, either in the acquisition of raw materials, or in the dispute for customers. In the case of small enterprises, such as the several small CO_2 deliverers, it is important to highlight items (2) and (3). According to the item (2), White Martins should sell, whenever requested, CO_2 to any competitor or distributor. Moreover, the sale should be at the same price that is normally offered to the direct client. Item (3), prohibiting a tied sale, reduces the entry costs to small enterprises in the gas market, allowing the sales only on the CO_2 market, and not with other gases.

AmBev (Merger Act nº 08012.005846/99-12)

The enterprises Cia. Antarctica Paulista and Cia. Cervejaria Brahma, respectively controlled by the Antonio Helena Zerrenner Foundation and by the enterprise BRACO SA and Consulting, Administration and Participations Enterprise SA – ECAP, submitted for CADE's evaluation, on July 2, 1999, the case of AmBev – Companhia de Bebidas das Américas.

Considering that the association resulted in the elimination of a substantial portion of competition in the beer market, the CADE Plenary Council, in its session initiated on March 29, 2000, approved the merger, conditioned to the *Performance Commitment Term* signature.

The TCD is related, basically, to the implementation of the so-called "integrated set of measures" (sub clause 2.1), which included the Bavária trademark sale, the disposal of 5 (five) plants and distribution sharing. Moreover AmBev should share its distribution network in each one of the five relevant geographic

markets (sub clause 2.2), disactivate other factories only by public offerings (sub clause 2.3), maintain the level of employment (sub clause 2.4), do not impose exclusivity to the so-called point of sale (sub clause 2.5) and adopt all the measures with the objective of reaching the efficiencies related to the merger (sub clause 2.6).

The determinations had, as one of their more important objectives, to allow the almost immediate entry of a new player in the market, without having all the costs associated with the creation of a distribution network, the construction of a big business network and the fixation of a brand name (in this case, the Canadian enterprise MOLSON Incorporated), besides the propitiation of the access of small beer enterprises to the AmBev distribution.

5.2 Vertical mergers

Regarding the transaction of a vertical nature, in some situations, the antitrust institution has implemented measures that do not necessarily imply a structural revision of the merger, but that have the objective to prevent determined anticompetitive conducts between vertically related markets. For example, when enterprises acquire raw material suppliers and one has a dominant position or become proprietors of a natural monopoly, usually CADE imposes the obligation on the enterprises of non-discrimination between shareholder and non-shareholding customers.

Several privatizations which occurred during the decade of the nineties resulted in strong verticalisation of the productive network. CADE has had an important complementary role in the privatization process, in the sense of seeking solutions which protect the privatized markets from anti-competitive conducts. Some of the most important cases of punishment implemented by CADE in vertical mergers are the following:

Ultrafértil/Fosfértil (Meger Act nº 02/94)

Ultrafértil, a Petrobrás subsidiary, was privatized in a puclic auction in June 25, 1993 as part of the National Privatization Program (PND). The enterprise was bought at auction by Fosfértil, also sold by the PND program to a consortium of enterprises which mix fertilizers called Fertifós. Considering that Ultrafértil produces basic fertilizers, raw material of companies producing mixed fertilizers, the merger was characterized as a mostly vertical integration.

The shareholder companies of the Fertifós group, which jointly dominate around 30% of the national market of mixed fertilizers, started to control close to 50% of the internal offering of basic nitrogen and phosphate fertilizers. The result, after the three first years of the privatization process, was a big change in the Ultrafértil and Fosfértil global sales composition, in benefit of big clients, especially of the enterprises which had the asset control of the Fertifós group.

Thus, the CADE Plenary Council, in May 28, 1997 decided, by unanimity, to approve the merger through the signing of a *Performance Commitment Term*. Beyond other obligations imposed to the enterprises, it is important to emphasize the following: the promotion of a fair financing and discounting policy depending on the sale quantities; equal treatment of competitors in the market and other producers of mixes in similar situations; assurance of the sale of raw materials to a pool of small and medium producers which organize to obtain discounting for acquired quantities; and not dividing among its shareholders or those controlling the enterprise, the markets suppliers of raw material or fertilizers, discriminating against the other purchasers.

Copesul (Merger Act nº 54/95)

The transaction consisted in commitments of supplying raw materials between Cia. Petroquímica do Sul – COPESUL and its controllers OPP Petroquímica S.A., OPP Polietanos S.A. and Ipiranga Petroquímica S.A.

Analyzing the merger, the allegation of the minority shareholder, Petroquímica Triunfo S.A., about their exclusion from the accords being examined, was considered. According to Triunfo S.A., the redivision of the additional quotas of ethanol, which were foreseen in the expansion of contracts, was necessary for its competitive survival in order to prevent its exit from the market.

The market affected by the merger were: the amount of the ethanol product (first petrochemical generation) and, downstream, the products of second generation of the petrochemical composed by the High Density Polyethylene (PEAD), Low Density (PEBD) and Linear Low Density (PEBDL).

Considering the limitations of the supply of this raw material by other petrochemical terminals, due to the high costs involved in the transportation; the scace storing possibilities of the imported product and the substantial expenses reduction due to the system of ducts that bind the first and second generation petrochemical enterprises; the relevant geographic market for ethanol considered was restricted to the Triunfo Terminal. This way, CADE concluded that COPESUL is monopolist in the production of ethanol in the Triunfo Terminal geographic market.

CADE considered as anticoncompetitive the agreements of division of surplus mentioned in the protocols of agreement as specified in the records, that privileged the controlling groups of the central office, to the detriment of competitors. It also determined that it would be necessary to remove any *ad hoc* conditions which limited the raw material for current and potential competitors of the controlling groups of the COPESUL. Thus, CADE decided to impose measures to prevent the occurrence of such facts, conditioning the approval of the merger in reference to the current project of expansion, to public offerings of the raw material available resulting from the elimination of the "bottleneck"[7], each time there was verification of surpluses between the already contracted amounts and the consumption of each plant.

Vale do Rio Doce (Merger Act nº 155/97)

This operation involved the privatization auction which resulted in the acquisition of 41,73% of ordinary capital and 26,85% of the total capital of Companhia Vale do Rio Doce by Valepar S/A, which bought at auction offered assets in the approximate value of R$ 3,3 billion.

The transaction produced effects of both horizontal and vertical integration in the markets of ore of iron, manganese, iron-ore binds, sheet and semi-finished steel and railroad transport. However, after the exit of the Companhia Siderúrgica Nacional - CSN of Valepar S/A, and sale of the participating shares that the CVRD withheld in the CSN, the horizontal and vertical integration effects were eliminated in the markets of ore of iron, manganese, iron-ore-binds and sheet and semi-finished steel.

On the other hand, the effects of vertical integration observed in the relevant markets of the services of cargo railroad transport, due to the concession withheld by CVRD for the exploration of the Estrada de Ferro Vitória-Minas - EFVM and of the Estrada de Ferro Carajás - EFC, continued to generate concern in the competition defence agencies. This was due to the possibility that CVRD, which transported the ore for itself and also to other competing mining companies which were dependent users of these services, might abuse its position as the only possessor of the basic infrastructure of transport.

Considering the extensive process of instruction imposed by SDE and SEAE, beyond the information received from reports of the Secretariat of Terrestrial Transports - STT of the Ministry of the Transport,

CADE decided to impose upon CVRD the commitment to establish separate accounting systems for the activities of railroad transport services developed by EFV and EFC, with the objective of allowing the monitoring of the prices charged for the services to the competitors *vis a vis* the costs appropriated by the CVRD when using the same services for the transport of its own iron ore.

5.3 Conglomerate mergers

A conglomerate merger occurs between two firms which do not concur in the same market and are not located in the same vertical chain. Mergers of a conglomerate nature can involve extensions of the product (e.g.: Pepsico and Pizza Hut), or geographic extensions (e.g.: supermarket chain in different states) or "pure" type (e.g.: the cigarette company R.J Reynolds and the Burmah Oil and Gas). Considering that they deal with operations which do not generate horizontal or vertical mergers, they tend to produce lesser concerns from an antitrust point of view.

However, when product or geographical extension occurs, the merger can imply the elimination of potential competition, which fortifies the dominant position of established enterprises. For example, the Federal Trade Commission considered anticompetitive the Clorox acquisition by Procter & Gamble (1967) because the Procter & Gamble was a potential competitor in the market of liquid bleach segment in which the Clorox operated. In Brazil, the argument of the potential competition was used on the occasion of the joint-venture between Antarctica and Anheuser Bush (1997), when CADE considered that the association would eliminate a good part of the potential competition in the market for beers, represented by the American company.

Antarctica/Anheuser-Bush (Merger Act nº 83/96)

On February 16, 1996, the Antarctica Company and the Anheuser-Busch signed a contract of association, aiming at cooperation in the production, marketing, use of the trademark and commercialization of Budweiser beer in the Brazilian market, and also assistance and cooperation aiming at the introduction and the increase of the participation of beers and soft drinks produced by Antarctica in the external market.

The central concerns in the discussion on the impacts of the merger were the damages to competition brought by the association of a company in position of vice-leader in the relevant geographic market, in this case the national market, with the company which, previously, had occupied the position of potential competitor without such association representing the effective entrance of a new player in the relevant national beer market. CADE understood that the association, from Antarctica's point of view, represented a strategic defence with the objectives of eliminating the pressure represented by the potential competitor, and neutralizing the impact of an eventual hostile entrance or eventual association with third company, to whose entrance they would have to react or accommodate, implying losses of yield and/or market share.

The Plenary Council of CADE approved the association under various conditions, originating in the *Performance Commitment Term* signed on April 8, 1998. It was determined that the stated period of duration of the association should be limited to only two years from the date of the publication of the sentence of the decision (up to September 9, 1999), enough time for the incoming company - Anheuser-Busch - to know the market, to organize distribution network and to consolidate a trademark. CADE would only authorize the extension of the stated period of the association if there would be investments in new plants – according to the Program of Investments presented by the companies -, considering that such investments would demand a long term period of return and would represent a potential generating of efficiencies. In case such investments were not realized, the extension of the association would cease to be economically necessary, considering that there would be no investments to mature. On July 5, 1999, the companies informed CADE of the end of the association.

6. International Cooperation

International antitrust cooperation among competition authorities is a crucial element in the effective application of competition rules even if the relevant market of the determined merger does not have a transnational impact, but affects two or more relevant national markets. The cooperation can occur on diverse levels:

- *Information exchange*. The cooperation accords must contemplate consultations, information's exchange and notification mechanisms to the country in which antitrust legislation has been affected by a merger carried in another country. A difficulty is presented by the treatment afforded to confidential information. No authority has the obligation to deliver information of this nature to another authority and, if this occurs, the authority that received the information must commit to maintaining its confidentiality.

- *Technical Assistance*. The implementation and development of convergent policies of competition depend on reasonable consensus between authorities on subjects of procedural and substantive nature, what implies working together in activities of technical assistance. Technical assistance means sharing experiences, training employees and promoting staff interchange. The greatest obstacle, in particular for antitrust authorities of developing countries, is the lack of available budgetary resources.

- *Creation of supranational competition institutions*. Information exchanges, joint projects of technical cooperation and recommendations on antitrust actions to be taken by the national authorities can more easily be accomplished by the creation of supranational commissions/agencies. On the other hand, rarely do the national authorities accept that the recommendations of the supranational agency have any obligatory character, meaning that they effectively function as reviewers of the decisions of the authority. Such effectiveness would only be possible if there is a consensus in the distribution of competencies between the national authorities and the supranational agency, with the definition of criteria concerning when the case would be decided by the court of appeals of the supranational agency and when it would be decided by the national authority.

- *Creation of joint measures*. Several transactions judged by CADE had been accepted simultaneously by other jurisdictions. The discussion concerning transnational mergers constitutes one of the most important points in the international agenda on competition matters. On one hand, there are considerable costs incurred by the companies, which are obliged to notify and to present information to an increasing number of competition agencies. Thus, the cooperation between antitrust agencies would contribute to the reduction of transaction costs. On the other hand, the adoption of joint corrective measures would provide for the adoption of consistent decisions. Eventually, when the merger presents transnational effects, the corrective decision of a national authority (e.g.: assets sale) could negatively affect the transactions' efficiency gains in another jurisdiction. However, serious obstacles to this type of cooperation exist when each authority deals with a different set of information and has different opinions about the same concepts. Thus, the cooperation on the application of corrective measures to be taken in transnational mergers depends not only on the reduction of the existing differences concerning procedural and substantive interpretation between antitrust authorities, implying not only the intensification of cooperation and standardization of relevant information to be analyzed, but also in greater efforts of convergence of the legislations.

It is important to emphasize that CADE, despite the scarcity of resources, has tried to actively participate in the discussions about international cooperation, in the context of Mercosul (Common Market

of the South), FTAA (Free Trade Area of Americas), OECD (Organization for Economic Cooperation and Development) and the WTO (World Trade Organization).

7. Conclusions

The number of merger acts, which entered the system, have substantially increased in the last few years. While in 1997 only 46 transactions were examined, in 2002 this number increased to 518. This phenomenon reflects the rapid liberalization process, which has occurred since the 90's, especially in the developing countries. The change of a type of strategy of traditional development - the model of import substitution - for a process of global insertion, has implied a greater demand for more effective instruments of regulation of market behaviours, in particular, antitrust policies.

In a context of economic freedom and global markets, in which it is possible to perceive an increasing clear relation between transnational activities and economic concentrations, antitrust policies become fundamental in the control of abusive behaviours. Improvements of the instruments of antitrust regulation, development of human and material resources and international cooperation are the new challenges to competition authorities. However, the necessary debates to the overcoming of such challenges cannot treat the national laws as *tabula rasa*. Greater convergence between institutions and ideas is fundamental, while respecting the existing historical differences - particularly, the distinct levels of economic development - and the objectives which each government desires to reach with its antitrust policies.

NOTES

1. OECD, *Merger Remedies Roundtable – Issues Paper*.

2. SCHERER, F.M. & ROSS D. (1990), *Industrial Market and Economic Performance*, Boston: Houghton Mifflin.

3. See, for example, WILLIAMSON, Oliver E. (1985), *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting*. New York: The Free Press. The transaction costs depend on the frequency of the transactions, on the uncertain level about the future facts and, mostly, on the assets involvement specificity.

4. According to the paragraph 2nd, Article 54, of the Law nº 8.884/94, "acts summoned on this article can be considered legitimate if they obey at least these three conditions summoned on the previous subsections; when necessary to protect the national economy, the public interest, and do not implicate in damages to the final consumer".

5. The hypothesis is based on the fact that the structure (degrees of concentration and verticalisation, conditions of entrance of new companies, etc) influences the behavior of the companies (commercial behaviors, marketing, expenses in R&D, etc), which in turn, affects the performance of the industry (efficiency, job, technological progress, etc.). The first reference to this type of model was done by MASON, E.S. (1939), "Price and Production Policies of Large-Scale Enterprise". *American Economic Review*. V. XXIX, p. 64-71, mar/1939.

6. Occasion in which it is impossible to verify the effort level of the economic agent that is being monitored (occult action). A typical example is the security industry, given that several insurance companies are not capable of verifying the assured effort level to "be careful", which tends to be smaller when the individual acquires the insurance.

7. Process of reformulation of industrial units after verification of their passage in the production process, characteristic of the chemical industry, which allows the plants to become more productive. This process demands a temporary interruption of the production.

BRAZIL

(SEAE)

1. Introduction

When choosing a remedy against others, a Competition Authority has in mind the main objective, which is to make sure that the merger does not have anticompetitive effects.

This paper tries to show how the Brazilian Antitrust Authorities deal with operations that damages competition and what kinds of remedies are used to eliminate such damage. The paper is organized in 4 parts: the first one describes some points of the current Brazilian Antitrust Law; the second part approaches the types of existing remedies and the main remedies adopted in Brazil, highlighting the study of two cases, the third one mention the importance of the international cooperation agreements, and finally some final considerations.

2. The 8.884/94 Law

The 8.884/94 Law broadly resembles the competition laws of other countries, proscribing anticompetitive conduct, including unilateral conduct by monopolists or dominant firms, anticompetitive agreements and anticompetitive mergers. This Law created the Administrative Council for Economic Defence (CADE) as an independent agency in the Ministry of Justice, consisting of seven voting members, including the President and six commissioners. The Brazilian System for Competition Defence (SBDC) is also composed by the Secretariat of Economic Law (SDE) in the Ministry of Justice, and Secretariat for Economic Monitoring (SEAE) in the Ministry of Finance, that have analytical and investigative functions. Both are responsible for issuing non-binding opinions on mergers and anti-competitive practices cases. CADE is an administrative tribunal and its decisions can only be reviewed by the courts. Cases are begun in SDE, which, with the assistance and advice of SEAE, conducts preliminary investigations and administrative proceedings before submitting the file and its recommendations to CADE, which renders the final judgment.

2.1 Premerger Notification

2.1.1 Current Situation

The 8.884/94 Law, in its Article 54, introduced merger control to Brazilian Competition Law. It requires notification to the Competition Agencies of mergers that either exceed certain size thresholds or that would result in a company controlling 20 per cent or more of a relevant market. Significantly, however, the notification does not need to be made before the merger takes place; the law specifies that it must be made no later than 15 days after the “occurrence” of the merger. This aspect of merger notification – postmerger and not premerger – has had an important influence on both the procedure and substance of merger control in Brazil.

An important factor that affecting substantive remedy in the merger process in Brazil is the fact that the system is not based on premerger review. In such case, the merging parties lack the strong incentive to complete the process quickly that comes with premerger review, as they are not required to suspend consummation of their transaction pending approval. From the remedial perspective, under the current

system it is much more difficult for CADE to prohibit a transaction entirely, as it would require the undoing of a consummated merger, a notoriously difficult task.

Therefore, it is necessary to prevent the scrambling of the merged companies during the agency's challenge in order to make divestiture an effective remedy. During the course of the post-merger litigation, the acquired firm's assets, technology, marketing system, and trademarks are replaced, transferred, sold off, and combined with those of the acquiring firm. Similarly, its personnel and management are shifted, restrained, or simply dismissed. In those ways the acquiring and acquired firms are, in effect, irreversibly 'scrambled' together. The independent identity of the acquired firm disappears. 'Unscrambling' the merger and restoring the acquired firm to its former status as an independent competitor is difficult at best, and frequently impossible.[1]

As a consequence of these difficulties, an agreement exists among SBDC bodies and the competition defence specialists, about the importance of a previous notification of the operations and, for such, a proposal already exists to modify the 8884/94 Law, which will be seen further on. While this modification is not implemented, SBDC is adopting precautionary measures to prevent the operation consummation before CADE's approval. The main objective of such measures is to avoid that any CADE's decision[2], at the end of the process, does not totally fulfil the objectives of the Law, if any fact that could irreversibly jeopardize competition in such market might occur.

According to the only paragraph of the Art 2º of the CADE's Resolution nº 28, 24 of July of 2002:

> *"among measures to be adopted, is included, when suitable, the determination that petitioners are to maintain the competition situation existent before the contract(s) signature and refrain from practicing any new act reflecting the signed contract, until the concentration act judgment, in what concerns to:*
> *I – any stockholders alteration;*
> *II – alteration of its facilities and transference or resignation of rights and obligations related to assets, also including trade marks, patents, customers and suppliers;*
> *III - to discontinue trade marks and products;*
> *IV - alterations on the structures, logistics, distribution and commercialization practices;*
> *V – administrative changes in the companies that represent personnel dismissal and personnel transfers among its production, distribution, commercial and research areas aiming the integration of the applicant companies;*
> *VI – interruption of previous approved investment projects on all sectors of the acquired company, as well as, the implementation of sales plans and targets."*

Still according to Resolution nº 28, in its Art. 8º:

> *"Until the granting or rejection of the precautionary measure decision is taken, the Operation Reversibility Preservation Agreement (APRO) can be signed.*
> *§ 1º The agreement above mentioned, which is legally supported by articles 55 and 83 of the 8884/94 Law and in articles 5º and 6º of the 7347/85 Law, will establish the proper measures to preserve the market conditions, preventing irreversible or difficult to revert changes that could occur and affect its structure, until the final judgment of the Concentration Act, avoiding the risk to make ineffective the final result of the process."*

Since March 2002, five APROs were signed between CADE and merging companies. The majority of these cases are still under analysis at SBDC. As an example, during the merger between NNHoldings do Brasil Ltda and Biopart Ltda[3], the parties committed themselves to abstain from practicing any new act

reflecting the signed contract, until the process final judgment, in what concerns to: I – any stockholders alteration; II – alteration of its facilities and transfer or resignation of rights and obligations related to assets, also including trade marks, patents, customers and suppliers; III - to discontinue trade marks and products; IV - alterations on the structures, logistics and distribution and commercialization practices; V – administrative changes in the companies that represent personnel dismissal and personnel transfers among its production, distribution, commercial and research areas aiming the integration of the applicant companies; VI – interruption of previous approved investment projects on all sectors of the acquired company, as well as, the implementation of sales plans and targets.

In Chocolates Garoto S/A and Nestlé Brasil Ltda.[4] merger, they also committed themselves to respect the same conditions mentioned on the previous case, and, additionally, to submit in advance to CADE any alteration on the Social Statute of Chocolates Garoto S/A, for its analysis and approval in what concerns to its effect on competition.

2.1.2 Alteration Proposal for 8.884/94 Law

Recently is being discussed in Brazil a proposal for the alteration of 8884/94 Law, whose main aspects are the establishment of a previous control of concentrations and the improvement of the notification criteria. It is being proposed that the SBDC emits its judgment in relation to concentration acts, which may fulfil the notification criteria, before its consummation. In this way, involved parties are stimulated to maximize cooperation for expediting the analysis, and at the same time, the generation of alternatives to solve market competition problems that might occur are highly increased.

Not all countries employ premerger control, but many do, and it would appear that such a change in Brazil would ameliorate some of the problems that now affect merger review in the country. The business community would oppose premerger control if it meant that they could not consummate their transactions for such a period of time after reaching agreement. Under the current system, however, the merging parties are themselves the cause of some of the delays. They have no incentive to hasten the process, as they have already consummated their transaction. Under a premerger control system, on the other hand, the parties have an incentive to complete the review quickly, as they cannot consummate it until the review is finished[5].

2.2 Performance Commitments Terms (PCTs)

The institution of the Performance Commitment Term (PCT) was inserted in the legal system referring to competition policy only in 1994, with the advent of the Law 8884/94. As it establishes article 58:

"Art. 58. The CADE Board will define performance commitments to be assumed by any interested parties that submitted acts for review pursuant to article 54 hereof, so as to ensure compliance with the conditions established in paragraph 1 thereof..

§ 1º Performance commitments will take into consideration the extent of international competition in a certain industry and their effect on employment levels, among other relevant circumstances.

§ 2º Performance commitments shall provide for volume or quality objectives to be attained within predetermined terms, compliance with which will be monitored by SDE.

§ 3º Failure without good cause to comply with performance commitments shall cause the CADE approval to be revoked pursuant to article 55 hereof, followed by the opening of an administrative proceeding for the adoption of the applicable measures."

In the cases where all or part of the operation cannot be approved in the way as it is placed, § 9º of Art 54 gives power to CADE to modify the configuration proposal, establishing instruments that move away the threat from potential damage to the competition through modification in the structure of the market. § 9º of Art 54 establishes:

> *§ 9º In the event the acts specified in this article are not subject to suspensive conditions or have already caused fiscal or other effects to third parties, the CADE Board — if it elects to deny approval thereof — shall determine that all applicable action be taken to totally or partially revert — by way of dissolution, spin-off or sale of assets, partial cessation of activities, among others — any action or procedure damaging to the economic order, notwithstanding any civil liability for losses and damages caused third parties."*

The Performance Commitments Terms (PCTs) had been conceived as an intermediate solution between integral prohibition and total approval to acts that may cause damage to competition. They are a kind of contract between CADE and the firms involved in the operation and their goal is either to ensure that the alleged efficiencies will be attained or to get rid of the threat to competition once and for all.[6]

3. Structural X Behavioural Remedies

3.1 Types of Merger Remedies:

Merger Remedies can be of two types:

i. *Structural remedies* modify the allocation of property rights and create new firms: they include divestiture of an entire business, or partial divestiture (possibly a mix and match of assets and activities of the different firms involved in the merger project).

ii. *Non-structural remedies* set constraints on the merged firms' property rights: they might consist of engagements by the merging parties not to abuse of certain assets available to them. They might also consist of contractual arrangements such as compulsory licensing or access to intellectual property.

Not all different remedies are applicable to the same merger, that is, they are not necessarily substitute to each other. Also, it is in principle possible to resolve competition concerns in a particular merger with a package of different remedies, that is, they might be complementary measures in certain cases. When choosing a remedy over others, a Competition Authority has in mind the main objective, which is to make sure that the merger does not have anticompetitive effects. However, a remedy that in theory solves a certain problem might not be effective in practice. This is because there exist information asymmetries among the merger parties, third parties and the Competition Authority; because certain remedies might be difficult to implement; or because they involve parties that have different incentives than the Competition Authority. Furthermore, remedies differ in the engagement required to the Competition Authority. Behavioural remedies and contractual arrangements entail continuous monitoring by the authorities, whereas structural remedies do not. On the other hand, structural remedies might be more risky, as they are not reversible: if the wrong buyer is chosen for a certain asset divested by the merging parties, for instance because the acquiring firm is not viable or not competitive enough, or because it ends up colluding with the merged firm, the competitive damage is there, and cannot be undone[7].

The most effective way to restore effective competition, apart from prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture. Divested assets can either create a new firm or be acquired by an existing competitor. In the

first case, the divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis.

Normally a profitable business can operate on a stand-alone basis, which means independently of the merging parties as regards the supply of input materials or other forms of cooperation other than during a transitory period.

Structural remedies are, in general, the best corrective measures for potentially anticompetitive mergers. Structural remedies, contrary to the behavioural ones, have also the additional advantage that they do not occupy further the scarce resources of a Competition Authority after they have been implemented. However, in some situations, divestiture is not feasible, or divestiture might be complemented with additional measures to ensure that competition will be restored. In these circumstances, behavioural remedies might be used.

Behavioural remedies consist mainly of commitments aimed at guaranteeing that competitors enjoy level playing field in the purchase or use of some key assets, inputs or technologies that are owned by the merging parties. Therefore, this situation mainly arises when the merged entity is vertically integrated.

In these cases, typical remedies might then be purely behavioural, as when the parties 'commit' to give access to rivals and/or accept non-discrimination provisions, that is they agree not to make offers to competitors that are less attractive in quality and price than those made to the own subsidiary[8].

3.2 The Brazilian Case

Brazil, like several other countries, has intermediate solutions for mergers that might cause damages to competition, besides the simple blocking of the whole transaction.

In Brazil, the Performance Commitment Term (PCT) clauses might be of two types[9]:

a. structural, involving divestiture, selling of assets, technology licensing, equipment leasing etc…
b. behavioural, aiming to compensate, through efficiency gains or conduct restrictions, the damages on competition.

Based on Brazilian experience since 1994, behavioural clauses might be of three types[10]:

i) technical efficiency guarantees, such as productivity increases, quality and technological improvements and investment increases. Such remedies represent a positive net return to the company, improving the profit maximization of the entrepreneur (See article 54 of law 8.884/94).

ii) non-technical or social efficiencies guarantees, involving some distribution of the benefits of the merger to society, specially to consumers (see article 54). These efficiencies are not targeted to improve the company's profit maximization, but social welfare, at least in the short run. Several commitments linked to this kind of efficiency have been demanded by CADE: lower prices or some kind of price control, production and employment increases (article 58), maintenance of trade-marks, financing of social programs, quality and technological improvement, investment increases, in cases that might result in a net negative return to the company;

iii) conduct commitments, which involve a previous promise of the company to avoid some conducts considered anticompetitive in that sector or to implement some pro-competitive actions.

Thus, behavioural clauses are not aimed at reducing or even eliminating the causes of damages to competition, as in the case of structural clauses. The conduct commitment tries to compensate damages to

competition, but without dealing with the primary causes linked to structural change in the market. But the first two kinds of clauses (technical and non-technical) neither reduce the cause of competition damage nor its consequences. They only try to compensate competition damages by efficiencies guarantees in the context of the rule of reason.

According to Mattos, social efficiencies can be (i) linked to economic decisions of the company, such as investments, quality improvements, production and employment increases, price decreases or control, export performance, trade-mark maintenance; or (ii) not linked to economic decisions of the company (or, alternatively, that don't affect resource allocation of the company), such as pollution control, dismissed personnel retraining, etc. The first kind of control means, many times, a strong restriction on a company's behaviour that can distort resource allocation. This kind of clause is very hard to implement in practice, given lack of information by the competition policy agency and by the unavoidable political intervention involved in any bureaucratic control of variables like prices and production. In the second case, consequences of government failures are lower, since they do not damage neither allocative nor productive efficiencies of the company.

3.3 Study Cases.

In the next paragraphs there is a summary of two cases approved by CADE with restrictions, where the involved companies signed the Performance Commitment Term, committing themselves to respect some clauses that CADE understood were essential for the approval of the operations. Additionally exists a third case that only SEAE concluded the study but that is still under analysis by SBDC.

Colgate-Palmolive Company and Kolynos do Brasil S.A[11]

The transaction in question resulted from an acquisition effected in another country, whereby Colgate took over part of American Home Products' global oral hygiene business. Four relevant oral hygiene products were affected: toothpaste, toothbrushes, dental floss, and mouth wash. However, CADE concluded that the only relevant market in which there would be a substantive threat to competition was the toothpaste segment, given the combined market share obtained in this segment (78,1%), as shown in the table below. There would also be a significant increase in the HHI for the toothpaste operation, reaching 2691.5 in a segment already deemed highly concentrated.

Table 1: Market Share & Concentration in the Oral Hygiene Market

Company	Toothpaste	Toothbrush	Dental Floss	Mouth Wash
Colgate	25.6	6.8	3.4	9.8
Kolynos	52.5	20.2	9.0	1.8
Colgate + Kolynos	78.1	27	12.4	11.6
Gessy Lever	18.2	2.8	5.3	0
HHI before operation	3750.8	1970.2	3720.9	1771.3
HHI after operation	6442.3	2243.1	3782.3	1806.7
HHI change	2691.5	272.9	61.4	35.4

Source: Colgate. CADE.

The relevant geographical market was classed as nationwide, given the low rate of import penetration observed.

The main entry barrier detected was brand-based product differentiation, due chiefly from strong consumer loyalty. Heavy investment in advertising would be required to introduce a new brand in this market, in addition to the establishment of a large-scale distribution system and the ability to overcome retailers' reluctance to allocate additional shelf space to other toothpaste brands with a lower rate of turnover.

On the other hand, the barriers relating to physical production scale and access to technology and inputs were considered low. The CADE therefore concluded that any intervention in this segment should focus on brands. The ruling authority offered three options:

a) Temporary suspension of use of the Kolynos brand name
b) Exclusive licensing of the Kolynos brand name to a third party
c) Sale of the Kolynos brand name

The purpose of all three options were to make room for new competitors by reducing, at least temporarily, the barrier represented by the brand name.

Colgate opted for suspension of its use of the Kolynos brand name for a four-year period in order to enable new competitors to enter the market. Colgate also put together a public bidding for toothpaste production contract tied to support and distribution in the segment occupied by the Kolynos Super Branco brand, involving job lots of up to 14,000 metric tons per annum, and prepared to provide the necessary assistance to large retailers and distributors who wished to introduce their own brands in the market.

Colgate signed an undertaking in these terms regarding Kolynos on March 19, 1997, in compliance with the provisions of article 54, paragraph 1. The undertaking specified a six-month transition period during which the company would adapt production lines used to manufacture Kolynos toothpaste to new packaging and other materials, as well as altering any contracts still in force for supply and distribution. Colgate agreed not to use the Kolynos brand name on any of its toothpaste products during a period of four consecutive years thereafter.

Another key element of the Performance Commitment was a public bidding procedure for production of 20% of the toothpaste market (equivalent to 14,000 tons) for existing or prospective competitors. Furthermore, quantitative and qualitative targets were set for such variables as exports, investment, productivity gains, and oral hygiene programs to be developed between 1997 and 2001.

The AmBev case[12]

The two parties to the merger, Brahma and Antarctica, controlled approximately 50 per cent and 25 per cent, respectively, of the sales of beer nationally. Antarctica owned several brands, its largest being the Antarctica brand. Brahma's principal brands were Brahma and Skol. The next largest brand in Brazil was Kaiser, which was indirectly controlled by the Coca-Cola Company and whose market share was about 15 per cent.

There were several other small, regional brewers operating in the country. The market shares and concentration resulting from the merger were clearly very high, and raised serious competitive concerns. The principal issue in the case involved entry barriers, (the parties also raised a strong efficiencies defence) which had three major components: the establishment of a consumer brand, access to an effective distribution system and access to retail points of sale (the great bulk of beer sold in Brazil is consumed on premises at retail establishments rather than at home).

It was considered that entry into beer production on a large scale, at the national level, was difficult. Brazil is a very large country, requiring the establishment of multiple production facilities to serve the different regions of the country.

It is expensive to establish a successful brand, and most of those costs are sunk. Good distributors were scarce in many parts of the country, and it would be difficult to persuade small retailers to carry an additional brand of beer. On the other hand, the Brazilian market is huge; it could likely be irresistible to the many large international brewers selling brands abroad that were already well known in many parts of

Brazil. Moreover, there were recent examples of rapid, successful expansion by a few regional brewers in the country.

The competitive effects scenario presented by the merger was fairly straightforward: AmBev (a new company formed to acquire both Brahma and Antarctica) would acquire significant market power which it would exercise unilaterally. Indeed, the three largest brands of the merging parties, Brahma, Antarctica and Skol, were positioned together at the "high end" of the brand spectrum. Kaiser was positioned somewhat lower. This phenomenon could result in the now-familiar unilateral effect whereby AmBev could increase the price of one or two of the brands that were considered close substitutes and capture with the third many of those consumers who would switch as a result of the increase.

Both SEAE and SDE conducted extensive inquiries into the merger, according to the procedures provided in the Law 8.884. Both agencies concluded that the transaction was harmful to competition (although they accepted some of the efficiency claims made by the parties), and both recommended that it be approved only if AmBev were required to divest one of the three leading brands that it would control – Brahma, Antarctica or Skol – and the production facilities associated with that brand. A separate opinion was submitted to CADE by the Ministry of Industry, Trade and Development, which recommended that CADE approved the merger with no conditions. Five of the seven CADE commissioners participated in the final decision, two having recused themselves because of potential conflicts. One commissioner voted to prohibit the transaction entirely. The majority agreed on a five part remedy:

1. AmBev must divest the "Bavaria" brand, a lesser brand owned by Antarctica. It must offer for sale to the purchaser of the brand five breweries, each located in a different region of the country. And it must provide the purchaser with access to the Brahma distribution system for a period of four years, with an option for an additional two years.
2. AmBev must offer access to its distribution system to five regional brewers.
3. AmBev may not close any of its production facilities for a period of four years without first offering them for sale.
4. AmBev must provide a program of retraining and relocation to workers who are displaced by the closing of production facilities for a period of four years.
5. AmBev is prohibited from imposing exclusivity requirements on retail points of sale.

The decision was criticized as not providing sufficient relief against the anticompetitive effects of the merger. CADE defended its decision as a compromise that sufficiently dealt with the merger's anticompetitive effects by providing the opportunity for a new entrant, while also permitting the merger's efficiency gains to be realized and its adverse effects on employment to be ameliorated.

Barbosa and Ahold Group

The Secretariat for Economic Monitoring (SEAE) has emitted a report approving, with restrictions, the acquisition of G.Barbosa assets by BR Participações e Empreendimentos S/A (Ahold Group). By this transaction, the Ahold Group has taken over 32 (thirty two) retail stores from G.Barbosa supermarket chain. In this sense, 23 (twenty three) retail stores were located at Sergipe, and 9 (nine) at Bahia, both Brazilian Northeast States.

Bompreço and G.Barbosa have operated simultaneously at Aracaju (the Sergipe's capital), at Feira de Santana, and at Salvador (Bahia's city and capital, respectively). It´s important to mention that in the markets above were observed horizontal concentrations. The rivalry, the conditions for new competitive entries, and the analysis of generated efficiencies have demonstrated that the liquid effect of the concentration was negative (this information was obtained based on the analysis of Aracaju's, Feira de

Santana's, and Salvador's markets). In this sense, SEAE has recommended to CADE the following measures:

a) that the transaction can be approved without restrictions, as long as Bompreço presents detailed studies and certificates issued by independents auditors, of notorious reputation and approved by CADE, confirming that the efficiencies cited do represent real economies and that these are specific of the transaction;

or

b) that, alternatively, the transaction can be approved with restrictions for the markets located at Salvador and Feira de Santana, if the efficiencies cited cannot be demonstrated. To make possible the re-establishment of the competitive environment in the markets listed above, SEAE has recommended:

   1) that the supermarket stores located at Aracaju, Salvador and Feira de Santana, which have been taken over in the merger, should be sold;

   2) that the stores are to be sold in separate blocks: a) the first block consisting of G. Barbosa supermarket stores in Aracaju, including the distribution center; b) the second block consisting of the two G. Barbosa supermarket stores in Aracaju; c) the third block consisting of G. Barbosa store in Aracaju; d) the fourth block consisting of the stores in Feira de Santana. It will be allowed that the blocks can be sold to different buyers, or to the same buyer - except for the two blocks located at Aracaju, that should be sold to different buyers;

   3) that to promote the immediate transfer of market share and re-establishing promptly competition, and to avoid stores abandonment, a deadline for this sale, not longer than three months from CADE´s decision, must be imposed. In addition, if this period expires before the sale, SEAE suggests that the stores should be auctioned;

   4) that the stores should be sold to a natural person or legal entity able to become an effective competitor in the Market nº 1 (located at Salvador), in the Market nº 2 (which consists of the whole Feira de Santana city) and in the Market nº 3 (which consists of the whole Aracaju city);

   5) that the buyers should have the option to acquire also the brand names that used to belong to G.Barbosa, as well as, the right to keep key-employees from that enterprise.

c) the breaching of some of the contract´s clauses.

It's important to mention that this is the SEAE's conclusion, and this case is still under analysis at SBDC.

4. International Cooperation[13]

Brazil's experience on international cooperation is relatively recent. Two basic reasons explain this fact. First, it should be mentioned that only after 1994 an effective antitrust policy has been possible in Brazil. The second reason is that the opening of the Brazilian economy, a relatively recent phenomenon, launched in the 1990´s, elucidated the need of international antitrust cooperation. The development of international commercial operations increased the impact of foreign antitrust illegal conducts on Brazilian consumers. This actually resulted from the whole process of globalization. Nowadays, with world-wide transactions of firms, eventual collusive practices tend also to have global impact.

Brazil has been undertaking several efforts on formal international cooperation through bilateral and multilateral negotiations. Two bilateral agreements with United States of America and Russia already exist, while others are still being negotiated[14].

The first formal agreement regarding cooperation between international competition authorities and Brazil was signed in October 1999 with the Government of the United States of America. This agreement aims at facilitating the exchange of information among antitrust officials in both countries. Nevertheless, it was ratified by the Brazilian Congress only at the beginning of this year.

The agreement specifies certain requirements to be followed by both national antitrust authorities as well as a number of possibilities regarding technical cooperation and enforcement activities, such as:

1. prompt notification to the other party with respect to enforcement activities that: (a) are relevant to enforcement activities of the other Party; (b) involve anticompetitive practices, other than mergers or acquisitions, carried out in whole or in substantial part in the territory of the other Party; (c) involve mergers or acquisitions in which one or more of the parties to the transaction, or a company controlling one or more of the parties to a transaction, is a company incorporated or organized under the laws of the other Party or of one of its states; (d) involve conduct believed to have been required, encouraged, or approved by the other Party; (e) involve remedies that expressly require or prohibit conduct in the territory of the other Party or are otherwise directed at conduct in the territory of the other Party; or (f) involve the seeking of information located in the territory of the other Party,

2. the consideration of coordination of enforcement activities with regard to related matters,

3. the possibility of requesting consultations regarding any matter related to the agreement,

4. the option to require, after prior consultation, the other party´s competition authorities to initiate appropriate enforcement activities whenever a party believes that anticompetitive practices carried out in the territory of the other adversely affects important interests,

5. the following technical cooperation activities, within the competions´ agencies reasonably available resources: exchange of information to the extent compatible with their respective laws and important interests; exchange of competition agency personnel for training purposes at each other's competition agencies; participation of competition agency personnel as lecturers or consultants at training courses on competition law and policy organized or sponsored by each other's competition authorities; and such other forms of technical cooperation as the Parties' competition authorities agree are appropriate.

The second formal bilateral agreement, signed with Russia, basically maintains the same cooperation standards of the agreement with United States of America.

Despite the signature of the international agreements with United States of America and Russia, the most valuable source of international cooperation continues being informal.

Particularly in three important recent cartel cases, this type of technical assistance proved to be essential. In the Lysine International Cartel, for example, transcripts of Lysine Cartel meetings sent to Brazilian authorities showed that Latin America and Brazil were included in the world market division set by the international cartel.

On the Vitamins International Cartel Case, the fact that the case had not gone to trial in the United States at the time of the investigations unabled the share of documents because of confidentiality restraints.

Nevertheless, some important hints provided by North American authorities were essential for the analysis of Brazilian officials.

Another case analyzed in Brazil that received international informal technical assistance was the Airline Companies Case. In August 1999, the presidents of the four major Brazilian airlines met in a luxury hotel in São Paulo. Five days later, the prices of the flights between central airports of Rio de Janeiro and São Paulo had gone up, in the four airlines whose presidents had met, by 10%. The price increase affected the most lucrative market in Brazilian air transportation.

For the elaboration of SEAE´s presentment to SDE, informal technical contacts with North American officials in DOJ were very helpful. They contributed with their expertise giving substantial advice on the case, as well as providing Brazilian officials with the latest developments in price parallelism cases in the U.S.

Informal cooperation is surely desirable as it can be expeditious, direct and can sometimes reveal hidden aspects, clues or hints not always present or possible in formal mechanisms of technical exchange. Nevertheless, this sort of cooperation has the disadvantage of being excessively based on personal contacts. In this sense, informal contacts can be a close substitute of formal ones in the short term, but not in the long term.

Brazilian competition authorities surely have the interest in developing cooperation agreements and contacts with other countries. The effective detection of anticompetitive practices can substantially be enhanced through the sharing of information between agencies and the better understanding of each other's laws and enforcement policies and activities. On the other hand, efforts towards the elaboration of common analysis standards through similar guidelines and the approximation of legislations can lower firm's transaction costs and facilitate technical exchanges between agencies. Nowadays, since mergers tend to have global impacts, submissions to approval are simultaneously required in a great variety of jurisdictions. Analogous analysis procedures presented in clear, systematized guidelines provide a higher foresee ability to merger companies also reducing submission costs. In this context, Brazilian competition authorities face some future cooperation challenges: 1) to extend its technical exchange to other countries, specially through the signature of formal agreements and 2) to implement efforts for the establishment of common analysis procedures and standards with other jurisdictions.

5. Conclusion

In Brazil, as mentioned before, the notification of concentration acts to SBDC is not previous. In this case, the merging parties lack the strong incentive to complete the process quickly that comes with premerger review, as they are not required to suspend consummation of their transaction pending approval. From the remedial perspective, under the current system it is much more difficult for CADE to prohibit a transaction entirely, as it would require the undoing of a consummated merger, a notoriously difficult task

A proposal already exists for a project of law where it is foreseen the alteration of some points of the 8.884/94 Law, whose main changes are the previous notification of the operation to the System and the notification criteria. Nevertheless, while this law alteration proposal is not implemented, the SBDC is adopting precautionary measures to prevent the operation consummation before CADE approval, through Resolution nº 28 of 28.07.2002. The main objective of such measures is to avoid that any CADE decision, at the end of the process, does not fulfil totally the objectives of the Law, if any fact that could irreversibly jeopardize competition in such market might occur.

This resolution foresees the signature of an Operation Reversibility Preservation Agreement (APRO), until the granting or rejection of the precautionary measure decision, which will establish the proper

measures to preserve the market conditions, preventing irreversible or difficult to revert changes that could occur and affect its structure, until the final judgment of the Concentration Act, avoiding the risk to make ineffective the final result of the process.

As mentioned before, the Performance Commitments Terms (PCTs) has been conceived as an intermediate solution between integral prohibition and total approval that might cause damage to competition. They are a kind of contract between CADE and the firms involved in the operation and their goal is either to ensure that the alleged efficiencies will be attained or to get rid of the threat to competition once and for all.

The PCT's clauses can be of two types: structural, involving divestiture, selling of assets, technology licensing, equipment leasing etc; and behavioural, aiming at compensating, through efficiency gains or conduct restrictions, the damages on competition. The behavioural clauses can be of three types: technical efficiency guarantees, such as productivity increases, quality and technological improvements and investment increases; non-technical or social efficiencies guarantees, involving some distribution of the benefits of the merger to society, specially to consumers; and conduct commitments, which involve a previous promise of the company to avoid some conducts considered anticompetitive in that sector or to implement some pro-competitive actions.

Structural remedies are, in general, the best corrective measures for potentially anticompetitive mergers. Structural remedies, contrary to the behavioural measures, have also the additional advantage that they do not occupy further the scarce resources of a Competition Authority after they have been implemented. However, in some situations, divestiture is not feasible, or it is also possible that divestiture must be complemented by additional measures to ensure that competition will be restored. In these circumstances, behavioural remedies might be used.

Besides that, in Brazil, since 1994, in almost no case, possibly in part because CADE does not review mergers *ex ante*, was a merger prohibited outright or fully broken apart after consummation[15]. Therefore, it is essential that some points of the current Brazilian Antitrust Law are modified to extend the options for the solution of competition problems that eventually appeared in the analysis of the concentration acts, especially in those aspects regarding the establishment controls before the consummation of the operation.

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Annex I

Performance Commitment Clauses in CADE (Until May 1997)[16]

Mergers	**Structurals**	**Behavioural**			
		Technical Efficiencies	**Social Efficiencies**		**Conduct**
			Linked to Economic decisions of the company	**Not linked to economic decisions of the company**	
Yolat-Parmalat		Quality improvement	Production level maintenance; maintenance of milk C (lower quality and lower price) production share in total production; Price control; Investment for broadening the goods produced; maintenance of milk c (lower quality and lower price) in the market.	Pollution control in the rivers affected	
Norton-Carborundum		Productivity increase; Quality improvement; Investment			
Rockwell-Albarus		Investments	Investments; Production increase; Price decrease; Domestic market supply; Export Increases; Efficiency gains must be shared between "original parts" market and "replacement" market.		i) avoid agreements on market-share between the two companies; ii) avoid the concession of privileges for companies share-holders of the two companies.

Mergers	**Structurals**	**Behavioural**			
		Technical Efficiencies	**Social Efficiencies**		**Conduct**
			Linked to Economic decisions of the company	**Not linked to economic decisions of the company**	
Melitta-Jovita		Productivity increase; Quality improvement; Investment; Marketing Expenditures Increase;	Investments; Marketing Expenditure increases; Quality improvement; Production increase; Sales increase; transfer of part of the productivity gains to consumers; Price decrease; Enlargement of distribution network; Exports increase; Maintenance of trade-mark Jovita in Brazilian Market until 2.000.		
Oriento-Ajinomoto		Productivity increase; New technology investment; Quality improvement.	Investments; Quality improvement; Employment maintenance; Transfer of part of the benefits of the operation to consumers targeting price reduction;		-Supply Guarantee for domestic market.
Hoescht-Fairway		Investment; Productivity Increase; Quality improvement.	Investment; Quality improvement		
verolme-Ishibras		Productivity increase; Personnel Training			

Mergers	**Structurals**	**Behavioural**			
		Technical Efficiencies	**Social Efficiencies**		**Conduct**
			Linked to Economic decisions of the company	**Not linked to economic decisions of the company**	
Belgo-Dedini		Investments; Productivity Increase; Quality improvement.	Investments; Production Increase; Supply increase in domestic and external markets; Transfer of part of productivity increase to consumers through price reduction; Enlarge distribution network; Quality improvement;		
Helios-Carbex		Investments; High technologies investments; Productivity increase.	Investments; Export Increases; Maintenance of obsolete goods in the market;		
Electrolux-Oberdofer		Investments; High technology Investments; Quality improvement; Productivity increase.	Investment; Quality improvement; Transfer of part of productivity gains to consumers; Price reduction; Sales increase for domestic and external markets.		
Santista-Carfepe		Personal Training; R&D Investment for quality improvement.	Production level maintenance; Transfer of part of productivity gains to consumers; Maintenance of trade-marks Campo Grande;		-Supply guarantee for domestic market;
Ficap-Alcan	Avoid share-holder control of Caraíbas Metais and Caraíbas Mineração by FICAP	technology investment; Investment.	Production level maintenance; Investments;		
Eternit-Brasilit(*)	Total divestiture				

Mergers	**Structurals**	**Behavioural**			
		Technical Efficiencies	**Social Efficiencies**		**Conduct**
			Linked to Economic decisions of the company	**Not linked to economic decisions of the company**	
Rhodia-Sinasa(*)	Partial divestiture related to business of some synthetic fibers.				
Kolynos-Colgate	Temporary Suspension of trade-mark(4 years) for the relevant market of tooth paste (it does not include, therefore, tooth brush dental rinse, dental floss; and either tooth paste for export); Colgate should make a public offer to produce for existent or potential competitors. The target was to help develop other trade-marks.	Investments; Investment in R&D; Technology development; Personnel training; Productivity increase.	Investments; Investment in R&D:	Personnel Training; for labor on basic skills; Personnel training for dismissed workers; Social Investment in educational programs of dental health care.	-Tooth paste import with Kolynos trade-mark is forbidden for Colgate during the suspension period.

Mergers	**Structurals**	**Behavioural**			
		Technical Efficiencies	**Social Efficiencies**		**Conduct**
			Linked to Economic decisions of the company	**Not linked to economic decisions of the company**	
Gerdau-Pains(**)	Rebuilding and divestiture of production unit in Contagem; Divestiture of transpains (transportation company of Pains)	Investment	Investment	Personnel training for dismissed workers; Granting of gains coming from " cooperation fee" contract with Manessmann for P&D institution without profit ends.	-Supply guarantee of inputs for the divested factory. -Restraint on the iron distribution of Pains in excess of 20% of total production of the factory of Divinópolis sold to others companies of Gerdau´s Group. -Free Access for competitors of technologies developed with Mannesman Demag.
Grace-Crown		Quality improvement; Technology Investment; Productivity Increase; Investment;	Investment; Export performance; Transfer of part of productivity gains to consumers; Production increase	Personnel training for dismissed workers;	-The Company is obliged to submit any price discrimination practices to CADE;
Nitroquímica Mineração Floral			Investments.		-Supply guarantee of the "Fluorita". -Imports of inputs for the maintenance of quality and supply of "fluorita".

Source: César Mattos
(*) Formally, they are not PC, but complete or partial denial of the merger.
(**) Decision implemen

NOTES

1. Baer, William J. and Redcay, Ronald C. (2002) "*Solving Competition Problems in Merger Control: The Requirements for an Effective Divestiture Remedy*."

2. Nº 28 Resolution of 24 of July of 2002 (published in Diário Oficial da União on 02.08.2002, republished on 09.08.2002) which covers the use of Precautionary Measure by CADE and other measures.

3. AC nº 08012.007861/2001-81

4. AC nº 08012.001697/2002-89

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7. Motta, Massimo; Polo, Michele and Vasconcelos, Helder. (2002) "Merger Remedies in th European Union: An Overview"

8. Id.

9. Mattos, César. (1997) "The Recent Evolution of Competition policy in Brazil: An Incomplete Transition."

10. Id.

11. CADE's Homepage: http://www.cade.gov.br/ing_juri.htm#RECENT%20JURISPRUDENCE

12. Clark, John (2000).

13. Considera, Claudio M. and Teixeira, Cleveland P. (2002) "*Brazil's Recent Experience in International Cooperation.*"

14. On September 23rd and 24th, in Brasilia, a meeting was held between Brazilian and Argentine Competition Authorities for experience interchange and the closing of the last details of the Bilateral Agreement regarding cooperation between both Competition Authorities and the enforcement of their Competition Laws. This agreement will be signed during the visit of President Luiz Inácio Lula da Silva to Argentina, next October.

15. In two cases prior to 1996 CADE did prohibit the transaction.

16. Mattos, César (1997).

CANADA

Introduction

Among the hundreds of mergers reviewed annually by the Competition Bureau ("Bureau"), a relatively small number require remedial action. Because each merger raises different issues, the Bureau must be able to adapt to address the specific competitive effects. In every circumstance in which action is warranted, the Bureau will pursue the resolution that is most appropriate to remedy the competitive harm. In the majority of cases thus far, the Bureau has sought a structural remedy. In a small number of cases, a behavioural remedy has been selected as a complement to a structural remedy and in a very small number of cases as the best option because of the unique facts of the case.

Section I of the paper will provide an introduction to merger enforcement in Canada. Section II will describe the range of remedies considered by the Bureau. The Bureau's enforcement history illustrates a strong preference for structural remedies and the limited use of behavioural remedies. Section III will provide an overview of many of the important principles and terms related to the design of merger remedies. Section IV will discuss the importance of international cooperation to achieve appropriate and consistent remedies in cases of cross-border mergers.

1. Merger Enforcement in Canada

The Commissioner of Competition ("Commissioner"), who heads the Bureau, is responsible for the administration and enforcement of the *Competition Act ("Act")*[1]. This includes the application of the merger provisions.

Mergers are examined in order to determine if they would result in a substantial lessening or prevention of competition in the relevant market[2]. That is, where the parties to a merger or a proposed merger are, or would likely be, able to exercise a greater degree of market power, unilaterally or interdependently with others, than if the merger did not proceed[3]. This framework is applied consistently to each transaction that is reviewed in Canada.

The test to determine whether the merger will prevent or lessen competition substantially is set out in Sections 92 and 93 of the *Act*. Section 92(2) specifies that a merger will not be deemed anti-competitive solely on the evidence of concentration or market share. Other relevant factors under Section 93 must also be considered including foreign competition; business failure or exit; availability of acceptable substitutes; barriers to entry; effective remaining competition; removal of a vigorous and effective competitor; change and innovation, and any other relevant factors.

The Commissioner, upon determining that a merger will likely cause a substantial lessening or prevention of competition, has a number of options at his disposal (this is discussed in greater detail in the following section). Throughout the review of the transaction, the Bureau is in direct communication with the merging parties. Competition concerns are relayed to the parties in a timely manner to maintain transparency and to facilitate resolution of those concerns when appropriate. In settlement discussions, it is important to balance the interest of the merging parties wanting to close a transaction with the public interest responsibility of the Commissioner to enforce the *Act*.

The Bureau will attempt to negotiate with the parties to achieve an acceptable resolution. Historically, the vast majority of mergers have not raised competition concerns and where there have been issues, most have been resolved without the need for litigation.

With recent amendments to the *Act*[4], the Bureau and merging parties can file a Consent Agreement ("Agreement") with the Competition Tribunal ("Tribunal")[5] for immediate registration of a negotiated remedy under Section 105. Previously, the Commissioner has agreed to merger remedies in the form of a Tribunal Consent Order ("Order") and in some cases in the form of a written undertaking to the Commissioner.

The original Consent Order process required the Tribunal to determine whether the merger would likely result in a substantial lessening or prevention of competition, and, if so, to determine whether the terms of the proposed remedy would remove the competitive harm. Under this earlier process, even where the Commissioner and the merging parties agreed to the terms specified in the draft Order, third parties had rights of intervention and the Tribunal had the authority to refuse to issue the Order if it determined that the remedy was not effective and enforceable. There had been some criticism by members of the Canadian Bar Association and business community that this created a process that was time-consuming, expensive and uncertain.

The Consent Agreement process is intended to make the process more streamlined and certain, as well as to obviate the use of undertakings. The Commissioner will now require the use of Consent Agreements in merger remedies in all but rare situations [6].

If the Bureau and merging parties are unable to agree on an appropriate remedy, the Commissioner does not have the authority to independently block a merger. The Commissioner does however have a number of statutory powers at his disposal to prevent the closing of a transaction or to hold assets separate. If the Bureau has not completed its assessment of the merger, Section 100 of the *Act* permits the Commissioner to apply to the Tribunal for a temporary order preventing the parties from completing the merger. If after completing his assessment, the Commissioner makes an application under Section 92 challenging the merger, he many also use injunctive powers under Section 104 of the *Act* by applying for a temporary order to prevent the closing of the transaction. In addition, if the Commissioner has registered a Consent Agreement, he may also make an application under Section 104 to maintain certain assets separate until the remedy can be carried out.

Interim orders are important to preserve the ability of the Bureau to achieve an effective remedy. Where possible, the Bureau will require only the anti-competitive portions of the transaction to be held separate. This is done to ensure that the merging parties' assets and confidential information are not intermingled before the closing of the transaction and avoids the difficulties of "unscrambling the eggs" if the merger has to be restructured at a later date[7].

In the majority of cases, it has not been necessary for the Commissioner to apply for an interim order. Usually, after the Bureau has expressed its competition concerns, the merging parties have postponed closing their proposed merger until a remedy has been negotiated or competition concerns resolved.

If the Commissioner believes that a merger or proposed merger will likely prevent or lessen competition substantially, he can make an application to the Tribunal to challenge the merger under Section 92 of the *Act*. Section 92 is very specific in the remedies in which the Tribunal may impose in contested cases. If a merger or proposed merger is challenged before the Competition Tribunal, the Tribunal is limited by Section 92(1)(e) and 92(1)(f) of the *Act*, which states:

> [s.92(1)(*e*)] in the case of a completed merger, [Tribunal may] order any party to the merger or any other person: (i) *to dissolve the merger* in such manner as the Tribunal directs, (ii) *to dispose of assets or shares* designated by the Tribunal in such manner as the Tribunal directs, ... or [s.92(1)(*f*)] in the case of a proposed merger, [Tribunal may] make an order directed against any party to the proposed merger or any other person: (i) ordering the person against whom the order is directed *not to proceed with the merger*, (ii) ordering the person against whom the order is directed *not to proceed with a part of the merger* ... [emphasis added]

Importantly, no behavioural remedy may be imposed in contested cases[8]. However, the Tribunal can accept Consent Agreements with a range of remedies that is much wider than those available under Section 92.

It is the Bureau's preference to come to an agreement with the merging parties without proceeding to litigation. In most cases the Bureau has been successful in negotiating remedies that involve the merging parties divesting assets in those markets where the Bureau has raised competition concerns. In recent cases, the Bureau has also been able to limit or narrow the scope of litigation through negotiations. The Bureau has allowed parts of a transaction to proceed while only contesting the problematic portion before the Tribunal. These agreements are usually contingent upon the merging parties agreeing to hold separate the anti-competitive portion of the merger.

United Grain Growers Limited and Agricore Cooperative Ltd[9]. Two of the largest grain-handling companies in Western Canada, United Grain Growers Limited (UGG) and Agricore Cooperative Ltd. (Agricore) announced they would merge into Agricore Limited. After an extensive review, the Bureau advised the parties that the proposed transaction would substantially lessen competition in grain-handling services at the Port of Vancouver and in certain grain-handling markets in Manitoba and Alberta. In response to the Bureau's concerns, the merging parties agreed to divest certain primary grain handling elevators in western Canada. However, the Bureau and parties failed to come to an agreement on the concerns raised in the Port of Vancouver and contested proceedings followed.

The Tribunal found that the acquisition did substantially lessen competition, after a hearing at which Agricore did not contest the substantial lessening of competition. A contested hearing was scheduled to address the issue of the appropriate remedy in the Port of Vancouver. However, prior to the hearing, the Bureau reached an agreement with Agricore United to divest either the UGG or Pacific grain-handling terminal in the Port of Vancouver.

Canadian Waste Services Inc. and Browning-Ferris Industries Ltd[10]. Canadian Waste Services Inc., which owned six landfills in southern Ontario, acquired the Ridge landfill in Chatham from Browning-Ferris Industries Ltd. The Bureau filed an application with the Competition Tribunal challenging this purchase on the grounds that it would likely result in higher prices for customers of waste disposal services in the Greater Toronto Area and Chatham-Kent. This acquisition was part of a larger transaction in which the Bureau had previously allowed undisputed aspects to proceed including the purchase of some collection and disposal assets in certain markets in Canada, while challenging several others which Canadian Waste Services abandoned. Following a contested hearing, the Tribunal ruled in favour of the Bureau's position. The Tribunal subsequently held a hearing to determine the appropriate remedy, and accepted the Bureau's proposed remedy, ruling that Canadian Waste must divest itself of the Ridge landfill.[11]

2. Range of Remedies[12]

The objective of remedial action is to prevent the merged entity from having the ability to exercise market power. When a merger does not raise competition concerns, the Bureau will not delay or prevent

the closing of the transaction. If the Bureau believes that competition concerns exist, the Commissioner will consider a range of remedies. Because each merger involves unique fact situations, the remedy must be appropriate for that set of facts. The Commissioner prefers structural remedies in most cases. Behavioural remedies have also been used in combination with structural remedies and in the limited number of cases in which they have been the appropriate resolution to the specific fact situation. The range of remedies include:

- structural remedies (prohibition, dissolution of merger; complete or partial divestiture);
- combination remedies (structural divestiture and another associated remedy); and
- behavioural remedies.

As a result of the Bureau's review of a proposed transaction, anti-competitive effects may be identified in quite specific geographic and product markets. Resolving these conflicts may require negotiating complex remedies. Each set of negotiations are unique because each transaction and industry has distinct characteristics. A cookie-cutter approach is not appropriate in negotiating merger remedies. The Bureau negotiates the remedy that is best suited for each case.

The Bureau follows very clear jurisprudence on which standard is appropriate when negotiating or designing remedies. The leading case is *Canada (Director of Investigation and Research) vs. Southam Inc*[13] which involved the acquisition of two community newspapers. The Court concluded that mergers must pass the threshold of substantial lessening of competition to raise antitrust concerns. They go on to conclude:

> *"... the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger."*[14] [emphasis added]

As a result, it is not necessary that a remedy restore the market to its pre-merger state of competition, only that the lessening of competition no longer be substantial.

The Court also suggested that this standard should apply to both contested and consent proceedings[15]. In addition, the Court held that the remedy should be strong or effective enough to fully eliminate the substantial part of the lessening of competition.

> "... If the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the *former option must be preferred. At the very least, a remedy must be effective*. If the least intrusive of the possible effective remedies overshoots the mark, that is perhaps unfortunate but, from a legal point of view, such a remedy is not defective."[16] [Emphasis added]

2.1 Structural Remedies

Structural remedies are most commonly in the form of the divestiture of assets or in a few cases, an outright prohibition on the transaction. Anti-competitive effects of a merger are created by a structural change to a market, and unless challenged, these changes are permanent. Accordingly, structural remedies are usually necessary to eliminate the substantial lessening or prevention of competition arising from a completed or proposed merger. Structural remedies require limited or no future monitoring or enforcement action[17]. Between 1995 and 2002, over 90% of case resolutions of the Competition Bureau contained a structural remedy.

The extent of the remedy will depend on the facts of a specific case. Structural remedies can take the form of prohibition, dissolution[18] or divestiture. Prohibition or dissolution will be required where there are no other remedies available that would eliminate the substantial lessening or prevention of competition. A full divestiture will be required where the assets cannot be separated or if it is necessary to divest a whole business unit and its associated assets to create a viable and effective competitor. However, a partial divestiture of assets may also be acceptable if it removes the substantial lessening or prevention of competition. This may also occur where a potential purchaser does not require the administrative functions (e.g. human resources, accounting) or the distribution assets of a divested business. Recently a divestiture was required in the following case:

British American Tobacco and Rothmans International[19] The tobacco industry in Canada is highly concentrated. As a result of British American Tobacco (BAT) proposed acquisition of Rothmans International, BAT would have an indirect interest in Imperial Tobacco and control of Rothmans in Canada. After a thorough review of the proposed transaction, the Competition Bureau concluded that a merger would likely substantially lessen or prevent competition in the Canadian manufactured cigarette and fine-cut tobacco markets, due to a high level of concentration, high barriers to entry, the lack of effective remaining competition, and the virtual absence of import competition. As a result, BAT agreed to divest its interest in Rothmans in Canada.

In some cases, the Bureau has required the divestiture of a product or a group of products. This has included divestitures that required the licensing of intellectual property. Divestiture of products and the associated licenses to intellectual property have occurred in the following cases:

Bayer AG and Aventis CropScience[20] The Bureau reviewed Bayer's acquisition of the world wide business of Aventis and found that it would likely have resulted in a substantial lessening of competition in certain crop science products in Canada. To address these concerns Bayer agreed to divest three key agricultural chemical products and to license a fourth in its crop protection division.

Pfizer Inc. and Pharmacia Canada Inc[21]. The Bureau registered a Consent Agreement with the Competition Tribunal to remedy the competition concerns arising from the acquisition of Pharmacia Canada Inc. and its foreign parent by Pfizer Inc. The Bureau concluded that the transaction would substantially prevent competition in the market for pharmaceutical products used in the treatment of human sexual dysfunction. To remedy these concerns, the parties agreed to: terminate a collaboration and licence agreement and to divest another pipeline product. These divestitures ensured the continued development of these products for eventual introduction into a Canadian market. The Bureau also determined that the transaction would substantially prevent competition in the market for pharmaceutical products that treat overactive bladder problems. To remedy these concerns, the parties agreed to divest a developmental product.

2.2 Combination Remedies

In a number of cases, the Bureau has used behavioural remedies to supplement or complement the core structural remedy. For instance, short-term supply arrangements have been used to ensure the competitiveness and viability of a firm to whom assets have been divested. In the following two cases, the Bureau's supplementary behavioural remedies included a Code of Conduct, where the terms are mainly self-monitoring and enforceable by a third party. The Bureau would not agree to a Code of Conduct that required the Bureau to engage in significant ongoing monitoring and enforcement.

Chapters Inc. and Trilogy Retail Enterprises L.P[22] Competition concerns were raised by the proposed merger of Chapters, the dominant book retailer in Canada, by Trilogy Retail Enterprises L.P. with its rival Indigo Books & Music. The Bureau reached an agreement with Chapters, Trilogy

and Indigo on a package of measures addressing its competition concerns. These included offering for sale 13 large-format book superstores, 10 mall stores, a distribution centre, certain of Indigo's on-line assets, and up to three store brands. In addition, Chapters, Indigo and publishers' associations agreed to a Code of Conduct enforceable by arbitration that sets minimum standards of trade between the merged company and publishers for five years.

Astral Media Inc. and Telemedia Radio Inc.[23] The Bureau challenged Astral Media Inc.'s proposed acquisition of Telemedia Radio Inc.'s French-language radio stations and 50 percent interest in Radiomédia. The Bureau believed that the acquisition would substantially lessen competition in six radio advertising markets in the province of Quebec. A Consent Agreement was agreed to resolving the Commissioner's concerns. The Agreement included: the divestiture of certain radio stations in all six relevant markets; the appointment of an independent manager to control certain local sales force, and the implementation of a Code of Conduct protecting advertisers in the French-language radio advertising markets.

Parts of the Code are enforceable by either the Commissioner or by advertisers. The Commissioner will enforce that there are no format changes in response to new entry and that the parties maintain separate sales forces. Advertisers will enforce such items as restrictions on exclusive contracts, no "meet-or-release" or "most-favoured-nation" clauses in sales contracts, and no long-term contracts. This part will be enforceable by advertisers using an ombudsman and arbitration procedures.

The Bureau's objective is to help promote the competitive functioning of markets. However, when other policy objectives are present, the Bureau has worked with other areas of the federal government to attempt to alleviate possible competition concerns. In the following example, the acquirer committed to a number of different types of remedies to remove barriers to entry in the industry.

Air Canada and Canadian Airlines[24] Following financial difficulties at Canadian Airlines, the federal minister of Transport announced a 90-day suspension of the provisions of the *Competition Act*, using powers under the *Canadian Transportation Act*. This allowed Air Canada and Canadian Airlines, Canada's largest and second largest airlines, to discuss the potential restructuring of Canada's airline industry. A key concern was the survival of Canadian. With the expiry of the 90-day suspension period, the Bureau was notified of Air Canada's proposed acquisition of Canadian. Accordingly, it undertook a two-stage review of the acquisition under the merger provisions of the *Competition Act*. First, the Bureau confirmed that Canadian was facing imminent financial failure. Second, the Bureau examined the commitments that Air Canada was prepared to make if the merger was allowed to proceed, including: surrendering certain slots, gates, loading bridges and counters; delaying launching an Eastern discount carrier; offering Canadian Regional Airlines for sale; allowing other Canadian carriers to participate in its Aeroplan program; basing its domestic travel agent commission overrides on volume rather than market share; and entering into interline and joint fare agreements with other Canadian air carriers. The Bureau concluded that the merger, together with these commitments, was preferable to the bankruptcy and liquidation of Canadian. Consequently, the Bureau informed Air Canada that it would not oppose the transaction.

2.3 Behavioural Remedies

Behavioural remedies are only appropriate when they are sufficient to address the substantial lessening or prevention of competition and when there is limited ongoing monitoring and enforcement action required by the Bureau. The Bureau has accepted these types of remedies in the past, but only in rare situations. It is not the Bureau's intention to accept behavioural solutions when structural remedies are clearly necessary. The Bureau will not agree to remedies where there is a need for continued monitoring of key aspects of an agreement such as pricing.

Certain types of behavioural remedies may have the same result as a structural remedy. These include remedies that eliminate barriers to entry, or facilitate entry or expansion. An example of this may be the removal of anti-competitive contract terms such as non-competition clauses and restrictive covenants. These types of remedies are acceptable because there is little need for any future monitoring or enforcement efforts, unless a complaint is raised. One such case is the following:

Reitmans (Canada) Limited and Shirmax Fashions Ltd[25]. Reitmans (Canada) Limited's acquisition of Shirmax Fashions Ltd., a competitor retailer in plus-size ladies apparel, raised concerns that access to retail space in shopping centres would be negatively affected. In response, Reitmans agreed not to enforce restrictive clauses in more than 100 leases, nor to enter into leases that would exclude competitors during the subsequent three years. With these undertakings, the Bureau concluded that competition would not be substantially lessened as a result of the proposed merger.

It is important to fully examine these remedies in the context of the industry as a whole. These types of remedies will only be considered by the Bureau if no other significant barriers, or other anti-competitive effects remain and if they are sufficient to address the substantial lessening or prevention of competition. It would not be sufficient to eliminate one barrier if multiple barriers remain.

Although the Bureau usually requires remedies to be clearly specified in advance, alternative remedies have also been used in the past. These included the elimination or reduction of tariff measures. However, this has been used only in the following situations that occurred before the Canada-U.S. Free Trade Agreement:

Asea Brown Boveri Inc. and Westinghouse Canada Inc[26] Asea Brown Boveri Inc. acquired the electric power transmission and distribution business of Westinghouse Canada Inc. In a rather unique solution to concerns raised by the Bureau, the parties agreed to a Consent Order which required ABB to divest certain assets obtained from Westinghouse if it was unable to attain specific tariff relief measures, including full remission of tariffs on imports of certain large power transformers for a period of at least five years. This was accomplished with the issuance of the Electrical Power Transformer Remission Order, SOR/90-23 which came into force on January 1, 1990.

Domglas Inc. and Consumer Packaging Inc[27] In 1989, Consumer Packaging acquired Domglas. The two companies were major manufacturers of glass containers used as packing in the food and beverage industry. Although concerns were raised, the Bureau did not challenge the merger. Instead, the parties provided an undertaking to formally apply to eliminate the tariff on United States glass container imports over a five-year period, expediting the process already instituted by the Canada-United States Free Trade Agreement by 50% and consequently increasing the availability of foreign competition.

2.4 Terminology

The usual distinction between structural remedies and behavioural remedies is in some ways confusing. So called behavioural remedies are usually designed to foster an economic structure that is competitive. They may do so in a number of ways:

- directly - as in the tariff elimination example where the geographic market was widened thereby eliminating the substantial lessening of competition;

- by facilitating other forces which will restore competition - as in the example where landing slots were given up to facilitate entry; or

- by combining either of the above with an asset divestiture.

These remedy the structure of the market just as much as an asset sale. They may also help offset anti-competitive effects during a transitional period during which a competitive structure re-emerges.

In some ways, it might be better to think in terms of: (1) structural remedies consisting of "prohibition of the transaction", "divestiture" and "other measures" or any combination thereof; and (2) "transitional measures" to offset the effects of periods where there is a substantial lessening or prevention of competition.

3. PrinciplesTerms Related to Remedies

As mentioned, merger remedies are fact driven and have to be tailored to the particular circumstances of each anti-competitive merger. The Bureau's goal is to prevent or eliminate the substantial lessening or prevention of competition in a timely and effective manner. Achieving the most effective remedy requires the Bureau to maintain flexibility and to work within the realities of the marketplace. Therefore, the Bureau follows a number of principles and uses a number of terms when designing an effective remedy.

3.1 Effective Remedy

For the divestiture to provide effective relief to an anti-competitive merger, three criteria must be met. They are:

- the viability of the assets chosen for divestiture;
- the independence and competitiveness of the purchaser; and
- the timeliness of divestiture.

To meet the requirements, the package to be divested must form a viable business and the asset package must be attractive to potential purchasers. The Bureau insists on approving the purchaser of the divested assets as it may be in the merging parties' interest to sell the assets to a less vigorous competitor or a purchaser who may increase the likelihood of interdependent behaviour. Requiring the Commissioner's approval ensures that an anti-competitive buyer is not chosen. In addition, it is important to impose deadlines for the divestiture. A prolonged divestiture process may increase the level of uncertainty or diminish the value of the asset package to be divested.

3.2 Fix-it-First

The Bureau considers a "fix-it-first" remedy to be an optimal solution. A "fix-it-first" solution can occur: (1) where the parties are able to divest the relevant assets to an approved buyer prior to the closing of the transaction; or (2) where there is a purchase and sale agreement in place which identifies an approved buyer for the specific set of assets and the divestiture is executed simultaneously with or shortly after closing. This ensures that the public does not suffer the anti-competitive effects of the merger for any length of time and removes uncertainty. The following two cases used such remedies.

Canada Bread Company, Limited and Multi-Marques Inc.[28] Canada Bread Company, Limited, one of Canada's largest bakers, announced its intention to acquire the remaining 75 percent of Multi-Marques it did not already own. The Bureau's investigation showed that the proposed merger would

likely substantially lessen competition in the supply of fresh bread and rolls to food service customers such as hospitals, restaurants, hotels and other institutional accounts in the Maritimes.

The **Bureau** allowed the transaction based on "fix-it-first" agreements in principle between Canada Bread and four other bakeries operating in the Maritimes to purchase the assets to be divested. The divestiture represented one third of the merged company's food service business in the Maritimes.

SYSCO Corporation **and SERCA Foodservice Inc.**[29] SYSCO Corporation announced its intention to acquire the assets of SERCA Foodservice Inc. and other related food service assets across Canada from Sobeys Inc. At the time of the announcement, SYSCO and SERCA were the two largest food service distributors in British Columbia. SYSCO is North America's largest food service distributor. Food service distribution involves the supply of food and restaurant supplies to restaurants, fast-food chains, hotels, and educational and health care facilities. After a thorough review, the Bureau concluded that the proposed merger would likely substantially lessen competition in British Columbia but did not raise competition concerns elsewhere. The transaction was allowed to proceed when SYSCO divested SERCA's assets in British Columbia Gordon Food Service, Inc. prior to completing the transaction.

3.3 Sales Process - Possible Extensions

Although the time frames may vary depending on the situation of the case, the Bureau generally allows the merging parties a period of time to complete a divestiture. During the initial time period, the parties are generally free to negotiate the price and terms of the sale with a potential purchaser, which will be subject to final approval by the Commissioner.

If the merging parties are unable to complete the divestiture during the specified sale period, an independent trustee is appointed by the Commissioner to divest the assets. The trustee has a fiduciary duty to complete the sale of the divestiture package at the best price and terms that, in the trustees' discretion, can be reasonably obtained.

Remedy agreements usually contain a clause allowing for an extension of either the merging parties' or trustees' sale period. This occurs only in situations where either the merging parties or trustee are close to completing the sale at the expiration of the initial sales period but requires additional time to finalize details. Generally, an extension will only be granted if the merging parties or trustee provide written proof of an intention to purchase the divestiture package from a *bona fide* purchaser. An extension is then triggered for a specified maximum time frame described in the agreement. The use of extensions is designed to facilitate the sale and thus meet the objective of the remedial action.

3.4 Confidential Provisions

Sales periods, and occasionally other terms, generally remain confidential so as not to adversely affect the sales process. Merging parties frequently are concerned that if potential purchasers know the divestiture period deadlines, they will wait until the last moment to submit an offer in order to be able to extract the lowest price for the divestiture package. Generally, the Bureau will make available to the Tribunal a "public" and a "confidential" version of the agreement protecting these terms.

3.5 Reporting to the Commissioner

The Commissioner insists on being informed at each stage of the sale process. During the parties sale process, the parties must provide regular updates on the details of their sales process to the Commissioner (usually on a monthly basis). The purpose of this is to ensure that the parties are using their best efforts to

complete the divestiture. During the trustee sale process, the trustee must provide both the Commissioner and the parties with regular reports also describing their part of the sales process.

3.6 Independent Manager

When the merging parties own the assets or businesses that must be divested, it may be necessary to hold separate those assets or businesses from the parties' other operations in order to preserve the integrity and competitiveness of the divestiture package. Under these circumstances, the divestiture package is typically held separate under the terms of an order by the Tribunal. Such an order includes the appointment of an independent manager to operate the assets or businesses pending final divestiture. An independent manager will usually be responsible for the daily management of the assets or businesses, for making pricing decisions, and for maintaining and enhancing the customer base and overall competitiveness. Certain other conditions will be imposed to ensure that the Independent Manager does not communicate confidential and commercially sensitive information to the merging parties or materially change the nature of the business.

3.7 Monitor

If the merging parties maintain control of the divestiture package during the sales process, an independent monitor is usually appointed to ensure that the assets are not allowed to deteriorate. The monitor should have access to any associated facility and to any related information or documents in the possession of the merging parties or independent manager. A monitor also ensures that the merging parties are using their best efforts to fulfil their obligations under the Consent Agreement. The Consent Agreement will include provisions that require the monitor to provide the Commissioner with regular reports (usually monthly) describing the parties' efforts to comply with the agreement.

3.8 Crown Jewel Provision

If it is impossible to sell the agreed upon assets in the initial sale period, this indicates that it did not comprise an adequate remedy package. It is therefore appropriate to provide for alternative assets to be sold that are clearly sufficient for there to be a buyer and achieve the objectives of the remedy. This is commonly referred to as a crown jewel provision. A crown jewel provision is a negotiated term which allows the Commissioner to add to or substitute specified assets in the original asset package to increase the marketability of the divestiture package. This provides the parties with an incentive to complete the divestiture of the original package before having to sell more valuable assets. A Crown Jewel provision is usually triggered during the trustee stage process[30].

3.9 Acceptable Representations and Warranties

To help ensure a successful divestiture, the merging parties should include certain reasonable representations and warranties in the divestiture package. The representations and warranties may include statements to the effect that:

- the assets to be purchased are in operating condition and are in a good state of repair;
- the vendor maintains appropriate insurance on the assets;
- the vendor has made full disclosure of all its employees and their salaries, all pension plans maintained by the vendor, and all the subsidiaries of the vendor; or

- if there are any environmental liabilities associated with the remedy package, they will be fully disclosed.

A negotiated settlement between the Commissioner and merging parties cannot anticipate all the representations and warranties needed to be provided to ensure that the sale will occur. Each industry has its unique requirements for the sale of assets.

3.10 No "minimum price provision"

If the sale process is to revert to an independent trustee, the Commissioner will not agree to a divestiture agreement that contains clauses referring to a minimum or floor price, or refer to such terms as Fair Market Value, Going Concern, Liquidation Price, Going Out of Business or Fire Sale. The Bureau has in the past faced litigation to interpret these terms[31]. Merging parties are given the opportunity to sell the remedy package first at the best price and terms they are able to negotiate. If they cannot sell the assets, then the trustee is tasked to complete the sale at the best price and terms that the trustee is able to receive to ensure that the divestiture alleviates the competition concerns, subject to specified conditions.

Note that "no minimum price" means that the purchaser acquires the assets free and clear of any liability for no minimum price. The vendor must indemnify the purchaser or pay the purchaser to offset liabilities that can not be separated from the assets, if that is required.

3.11 Vertical Mergers

The Bureau does not distinguish between horizontal vs. vertical mergers when reviewing a proposed merger. Both horizontal and vertical mergers are reviewed using the same criteria set out in Sections 92 and 93 of the *Act*, as well as any other competition issue which may be relevant, and each transaction is considered on its own merits. When designing remedies, distinctions are not made between these types of mergers. If there are competition concerns with a vertical merger, the Bureau will examine each part of the transaction. Again, the Bureau prefers structural remedies to resolve competition concerns even in vertical mergers[32].

4. International Cooperation

With an increase in the number of international merger transactions, multiple jurisdictions often simultaneously review the same transaction. This has increased the need for communication and cooperation among competition authorities. The Bureau uses a number of cooperation arrangements with its foreign counterparts which help facilitate information exchange, investigations and ultimately coordination of remedies[33]. It is important for the Bureau to discuss the dynamics of a market with foreign counterparts to ensure that relevant geographic and product markets, barriers to entry and other relevant factors are considered in a consistent manner.

Section 29 permits communication "for the purposes of the administration or enforcement" of the *Act*. This includes the right to communicate confidential information to foreign authorities where the communication will advance a specific investigation being carried out under the *Act*. Waivers are used when the Bureau cooperates with foreign antitrust authorities. These waivers are requested by foreign authorities which would not otherwise be able to exchange confidential information. Safeguards are in place to prevent the unauthorized disclosure of confidential information in the case of mergers that have not yet been publically announced or to prevent identification of third party complainants or informants.

With respect to the coordination of remedies, historically, most coordination has been with the U.S. authorities in the form of parallel consent orders. It is very important that coordination take place in order

to increase the likelihood of consistent remedies across jurisdictions. The following cases are examples where the Bureau has successfully cooperated with our foreign counterparts.

> **Lafarge S.A. and Blue Circle Industries PLC**[34] Following an extensive investigation into this transactions in multiple jurisdictions, the Bureau was able to negotiate unprecedented divestitures which were part of a package to resolve competition concerns arising from the proposed acquisition by Lafarge S.A. of Blue Circle Industries PLC. The Canadian subsidiaries of the merging parties were the two largest cement and related construction material suppliers in Canada. The Bureau had concluded that without these divestitures the deal would likely have prevented or lessened competition substantially in certain cement and related construction material markets such as ready-mix and asphalt in Ontario. The divestiture also included certain complementary assets in the Great Lakes region of the United States such as distribution terminals and barges. The Bureau agreed not to challenge the proposed acquisition after Lafarge consented to sell the vast majority of its Canadian Blue Circle assets and businesses as well as related cement distribution assets in the United States.
>
> Valued at **more** than US$1 billion, the assets the merging parties divested in Canada and the United States represent the largest divestiture package in the history of Canadian competition law. The Bureau cooperated extensively with the US Federal Trade Commission. In this case, Canadian and US officials shared views on substantive matters such as relevant market definitions, entry conditions and coordinated remedies with matching asset divestitures in Ontario and the Great Lakes in the United States.
>
> In both Bayer **AG/Aventis CropScience**[35] and **Pfizer Inc./Pharmacia Canada Inc**.[36], the Bureau communicated regularly with our counterparts in the United States and Europe to ensure appropriate and consistent remedies.

Cooperation and coordination of remedies have many benefits, including optimizing resource allocation by reducing duplicative efforts, avoiding potential frictions where a remedy in one jurisdiction may have extraterritorial impacts which can affect enforcement efforts in another jurisdiction, and allowing consultation to avoid inconsistency in remedies. While such a coordinated approach to remedies in multi-jurisdictional mergers incorporating principles of comity has great potential, it is important for each jurisdiction to retain the ability to ensure the sufficiency of remedies against anti-competitive effects within its borders.

5. Conclusion

The Bureau considers the unique facts and dynamics of each case and industry when designing merger remedies. Structural remedies are preferred since they will structurally change the market to alleviate the substantial lessening or prevention of competition and will not require future monitoring. The Bureau will however consider the appropriate range of remedies that, based on the specific facts of each case, will best achieve the desired objective of eliminating a substantial lessening or prevention of competition.

NOTES

1. *Competition Act*, R.S., 1985, c. C-34.

2. In 1986, the *Competition Act* was brought into force, establishing a civil regime for the review of mergers. This established the burden of proof to a standard of balance of probabilities.

3. The Bureau's Merger Enforcement Guidelines, Section 2.4 state, "... In general, a prevention or lessening of competition will be considered to be "substantial" where the price of the relevant product is likely to be materially greater, in a substantial part of the relevant market, than it would be in the absence of the merger, and where this price differential would not likely be eliminated within two years by new or increased competition from foreign or domestic sources."

4. http://www.parl.gc.ca/common/bills_house_government.asp?Language=e&Parl=37&Ses=1#C-23

5. The Competition Tribunal is a quasi-judicial court made up of Federal Court Judges, and economic and industry experts. It was established to hear civil reviewable matters under the *Act*. The Tribunal would then hear all the relevant facts and make a determination as to whether the merger or proposed merger is anti-competitive.

6. A Consent Agreement or Order may be rescinded or varied under Section 106 if it is determined by the Tribunal that the circumstances have changed.

7. The *Act* provides for the statutory notification of mergers to catch anti-competitive mergers before they happen. To be notifiable, the proposed transaction must surpass the party-size and transaction-size thresholds set out in Sections 109 and 110 of the *Act*. The purpose of this is to help avoid the problems associated with "undoing" a merger and restoring firms and competition to their pre-merger status.

8. *Commissioner of Competition v. Canadian Waste Services Holdings Inc*., Reasons and Decision Regarding Remedy, Oct. 3, 2001, paras. 46-50. The Tribunal cited the Federal Court of Appeal in the *Director of Investigation and Research v. Air Canada* (1993) that, in a contested proceeding as opposed to a consent proceeding, the authority of the Tribunal is limited to "blunt instruments" of dissolution or divestiture. Anything beyond that can only be done, as shown in subparagraph 92(1)(e)(iii) of the *Act*, on a consent basis.

9. http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02438e.html

10. http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02515e.html

11. The parties have filed an application with the Tribunal under Section 106 of the *Act* for change of circumstances. The parties have also sought leave to appeal to the Supreme Court of Canada.

12. Except for the note at the end of this section, the terms "structural remedies" and "behavioural remedies" are used in the way commonly understood in Canada.

13. Supreme Court of Canada: Southam Inc., Lower Mainland Publishing Ltd., RIM Publishing Inc., Yellow Cedar Properties Ltd., North Shore Free Press Ltd., Specialty Publishers Inc., and Elty Publications Ltd. v the Director of Investigation and Research. March 20, 1997. The Commissioner of Competition at that time was called the Director of Investigation and Research.

14. Ibid, para. 85.

15. Ibid, para. 85.

16. Ibid, para. 89.

17. Under Section 97 of the *Act*, the Commissioner may not make an application to the Tribunal if the merger has been substantially completed for more than three years. Structural remedies are especially important, therefore, in situations where the possible effects of an anti-competitive merger may persist past the three year statutory review limitation period.

18. In the contested case of the Commissioner of Competition v. Superior Propane Inc., the Bureau tried to undo the entire transaction.

19. http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct01525e.html

20. http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02403e.html.

21. http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02556e.html

22. http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02170e.html

23. http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02422e.html

24. http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct01984e.html

25. http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02375e.html

26. 1989/90 Annual Report, Competition Bureau.

27. Musgrove, James, Lang Michener, "Merger Remedies: Some Thoughts on the Canadian Experience", 2003 Competition Law Invitational Forum, Langdon Hall, pg.4/5.

28. http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02283e.html

29. http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02347e.html

30. **Bayer and Aventis.** (see footnote 18) The Consent Order contained a crown jewel provision permitting the divestiture trustee to sell assets in other areas should the agreed upon divestiture package not be sold within a certain time period. This was not necessary however since Bayer found an approved buyer.

31. http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02322e.html. After competition concerns were raised with the proposed acquisition of Donohue Inc. by Abitibi-Consolidated Inc., Abitibi agreed to sell a newsprint mill. During the sale process, litigation was commenced by Abitibi to determine the value of the price clause in the agreement. The clause stated, "the Designated Assets may be sold by the Agent within the Agent Sale Period at a price and on terms that are then most advantageous to ACI and consistent with accomplishing the sale, in the opinion of the Agent, acting reasonably (the "Agent Sale"), and, without in any manner limiting the foregoing, in no event will the price and terms of an Agent Sale equate to those of a "going out of business", "fire" or liquidation sale." (Commissioner of Competition v. Abitibi Consolidated Inc., Consent Order, February 21, 2002, para. 9(a)).

32. In general, the MEGs indicate that vertical mergers will only raise concerns in two circumstances. First, barriers may be increased in situations where there is an elimination of an independent upstream source of supply (or downstream distribution outlet) that leaves only a small amount of unintegrated capacity at

either of the stages at which the acquirer or the acquiree operate. In particular, concerns may be raised when the amount of unintegrated capacity at one stage (the secondary market) is sufficiently small that an entrant into the other stage (the primary market) would consider it necessary to simultaneously enter into both the primary and secondary market. Second, a merger that results in, or increases, an existing high degree of vertical integration between an upstream market and a downstream retail market can facilitate interdependent behaviour by firms in the upstream market by making it easier to monitor the prices charged by rivals at the upstream level.

33. Canada currently has cooperation arrangements with the U.S., E.C., Mexico, Costa Rica, Australia/New Zealand and Chile. Canada is currently negotiating co-operation arrangements with the United Kingdom and Japan.

34. http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02193e.html

35. See footnote 21.

36. See footnote 22.

CZECH REPUBLIC

The possibility to conditionally approve a concentration, which would otherwise have lead to a distortion of competition in the market, is an integral part of the merger control system in the Czech Republic. This area is legislatively provided for by the Act No. 143/2001 Coll., on the Protection of Competition (hereinafter referred to as "the Competition Act"), which stipulates in Article 17(3) that the Office for the Protection of Competition (hereinafter referred to as "the Office") may in its decision approving the concentration set conditions and restrictions in favour of preservation of effective competition or make the approval conditional upon fulfilment of commitments that the merging parties have for this purpose entered into.

The importance of remedies within the process of concentration approval is shown by the statistical figures about the decision-making activities of the Office for the period from entry into force of the Competition Act (i.e. from 1 July 2001 to 31 August 2003). It follows from these statistics that the Office has made subject to conditions 12 decisions approving a concentration, representing 2.8 % of in total 429 merger decisions issued. In case only phase II decisions are taken into account, conditional approvals amount to 64.7 % of all cases. One decision approving a concentration subject to conditions has been issued within the phase I proceeding. In the same period, a concentration of undertakings has not been approved in two cases, representing less than 1 % of all investigated cases and 11.8 % of phase II decisions. On the other hand, 4 cases assessed within the framework of the phase II have been approved without any remedies being necessary.

For the purpose of analysing merger remedies for this period, the Office classified the conditions imposed and commitments entered into (hereinafter both these groups will be referred to as "conditions") according to their types into the following general categories:

- Structural conditions leading to changes in the market structure (divestiture of part of a company, of certain business activities etc. to a third party);

- Behavioural conditions related to the behaviour of undertakings in the market and having no direct effect on the market structure (for example non-competition clause, commitment to terminate co-operation with another company);

- Quasi-structural conditions related in particular to transfer and use of intellectual property rights (for example commitment not to use a trademark in a certain territory, divestiture of a trademark to a competitor, termination of a licensing agreement with co-operating third party or grant of a non-exclusive licence on patents and know-how to competitors);

- Conditions consisting in elimination of interlocking directorates in the bodies of merging undertakings;

- Supervisory conditions enabling the Office to check the state of implementation of the other conditions imposed (for example obligation to submit to the Office reports on fulfilment of the conditions or to inform of future plans connected with acquisition of ownership shares in other companies).

It is however necessary to point out that this classification is a theoretical one and is by no means set in the merger control legislation in the Czech Republic. Furthermore, the categories described may overlap to a certain extent in concrete cases.

Out of the total number of 12 decisions conditionally approving a concentration, five decisions contained both structural and behavioural conditions, six decisions only behavioural conditions and one decision only structural conditions (the other supplementary categories were not taken into account in this overall survey). When all individual conditions contained in these decisions are summed up, the total number of conditions imposed reaches to 48, representing in average 4 conditions per one decision. It is nevertheless necessary to note that conditions imposed by a decision very often form one complex of conditions having a single purpose to eliminate the identified competition concern. Analysis of these 48 individual conditions shows that behavioural conditions represent 52 %, structural conditions 27 %, quasi-structural conditions 10 % and supervisory conditions also 10 % of all individual conditions imposed in the analysed period. **Nevertheless, in the most important cases the Office has placed the greatest emphasis on structural or quasi-structural conditions, as it is demonstrated by the bellow-described cases of concentrations ČEZ/5 distribution companies and Léčiva/Slovakofarma.**

The most common types of structural conditions imposed were divestiture commitments representing 77 % of all structural conditions. The divestiture concerned in particular specific assets connected with production and sale of a certain product. Behavioural conditions imposed have been focused in particular on maintenance of production or supplies (32 % of all behavioural conditions), prohibition of discrimination between customers (24 %), pricing (20 % - concerning price increases or maintenance of price portfolio of the products) or distribution of products (12 % - e.g. ensuring access to the distribution network or separation of distribution networks). Quasi-structural conditions consisting in transfer of intellectual property rights have involved in particular the right to use a trademark or obligation to terminate a licensing agreement or refrain from its renewal. Supervisory conditions have involved in particular the obligation to submit reports on fulfilment of the conditions by the party to the proceeding or to submit agreements envisaged by other conditions in the decision.

In general, the process of imposing conditions may be assessed positively as in many cases their attachment to a decision has enabled approval of a concentration and at the same time eliminated any distortion of competition in the market. It is evident that alternative solutions are sought in cases of concentrations leading to significant competition concerns. The Office uses disapproval of concentration only when there is no remedy found that would eliminate the identified competition concerns. In the analysed period, this was the case in two merger cases where no possible remedies were found that would effectively eliminate the distortion of competition identified during the administrative proceedings and where, therefore, the Office had to issue a negative decision.

The following part contains descriptions of some important cases approved conditionally by the Office, demonstrating these general conclusions.

1. RWE GAS / Transgas / 8 regional distribution companies (gas sector)

The Office approved in May 2002 a concentration of RWE GAS (member of the multinational energy group RWE), the company Transgas (active among others in the areas of international and domestic transportation of gas, storage of gas and trading in gas, and operating the gas transmission infrastructure in the Czech Republic), and eight regional gas distribution companies. This concentration finalized the process of privatisation of the gas sector in the Czech Republic.

The competition concerns of the Office in connection with this concentration related in particular to the future position of the company Moravské naftové doly (Moravian Oil Mines, hereinafter referred to as

„MND“) that currently is the largest gas producer in the Czech Republic and at the same time the only competitor to Transgas in the Czech gas storage market. In connection with the assessed concentration there was a danger that this sole competitor to the company Transgas would have been eliminated due to influence on its activities exercised by the merged undertakings or even by their taking control over this undertaking, as both Transgas and one of the acquired distribution companies held ownership shares in the company MND. That could have lead to attempts of the merged undertakings to take control of MND or to co-ordinate their voting in MND with the aim to create an obstacle to adoption of crucial decisions on strategic plans of the company MND of apparent competitive nature in relation to RWE GAS.

The decision on approval thus contained the following conditions aimed at eliminating this danger of anti-competitive effects of the concentration:

- RWE GAS may not, without consent of the Office, increase directly or indirectly its current share in the stock capital of the company MND and may also not, maintaining its current ownership share, gain direct or indirect control of MND in any other way,

- RWE GAS may not block decisions of MND on plans of apparent competitive nature in relation to RWE GAS, with the exemption of cases that would according to an objective assessment lead to damage for MND or its stockholders.

These conditions were aimed at ensuring autonomy of the competitive decision-making of the company MND as the only domestic competitor to the merged undertakings. It is worth noting that following approval and implementation of the concentration, RWE GAS has decided to divest fully its ownership interest in MND. The behavioural conditions imposed by the Office thus have in fact lead to structural changes in the market strengthening the potential for future development of competition in this sector.

Another concern of the Office connected with this concentration was a danger arising due to the situation when in a certain regional market one owner gains direct or indirect influence over decision-making of both gas and electricity distribution companies, taking into account their partial substitutability. Such situation may lead to co-ordination of behaviour of these distributors aimed at preserving the *status quo* in this regional market and preventing entry of other competitors once the liberalisation of the gas market is started.

With the aim to eliminate this danger, the decision contained a third condition prohibiting RWE GAS from acquiring, without consent of the Office, directly or indirectly ownership shares in the electricity and heat distribution companies or build new electricity or heat distribution companies in the Czech Republic until the privatisation of electricity sector is completed, at the maximum for a period of 5 years.

By setting these conditions, the Office has created preconditions for effective competition in particular in connection with the envisaged liberalisation of the market.

2. ČEZ / 5 regional distribution companies (electricity sector)

The concentration consisted in acquisition of control by the company ČEZ (active in particular in areas of electricity production and supply) over five regional electricity distribution companies. The concentration had a vertical character and its implementation would have lead, according to the investigation of the Office, to creation of an integrated entity with considerable economic and financial power that would have gained a dominant position in the market of electricity supplies to eligible customers with negative effects on competition. The reasons for such conclusion of the Office were the following:

- the merged undertakings would have gained a high share of this market with wide distance from market shares of its closest competitors, as ČEZ was to acquire control over five out of in total eight regional distribution companies in the Czech Republic. Individual distribution companies are together with ČEZ the main competitors in the market of electricity supplies to eligible customers and competition between them is crucial for ensuring competitive electricity prices;

- the existing structural links between the company ČEZ and the remaining three distribution companies, in which ČEZ holds blocking minority stakes, would have enabled the merged entity to influence some of the crucial decisions of these companies affecting long-term competitive behaviour of these important competitors;

- the existence of structural links between the merged entity and the operator of electricity transmission system due to 34 % ownership share of the company ČEZ. This link would have enabled the merged entity, as the only from the market participants, to influence some of the key decisions of the transmission system operator, which could have had a negative impact on the market for electricity supplies to eligible customers. The Office in this regard took into account that independent and impartial functioning of the transmission network is a necessary precondition for creation and functioning of electricity market, in particular in case when there is a dominant entity in the areas of electricity production or trade.

With the aim to eliminate the negative competition effects, the concentration of ČEZ and regional distribution companies has been approved subject to three significant conditions:

- ČEZ is obliged to divest within a stipulated deadline its 34 % stake in the transmission system operator, ensuring thus full structural separation of transmission system from the most important electricity producer.

- ČEZ is obliged to divest within a stipulated deadline its minority stakes in the remaining three regional distribution companies over which it is not gaining control. That ensures full independence of these important competitors to the merged entity.

- ČEZ is obliged to divest within a stipulated deadline one of the five acquired regional distribution companies to a third party without any links to the company ČEZ. At the same time this third company must be able to maintain and develop the activities of the divested distributor. This divestiture was considered as a minimum structural measure eliminating the danger of creation of a strong dominant position of the merged entities hindering effective functioning of competition, which should at the same time lead to strengthened competitive environment and enhanced possibility for independent producers and traders to supply their electricity.

In line with these conditions, the company ČEZ has already divested some of its minority shares in the regional distribution companies.

3. Léčiva / Slovakofarma (pharmaceuticals)

The basis of this concentration was acquisition of indirect control by the company Zentiva over the companies of the Slovakofarma group, which is the most important Slovak producer of generic pharmaceuticals. As Zentiva already controls the companies of the Léčiva group, representing the most important Czech producer of generic pharmaceuticals, there is in fact a concentration of companies Léčiva and Slovakofarma representing the leading pharmaceutical companies in Czech Republic and Slovak Republic respectively.

The results of the investigation carried out by the Office had shown that this concentration would have lead to significant strengthening of the market power of the merged entity leading to substantial distortion of competition in several relevant markets. It has been also taken into account that these markets are characteristic by existence of relatively high entry barriers due to necessity to register the pharmaceutical and due to the functioning of the public health insurance system preferring cheaper pharmaceuticals (which are in many cases supplied the merging companies). In addition, the merging undertakings own a number of well-established trademarks with a long tradition of consumption in the Czech Republic. The competition concerns of the Office related in particular to the following areas:

- In five relevant pharmaceutical markets delineated according to the appropriate expert classification of drugs, the concentration would have lead to significant increases of market shares of the merging undertakings. Taking into account the above-mentioned characteristics of the competition in these relevant markets, these horizontal overlaps would have lead to the creation of dominant positions of the merged undertaking in these markets leading to significant distortion of competition. The competitive pressure between these two important direct competitors would have been eliminated resulting in possible negative impact on the price competition, reduction of choice of products offered and foreclosure of certain markets.

- The concentration would have lead to a significant strengthening of negotiating power of the merged entity that would have had available a large product portfolio with a whole group of pharmaceuticals which are unique due to their quality, price and trademark. It would have thus become an unavoidable trading partner for distribution companies active in the selling of human pharmaceuticals. A danger of distortion of competition would then have existed in the market for distribution of pharmaceuticals in case the merged entity would have created an exclusive relationship with only one pharmaceutical distributor, threatening thus the existence of the other distributing companies.

In order to eliminate these competition concerns, the party to the proceeding entered into the following commitments, upon the fulfilment of which the Office made conditional its decision approving the concentration:

- In relation to the above-mentioned markets with significant horizontal overlaps, the merging undertakings have committed to divest all assets connected with production and selling of three important pharmaceuticals offered in these markets. The divested assets must form an indivisible complex containing all elements (i.e. both tangible and intangible assets) necessary for the divested assets to be able to be further active in the market as a real competitor. This complex of assets thus also has to be divested to a single purchaser. At the same time, the merging undertakings have committed vis-à-vis both the Office and the purchaser of these assets not to compete for a certain sufficiently long period by producing pharmaceuticals of the same chemical composition as that of the divested pharmaceuticals. This set of commitments has reduced the increase in market shares of the merging undertakings in these markets and prevented thus the creation of dominant positions distorting competition. Furthermore, taking into account the fact that the merging undertakings yield in this way several well-established trademarks of pharmaceuticals that would be available to independent undertakings, the implementation of these commitments leads also to reduction of entry barriers in these markets and to enhanced potential for third parties to enter these relevant markets and establish themselves there.

- Another set of commitments consisted in transfer of two well-established trademarks to third parties, without transferring any production or other connected assets. These are quasi-structural conditions where a sufficiently strong competitive impulse in the relevant markets is to be created

by the fact that well-known trademarks for generic pharmaceuticals are gained by a new entity or a current competitor.

- With regard to the above-described danger of anticompetitive effects of the concentration in the vertically connected pharmaceutical distribution market, the merging undertakings made a behavioural commitment not to conclude exclusive distribution agreements with some pharmaceutical distributors and to ensure non-discriminatory treatment for all distributors of pharmaceuticals produced by the companies Léčiva and Slovakofarma.

These commitments entered into by the merging parties have been assessed by the Office as sufficient to remove the identified dangers of substantial distortion of competition resulting from this concentration. Once these commitments are properly implemented, the effects of the assessed merger will no longer hinder maintenance and development of competition in these relevant markets and the danger of creation of a substantial distortion of competition caused by creation or strengthening of dominant positions of the merged entity in the defined relevant pharmaceutical markets will be eliminated.

DENMARK

1. Introduction

Since its introduction in October 2000 merger control has played a significant role in the work of the Danish Competition Authority. This note contains reflections on some of the many interesting issues raised by the Secretariat in the paper on merger remedies.

In Denmark we follow the guidelines and case law of the European Commission. This means that we agree with the common view that structural remedies are normally preferable to behavioural remedies. Nevertheless, statistics seem to draw a somewhat different picture. Only 6 out of 10 mergers, where remedies were involved, have contained structural remedies, whereas behavioural remedies have been necessary in 9 out of 10 mergers. This pattern does not only seem to be a specific Danish phenomenon – similar figures hold for the other Nordic countries.

In this note we argue that the use of behavioural remedies have primarily been used in cases with (some of) the following characteristics:

- the merger was vertical;
- the merger was a joint venture;
- the merger was between associations or co-operatives;
- the behavioural remedies were used to support a structural remedy;
- the merger took place in a market under liberalisation.

2. Danish legislation and statistics on merger control

Rules on national merger control were implemented in Denmark in October 2000. Mergers with a combined aggregate turnover of at least DKK 3.8 billion (app. 500 million Euro) are subject to notification and approval. The Danish legislation conforms to the EU rules on merger control and the case law of the European Commission and the European Courts. The Danish Competition Authority has a strict timetable for its treatment of merger cases. The case must be settled within four weeks after receipt of a complete notification, unless it is decided that further investigation is required. In that case a decision must be reached within three months. The authority cannot subsequently resume the case and e.g. require divestiture.

Since October 2000 the Danish Competition Authority has received 33 notifications of mergers of which none were banned, 7 were approved with remedies, and 26 were approved without remedies, cf. table 1. Before 2000 the Danish Competition Authority approved 2 mergers with remedies, cf. note 1. Furthermore, the authority required remedies in a third merger, but the parties abandoned this merger, before the case was settled cf. note 2.

Table 1: Mergers in Denmark

	Notified mergers	Approved	Approved with remedies	Banned
Before 2000[1]	3	0	2	(1)[2]
2000[3]	3	2	1	0
2001	12	11	1	0
2002	13	9	4	0
2003[4]	5	4	1	0
Total	**36**	**26**	**9**	**(1)**

Notes:

1. Prior to 1st October 2000 there were no national rules on merger control, but the Danish Minister of Economic and Business Affairs could refer the case to the European Commission, even though the merger did not exceed the EU threshold values. In three cases, however, the Danish Competition Authority required remedies instead of asking the Commission to investigate the merger.
2. In the merger Carlsberg/Albani the Danish Competition Authority agreed with the parties on a long list of remedies. However, another company gave a competitive bid for Albani and Carlsberg declined from giving a better bid, mainly because of the required remedies.
3. After 1st October 2000.
4. Until 16th September 2003.

Nine out of ten mergers, where remedies were required, have involved behavioural remedies, and six out of ten mergers have involved structural remedies. Structural remedies have primarily been used in mergers with horizontal elements, cf. table 2.

Table 2: Mergers with remedies in Denmark

Merger	Year	Vertical/horizontal	Structural remedies	Behavioural remedies
MD Foods / Kløver Mælk	1999	Horizontal	Yes	Yes
Arla/MD Foods	2000	Horizontal	Yes	No
Carlsberg / Albani	2000	Horizontal	Yes	Yes
Danske Bank / RealDanmark	2000	Both	Yes	Yes
DONG / Natur-gas Sjælland	2001	Vertical	No	Yes
Ditas/Dendek	2002	Horizontal	No	Yes
Danish Crown / Steff Houlberg	2002	Both	Yes	Yes
FAS	2002	Joint-venture (new market)	No	Yes
DLG / KFK	2002	Horizontal	Yes	Yes
Zonerne	2003	Joint-venture (new market)	No	Yes

3. General principles

Four general principles for devising remedies are stated in the paper from the Secretariat: remedies should only be applied when there is a threat to competition, remedies should be the least restrictive possible, remedies should not be used to industrial planning, and remedies should be creative. The Danish Competition Authority agrees with these principles, which are generally used when the authority is evaluating mergers. The Danish Competition Authority also agrees with the position that in most cases

structural remedies have an advantage over behavioural remedies whenever there is a choice between the two.

The discussion of what type of remedy to prefer is, however, not as simple as sometimes indicated in the economic literature. Some of the most common arguments for structural remedies are that they have low post-merger monitoring and enforcement costs compared to behavioural remedies, and that they don't affect the market mechanism.

But in practice, Denmark has experienced difficulties when using structural remedies. Some divestitures have required a lot of resources before the divestiture was accomplished. There have been disputes over what exactly was included in the divestiture, and over the question of how to keep the unit for divestiture in good shape, until the divestiture was completed. Furthermore, the authority must use strength and energy to approve potential buyers and sometimes it takes a lot of efforts and resources before the divestiture can be accomplished.

Structural remedies give other concerns as well. In order to be effective, there must be a unit of the merger that is suited for divestiture, i.e. viable, proportional to the threat to competition, and in a position to attract a competent buyer. Furthermore, it is important that a buyer actually intends to compete on the relevant geographic market, where competition is threatened, and not just use the facilities for exports or other purposes. These requirements are of special concern for specific types of mergers. We have experienced three types of mergers where divestiture was distinctly problematic: joint ventures, vertical mergers and mergers involving co-operatives or associations.

The mergers *FAS* and *Zonerne* were both joint ventures creating new products in new markets. The concerns to competition were related to the risk of exclusivity or foreclosure if the joint venture in near future would be very successful in the new market. (For a further description of the two mergers, see the paragraph on range of remedies).

In vertical mergers the threat to competition does not result from a higher concentration in the market. Competition concerns are more likely to arise from the possibility of foreclosure of e.g. important upstream suppliers.

Four out of ten mergers with remedies have involved co-operatives.[1] This type of merger is rather different compared to other mergers. The suppliers of raw materials typically own the company, and sometimes they are also among the company's primary customers.[2] In these cases, the companies often argue that the merger will not harm the market, since its suppliers own the company. Thus the merger will not abuse its position against its suppliers, and therefore there is no reason for the authority to intervene.

But although the merger may not harm suppliers, there can be other misgivings:

- the merged company will not face a high competitive pressure and therefore, in the long run, it cannot be expected to develop as efficiently as otherwise;
- there might be minority interests that are important to preserve;
- the merger can harm its customers.

Divestiture is problematic in these cases and can require creative solutions. In particular, it can be challenging to find means to ensure the divestiture continued access to important raw materials. The potential suppliers (e.g. of raw milk or living pigs for slaughtering) are normally reluctant to supply to the

new company because of exclusive contracts of delivery, and/or because they are owners of the co-operative and may feel it morally wrong to supply to a competitor.

Related to this issue is the merger *Ditas/Dendek*, which was a merger between two wholesale societies for DIY centres (retail sale of building materials). In this case a divestiture did not make much sense since the DIY centres were already competitors. In this case it was of special concern that there was a possibility of foreclosure of other DIY centres to the wholesale market. The remedies in this case were targeted towards opening the wholesale society to all interested DIY centres and to remove exclusive rights, thus allowing suppliers to trade with DIY centres outside the wholesale society.

The argument against behavioural remedies, that they induce high post-merger monitoring and enforcement costs, especially holds for behavioural remedies that regulate prices. However, the range of behavioural remedies is considerable, and some may not require higher post-merger costs than a divestiture, e.g. changes of the duration of contracts, changes of exclusive rights in contracts, changes in rules and regulations of the association, or remedies granting third party access to facilities, such as distribution networks.

Behavioural remedies do have strong pro-arguments as well. As noted in the paper from the secretariat, they can be more flexible. One example is when a merger takes place in a newly liberalised market. There may be large efficiency gains due to e.g. economies of scale or scope from such a merger. Behavioural remedies can be effective in order to support entry to the market, e.g. by limiting the duration of contracts between suppliers and customers or by giving third party access. Furthermore, these types of remedies may only be needed for a period of few years to boost the competition in the market. In this case behavioural remedies are more suitable since they can run for a limited time period. In addition, this type of remedy is usually rather inexpensive to implement for the parties (except for the possible loss in market share) compared to a divestiture with a proportional effect on the market. However, the authority can primarily affect the supply side of the market, whereas it is usually difficult to affect the demand side.

The merger *DONG/Naturgas Sjælland* is an example of a merger where the remedies aimed at opening the supply-side of the market. *DONG and Naturgas Sjælland* were both suppliers of natural gas to households and companies in Denmark – although in different geographic areas. Three remedies were attached to the approval. *DONG* had to limit its long-term contracts with large-scale customers. *DONG* promised more transparency in the prices and terms for transmission of gas. Finally, *DONG* had to open up for customers and competitors to store gas at their facilities.

Related to this issue is the possibility of using behavioural remedies to reduce the barriers of entry for foreign companies and thereby enlarging the relevant geographic market whenever the relevant market has a national extent.

Finally, the authority often comes to the conclusion that a divestiture cannot stand-alone but must be combined with behavioural remedies in order to have the desired effect. E.g. behavioural remedies are sometimes required for securing important input factors or access to distribution networks.

Using behavioural remedies raises the question of definite or indefinite terms of the remedy. In Denmark both definite and indefinite terms are used. The Danish Competition Authority doesn't have any possibility of reopening a merger case after an approval. Therefore, indefinite terms for behavioural remedies may be necessary. The parties can ask the authority to remove the remedy if market conditions have changed, or the authority can do so on its own initiative. This is expected to happen in many of the cases in which unlimited terms have been used.

4. Range of remedies

There have been two examples of mergers with contingent remedies in Denmark, *FAS* and *Zonerne*. Common for the two mergers was the difficulty in assessing the success of the created joint ventures. In neither of the cases the joint venture would hold a dominant position in the present market, but they could not be excluded to obtain a future dominance, nor could it be excluded that this dominance could harm competition in another market.

FAS is a joint venture between the three (now two) largest national newspapers in Denmark. *FAS* will supply the market with a new product, namely on-line access to news from the press. Prior to the joint venture, independent companies already supplied the market with news from the press (but not on-line). It was hard to estimate how successful this new service would be in the market. The merger agreed on a contingent remedy for a period of three years, stating that other suppliers (of news from the press) should be granted electronic access to the news from the merging parties' newspapers if the turnover of the joint venture exceeded DKK 37 million per year (which is app. a market share of 30%). After the three-year period the joint venture must give electronic access. It is too early to conclude on the success of this remedy as the merger took place one year ago.

In the most recent merger with remedies in Denmark a contingent remedy was used. The merger was the creation of a joint venture between the two largest national newspapers and the largest commercial Danish television broadcaster. The joint venture *Zonerne* offers classified advertisement for jobs, accommodation, cars and travel. The merger gave rise to concern about the competition on the market for classified advertisement in print. If the joint venture becomes a successful Internet marketplace for classified advertisement, there is a risk of harmful bundling of classified advertisement in the print media. Therefore, the merger agreed to a contingent remedy. If the joint venture gets more than a certain number of visitors on their Internet marketplace (corresponding to app. 30% of the market), other print-media suppliers must be granted access to classified advertisement on their marketplace. Also in this case it will be premature to conclude on the effect of the contingent remedy.

5. Implementation – Administrability and Enforceability Issues

So far the Danish Competition Authority hasn't used up-front buyers or crown jewels as part of a remedy. We do, however, not exclude the possibility of using these measures in the future. We always give the merging parties a limited time period to sell the divestiture. The authority's only restriction is that it has to approve the buyer. If this is not successful, the authority will appoint a trustee. The experience shows that it is very important that the trustee has a clear mandate. Therefore, it is important to have a detailed agreement on the scope and extent of the tasks assigned to the trustee. Furthermore, the merging parties must understand that, despite of the fact that they pay the expenses, the trustee is working on behalf of the Competition Authority.

NOTES

1. The mergers *MD Foods/Kløver Mælk, Arla/MD Foods, Danish Crown/Steff Houlberg* and *DLG/KFK*

2. The latter was the case in the merger *DLG/KFK*.

GERMANY

1. Introduction

The Bundeskartellamt's experience with the imposition of remedies (conditions or obligations) in clearance decisions under merger control is relatively new. Before the coming into force of the 6th amendment to the Act Against Restraints of Competition (ARC) in 1999 the Bundeskartellamt did not have any legal basis for making the clearance of a merger subject to remedies. The ARC merely provided for the possibility of either clearing a merger without conditions or prohibiting it. After merger control was introduced in 1973 it soon became clear, however, that this "all or nothing" principle was not appropriate in practice. Since as early as 1975 the Bundeskartellamt therefore coped with this problem by accepting commitments on the part of the companies, suitable to prevent a prohibition, and by making these binding on the basis of a public law contract. It was doubtful, however, whether these commitments were actually enforceable in case of conflict. Consequently, this practice was placed on a secure basis with the 6th amendment to the ARC in 1999. Since then the Bundeskartellamt has been able to clear mergers subject to conditions and obligations under Section 40 (3) sentence 1 of the ARC. It has used this possibility in about 40 cases since 1999.

2. Preconditions for Imposing Remedies

In procedural terms the imposition of remedies requires a formal clearance decision. They can only be imposed in clearances in the second examination phase, the so-called main examination proceedings. Clearance of a merger in the first phase of the merger control procedure, which lasts for a maximum of one month, is not given through a formal decision and can thus not be subjected to remedies (Section 40 (1) of the ARC).

Clearance subject to remedies is only possible if the merger would otherwise have to be prohibited under Section 36 (1) of the ARC on the grounds that it would result in the creation or strengthening of a dominant position, and if these grounds are eliminated by the remedies. The sheer possibility of the merger fulfilling the prohibition conditions of Section 36 (1) of the ARC is not sufficient for imposing remedies. On the contrary, before imposing remedies the Bundeskartellamt has to positively establish in its decision that without remedies the merger will lead to or strengthen a dominant position.

The imposition of remedies must not serve to pursue industrial, social or regional policy objectives. Remedies merely serve to ensure the legal preconditions for clearing a merger.

In addition all remedies must comply with the constitutional principle of proportionality. Consequently, a clearance subject to remedies may only be given if the following conditions are fulfilled:

1. The remedy is suitable to fulfil the statutory goal of merger control, i.e. to prevent the creation or strengthening of a dominant position.

2. The remedy is necessary in order to prevent the creation or strengthening of a dominant position as a result of the merger.

A clearance subject to conditions and obligations requires cooperation on the part of the companies participating in the merger. Without the parties' cooperation the Bundeskartellamt is generally unable to judge whether potential remedies, which from a purely competition law point of view would eliminate the preconditions for a prohibition, are feasible for the companies also in technical and economic terms. In practice, this question is sorted out jointly between the competition authority and the merging parties. In this way the principle of the mildest measure, which follows from the principle of proportionality, is satisfied as well since the companies obviously propose such suitable conditions and obligations which place the least burden on them.

3. Range of Remedies

Under Section 40 (3) sentence 2 of the ARC remedies imposed in a clearance decision must not be aimed at subjecting the merging companies to a permanent control of conduct. The Bundeskartellamt thus in principle only has the possibility of making a clearance subject to structural remedies.

This is in line with the purpose of merger control according to the ARC. The aim of merger control is to prevent that a merger results in the market structure deteriorating in such a way that effective competition no longer exists. However, the deterioration of the structural conditions of a market can only be prevented by remedies relating to the market structure. Permanent control of conduct, on the other hand, is no suitable instrument for protecting particular market structures as a precondition for effective competition. Therefore behavioural obligations involving permanent control of conduct do not come into consideration for merger control under the ARC. Only if and to the extent that the market structures concerned no longer allow for effective competition does the ARC provide for a permanent control of conduct within the framework of abuse control of dominant or powerful companies. However, it is precisely the emergence of such market structures which merger control is supposed to prevent. Besides, a point against obligations requiring permanent control of conduct are the practical difficulties the monitoring of such measures would involve.

The Bundeskartellamt is thus limited by law to imposing structure-related remedies. These may for instance be structural remedies in a narrower sense, for example a condition or obligation to sell parts of companies. Behavioural conditions or obligations may only be considered if they do not result in a permanent control of the merging companies' conduct and if they are aimed at the market structure.

4. Design of Remedies

Conditions or obligations imposed by the Bundeskartellamt under merger control can be classified into three types: They are either aimed at the sale of assets, opening up markets or limiting an influence based on company law.

4.1 Divestiture

The most important structural measure is the divestiture of participations, operations or assets to third parties not associated with the merging companies. As a rule, the aim of such obligations or conditions to sell is to reduce the effects of the merger by reducing the market shares held by the merging companies. The idea behind this is that the participations, operations or assets sold are used by competitors in their competition with the merged companies.

Well-known examples of this type of remedy are the Shell/Dea and BP/Veba cases which the Commission in 2001 referred to the Bundeskartellamt for examination upon application by Germany. In its decision the Bundeskartellamt imposed remedies involving, among others, Shell/Dea selling 5.3 per cent and BP/Aral 4 per cent of the total sales volume of their domestic petrol stations to third companies without, however, resulting in the creation of new dominant positions. With a network comprising around

16,000 petrol stations at the time of the merger, the market share reduction involved the sale of approx. 1500 petrol stations. Shut-downs of petrol stations were not considered to represent sales as required under the obligations. Without the obligations to sell, each Shell/Dea and BP/Aral, combined with another leading supplier, would have reached a level of concentration of more than 50 per cent of the market for fuel sales through petrol stations. This was also the case if the two mergers were considered completely independently of each other.

Under certain circumstances it may be important that the participations, operations or other assets to be sold are purchased by the same buyer (single buyer approach). This applies in particular if there is a great difference between the market shares of the merging companies and those of their competitors, and if only a considerable increase in the market share of one of these competitors can ensure that the merged companies' scope of action is effectively controlled by the competitive pressure exerted by that competitor. By dividing up the total volume to be sold between several companies which are rather small in relation to the merged companies, the merging parties would be able to eliminate the positive effect on the market resulting from the reduction in their market share.

This is illustrated by the BayWa/WLZ case which the Bundekartellamt had to decide on in 2002. Both companies are central agricultural cooperatives active in the Bavarian (BayWa) and the adjacent Baden Wurttemberg (WLZ) agricultural markets, especially in the purchase of grain and oil seeds and the retail of seeds, fertilizers and pesticides. Apart from BayWa and WLZ a great number of other companies are active in these two regional markets; however, they only hold very low market shares. Without obligations the BayWa and WLZ merger would have strengthened WLZ's existing dominant position in the agricultural markets in Baden-Wurttemberg on account of the increase in its financial strength and the elimination of potential competition from BayWa. In addition BayWa's dominant position in the Bavarian agricultural markets would have been secured on account of the elimination of potential competition. Therefore the merger could only be cleared subject to the obligation that the merging parties sell a volume of business worth 65 million euro, i.e. almost half of WLZ's turnover from trade in agricultural products, to a single company, which required the Bundeskartellamt's consent. After the sale, the creation of a dominant position held by the merging companies was no longer to be expected. At the same time it was ensured that for the first time an effective competitor entered into direct (and not only potential) competition with BayWa and WLZ in the regional agricultural markets concerned, which due to the obligation will have at least half of WLZ's business volume at its disposal.

4.2 Opening up Markets

Apart from remedies involving the sale of assets, conditions or obligations aimed at opening up markets by reducing barriers to entry are relevant in the Bundeskartellamt's practice.

Remedies aimed at opening up markets are significant particularly in markets that have been liberalised but are still dominated by former monopolists which have networks or other essential facilities at their disposal. Accordingly, the Bundeskartellamt imposes such remedies in particular in merger control in the energy sector. Mergers in this area often give rise to serious competition concerns since electricity and gas providers as a rule hold dominant monopoly positions in their supply areas. Such dominant positions are likely to be further strengthened with the creation of interlocks under company law between the providers. In the case of horizontal interlocks potential competition for supply areas may be eliminated after the expiry of the concession agreements with the municipalities. In the case of vertical interlocks, existing supply relationships between companies at the upstream and downstream levels are permanently secured.

An exemplary case constellation is the merger between Contigas Deutsche Energie-Aktiengesellschaft (Contigas) and the municipal utilities in Heide (Stadtwerke Heide) which the Bundeskartellamt cleared in

2000 subject to obligations. Stadtwerke Heide is active in the market for supplying gas to end consumers in Heide while Contigas operates in the upstream market for supplying gas to distributors in the Heide region through its sister company Schleswag AG. The merger resulted in Schleswag no longer acting as a potential competitor in the gas supply market for end consumers in Heide. Stadtwerke Heide's dominant position was thus strengthened. At the same time Schleswag's dominant position in the upstream market for supplying distributors was strengthened since Schleswag was able to secure its position as an upstream supplier through its sister company Contigas' stake in a distributor.

Consequently, Stadtwerke Heide was obliged, by means of obligations, to publish its transmission fees and calculation methods for the third-party use of the gas supply network in Heide owned by Stadtwerke Heide. In this way the legally prescribed co-utilisation of existing networks was turned from an abstract legal position into an actually available market process. At the same time Stadtwerke Heide was ordered to grant its major customers special rights of termination. This also facilitated market entry for competitors. In general the pro-competitive effects of the obligations outweighed the structural deterioration resulting from the merger, so that it could be cleared. After the Contigas/Stadtwerke Heide decision the Bundeskartellamt imposed similar obligations aimed at opening up markets (publication of transmission conditions and rates for the gas networks concerned and granting of special rights of termination for bulk buyers) in a number of other merger cases in the gas sector.

However, a condition or obligation aimed at opening up a market does not necessarily have to relate to the market affected by the merger. Under Section 36 (1), 2nd partial sentence of the ARC a merger which is expected to create or strengthen a dominant position is to be cleared if it provably leads to improvements of the conditions of competition and these improvements outweigh the disadvantages of dominance (balancing clause). Here the structural deterioration in the market affected by the merger is weighed up against the structural improvements emerging in another market. So, if conditions or obligations result in improvements of competition in another market than the one actually concerned, and these outweigh the disadvantages in the market where the dominant position is created, the merger is to be cleared.

The balancing clause was applicable e.g. in the RWE/VEW merger case. Apart from the electricity market the merger also affected the gas market where it would have resulted in RWE's and VEW's dominant positions being strengthened in several regional markets. The obligations the Bundeskartellamt had at its disposal in the gas market were not sufficient to dispel the competition concerns regarding this market. However, RWE/VEW made additional commitments aimed at opening up to competition the markets for balancing energy which they dominated. The improvements achieved by the merger and the obligations in these markets outweighed the remaining structural deterioration caused by the merger in the gas market, so that the merger was to be cleared on the basis of the balancing clause.

4.3 Limitation of Influence

In addition, the Bundeskartellamt's practice includes remedies which are aimed at limiting influence in terms of company law on particular companies or operations. They are of significance in particular as a supplement to remedies which oblige the merging parties to sell participations. In this case remedies aimed at limiting influence ensure that the merging parties cannot thwart the objective of the condition or obligation to sell by making decisions under company law before the divestiture which negatively affect the competitiveness of the object to be sold (see paragraph 5.2. below).

5. Administrability and Enforceability

5.1 Conditions and obligations

The Bundeskartellamt can impose remedies in the form of either obligations or conditions. As regards conditions, a distinction should be made between suspensive and dissolving conditions. The fundamental difference between an obligation and a condition is that an obligation directly obliges the merging companies to undertake action in the event of the merger being put into effect whereas a condition does not impose any direct obligation upon the parties but makes the effectiveness of clearance dependent on the condition.

If an obligation is not fulfilled the clearance of a merger can be revoked. The merged companies then have to be demerged. However, an obligation can also be enforced independently by coercive measures in accordance with the rules of general administration law. By contrast a suspensive condition has the effect that the clearance of a merger is only effective once the condition is fulfilled. Until the condition is fulfilled the merger may not be put into effect because the prohibition preventing this is still in place. In its effect the suspensive condition thus corresponds to the "up-front buyer" model or "fix it first solution". In the case of the dissolving condition on the other hand the clearance decision is immediately effective and so the merger can be put into effect. The effect of the clearance lapses retrospectively however once the dissolving condition is given. It is important therefore that correspondingly short time limits be agreed.

Conditions are "self-executing" and do not require separate enforcement by the competition authority. In addition the competition authority can directly initiate demerging proceedings after the violation of a condition without an intermediate revocation of the clearance. This represents a major advantage over the obligation. In the recent past the Bundeskartellamt has made increasing use of conditions, above all in the form of conditions for the divestment of specific corporate entities or assets. Apart from avoiding implementation problems, conditions also give the merging companies an incentive to put the substance of the condition into practice quickly since they cannot otherwise realize the merger (suspensive condition) or run the risk of having to demerge again immediately afterwards (dissolving condition). In this way the phase of uncertainty about the future of the object of divestiture and possible risks to its competitiveness is kept to a minimum.

Due not least to the effectiveness of conditions the Bundeskartellamt has not yet seen any reason to resort to the so-called "crown jewels" solution according to which the merging parties have to part with an alternative asset offering greater attractiveness for potential purchasers if they have not sold the object of divestiture by a specific time.

The majority of conditions imposed by the Bundeskartellamt were suspensive conditions. In 2001, for instance, the merger of two publishers of specialist magazines was cleared under the suspensive condition that the purchaser divested two specialist magazines. Without the fulfilment of this condition the merger would have led to a dominant position of the merged companies in the advertising market for electronic trade journals. However the Bundeskartellamt has also made clearances subject to dissolving conditions e.g. in the Trienekens/Awista case. This posed the risk of Trienekens' dominant position on two regional disposal markets being strengthened. Clearance was therefore made only under the dissolving condition that Trienekens divest specific financial interests and disposal capacities to an independent third party within a certain period. The effectiveness of the dissolving condition was assured by a commitment by the merging parties to make a provision in the merger agreement for the automatic reversed transaction of the agreement if the divestiture had not taken place within the specified period.

In the case of obligations additional measures are in some cases taken by the Bundeskartellamt to respond to problems associated with the implementation of obligations. In the case of the obligation to

divest, for example, it is in some circumstances advisable to appoint a trustee to oversee the first phase of divestment endeavours by the merging parties and to report on this to the Bundeskartellamt. In the event of the failure of such endeavours by the parties in the first phase the merging parties are obliged to transfer the right to divest to the trustee, who then acts as the independent divestiture trustee.

5.2 Safeguards

In Bundeskartellamt practice a condition or obligation to divest corporate entities, investments or other assets is always tied to a range of other additional remedies to ensure the effectiveness of the divestiture condition or obligation.

Firstly the purchaser in principal requires the approval of the Bundeskartellamt. This is to ensure that the merging parties do not sell the object of divestment to a third party from which no competition is expected. If the obligation to divest is to achieve its structural objective the purchaser has to be an effective one which is able to put the merging parties under real and lasting competitive pressure.

The value of the object of divestiture also has to be maintained. For this it might be necessary to transfer the exercise of voting rights in the executive organs of the companies to be divested to a trustee, a so-called “hold-separate” trustee. The merging parties are then no longer able to make any decisions which impair the competition potential of the object of divestiture and which undermine the purpose of the remedy, i.e. to make it possible for a third party to enter into effective competition with the merging parties by acquiring the object of divestiture.

However, it may be necessary under some circumstances to make arrangements for the value of the object of divestiture even after divestiture has taken place. In the Shell/Dea case already mentioned Shell/Dea, for instance, was obliged to offer fuel at favourable conditions and for a period of up to five years to refinery-independent purchasers of petrol stations sold off by Shell/Dea. This also allowed purchasers of petrol stations without refinery capacities to establish a stable competitive position on the petrol station market.

The value of the object of divestiture also played a role in the Dentsply/Degussa merger. In order to prevent the strengthening of Degussa’s dominant position on the German market for veneered ceramics for teeth Dentsply was obliged to sell a specific product line of veneered ceramics. However, in order to actually ensure the purchaser of this product line the relevant clientele and to bring about the required slimming-down process at Dentsply, Dentsply was also obliged to commit itself in the purchase contract to offer the purchaser adequate (min. two weeks) technical training in the manufacture of the veneered ceramic divested and not to bring any veneered ceramics corresponding to the product line divested on to the market within a two-year period.

6. International cooperation

In the case of mergers which are also examined by other competition authorities close coordination between the competition authorities on possible obligations and conditions is absolutely essential. Otherwise neutralising and in the worst case even contradictory remedies by different competition authorities are the likely outcome.

An important example of such cooperation in formulating obligations or conditions in Bundeskartellamt practice is the RWE/VEW case already mentioned. Parallel to this case reviewed by the Bundeskartellamt the European Commission examined the merger between Veba and Viag to form what is now E.ON. As the economic and competitive focus of this merger also lay in the energy sector in Germany, the Bundeskartellamt, in the interest of a uniform examination, at first applied for referral in accordance with Art. 9 of the European Merger Regulation After the Commission refused referral the

Bundeskartellamt and the Commission at least went on to closely coordinate their actions in both cases, which affected the same markets.

By way of obligations the Bundeskartellamt obliged RWE/VEW to divest its interests in Veag, an electricity provider in eastern Germany and its brown coal supplier Laubag. Parallel to this the European Commission obliged Veba/Viag to relinquish its interests in Veag and Laubag to a third party. The coordinated obligations imposed by the Bundeskartellamt and the Commission formed the prerequirement for the transformation of Veag into a competitor on the German electricity market which is independent of RWE/VEA and Veba/Viag. The Commission also accepted Veba/Viag's commitment to end the mutual interlocking arrangements with RWE/VEW. In turn this commitment completed the corresponding obligation imposed by the Bundeskartellamt by which RWE/VEW was to take divestment measures vis à vis Veba/Viag. These divestiture obligations which were closely coordinated between the Bundeskartellamt and the Commission were an essential precondition for stronger internal competition between RWE/VEA and E.ON, the creation of the Veba/Viag merger.

HUNGARY

Introduction

The following contribution of the Gazdasági Versenyhivatal (GVH - The Hungarian Competition Authority) to the mini-roundtable on merger remedies follows the structure of the issues paper prepared by the OECD. However, the limited number of cases the GVH had to deal with does not allow us to comment on every single issue raised by the paper due to a lack of the underlying case material, instead we try to focus on the issues that the Hungarian regulation and case law allows to comment on, with a short introduction to the relevant Hungarian rules.

The Hungarian Competition Act establishes a pre-notification system on merger cases. The application for authorization shall be submitted to the GVH within thirty days of the date of the publication of the invitation to tender, the conclusion of the contract or the acquisition of the controlling rights, whichever of them is the earliest. The merger requires the authorisation of the GVH for validity. The parties may proceed with the factual implementation of the transaction before the conclusion of the proceedings by the authority at their own risk.

The decision shall be made within 45 days if the transaction does not qualify for a merger, the thresholds are not met, or if the application may clearly not be refused. In all other cases the deadline is 120 days, which can be expanded by an additional 60 days. The investigation itself is conducted by an official of the investigation section concerned, while the final decisions are made by the Competition Council, which is the decision making body of the GVH.

1. The principles

The GVH case law appears to be in line with the principles presented in the Issues Paper.

1.1 Remedies should not be applied unless there is a threat to competition

At the imposition of remedies the GVH seems to be moderate. In the last four years out of almost 300 mergers only 11 were cleared subject to conditions. We consider that this limited number of interventions were justified by the threat to competition in all these cases, and the use of remedies allowed mergers to be completed which would have been prohibited otherwise.

These threats to competition were:

- (partially) unnecessary ancillary restraints associated with some mergers;
- discrimination as a result of vertical integration;
- changes in the market structure causing competition to potentially deteriorate;
- increase in oligopolistic interdependence, increased probability of collusion.

As it is clear from the introduction, there is a strict timetable for merger control in Hungary, too, which normally carries a certain degree of risk of agreeing on a remedy erring on the overly strict side.

However, the possibility to expand the deadline leaves some playing room for the Competition Council to cooperate with the merging parties if they needed some additional time to formulate their commitments.

1.2 Remedies as the least restrictive means to effectively eliminate the competition problem posed by a merger

The GVH is relying on remedies as a means to eliminate competition problems and is trying to find the least restrictive remedy at the same time.

A good example of this is the Friesland/Numico merger. Friesland (FEH) had a 33% share in Mizo competitor undergoing reorganisation. Numico held an option to an additional 16% share of the same undertaking. The unconditional clearance of the merger would have put the merged entity into a position that enabled it to determine the future of an important potential competitor. However a divestiture order would have caused significant losses for Friesland since the actual value of the shares were low at that phase of the reorganisation procedure. Taking all this into account the Competition Council found, that "*Competition concerns deriving from the merger would be clearly solved by the divestiture of FEH's interest in Mizo. The imposition of such a condition however – taking into account that Mizo is under reorganization – would be disproportionate for FEH as the value of a minority interest in an undertaking of uncertain future would be low so FEH would in reality loose its investment. On the other hand the quit of FEH would reduce the chance for survival by Mizo*."

1.3 Industrial planning, regulatory role

Like most competition authorities, the GVH has no mandate to engage in industrial planning, either, and the GVH is acting correspondingly, as it is illustrated by the following example. Upon a request from the Hungarian Energy Authority the Competition Council explicitly established that "*In the present proceedings it should be kept in mind that the competence of the Competition Authority relates to the solution of the competition concerns deriving from the merger. It may not undertake the general role of a market regulator even if it would lead to more desirable circumstances for competition*." Nevertheless, in practice it might prove to be very difficult to establish a borderline between industrial planning and competition supervision.

However we do not agree to a full extent with the statement quoted in the issues paper that "*the goal is to effectively remedy the violation…maintaining competition at pre-merger levels*". This statement is based on the "significant lessening of competition" test while Hungary just like most of the European jurisdictions follow a dominance test. According to this, there is a realistic option to apply a remedy that does not restore competition at the pre-merger level, but still eliminates competition concerns associated with dominance. On the other hand according to our opinion if there were only such remedies available that actually improve the conditions of competition on the market, the authority should not hesitate to apply them.

1.4 Flexibility and creativity in devising remedies

Upon imposing a remedy the GVH tends to apply the most widely accepted types: divestiture, disallowance of unnecessary ancillary restraints and providing non-discriminatory access are examples of this.

Some flexibility can be experienced in the Raffinerie Tirlementoise/Financiere-Franklin Roosevelt case, as when the parties failed to comply with the remedy, a new remedy was applied. Also to this point is to be mentioned the application of "subsequent remedies", imposing conditions in the case of failing to fulfil the original condition. This method shows some common characteristics with the contingent remedies, so it will be presented there in some details.

There is an assumption based on case law experience that the GVH prefers remedies to post-merger intervention. There was an initiative in Deutsche Telekom/Westel-Matáv from the parties to dismiss the remedy and to rely on post-merger remedies instead, but it was turned down by the Competition Council.

2. Range of remedies

2.1 Combination of behavioural and structural remedies

Upon classification issues, a third type of remedies can be distinguished alongside with structural and behavioural ones, namely information remedies. In this case the competition authority obliges the parties to provide information to enable the authority to monitor and assess the outcome of the merger.

There have been both structural and behavioural remedies applied by the GVH. It is interesting to note, that behavioural remedies were the first to be introduced and the structural remedies followed somewhat later, but this shows no preference of the authority. The opinion of the members of the Competition Council reflects the view, that divestiture is the preferred remedy in horizontal cases, while it is less preferred in vertical cases, where typically some kind of behavioural (or sometimes "quasi-structural") remedy is used.

It is typical to apply either a structural or a behavioural remedy, but in the case of Deutsche Telekom/Media One International and Westel a combination of both has been used, as after DT has acquired a majority share in the largest Hungarian mobile company (Westel), the Competition Council ordered the granting of a non-discriminatory access by the operator of the Hungarian fixed-line network, DT-daughter Matáv to all Hungarian mobile phone companies together with forbidding the amalgamation of Westel and Matáv, i.e. the largest mobile and fixed-line telecommunication companies.

In addition to this there were some obligations attached to the structural remedy but these mainly served the administration and the monitoring of the divestiture. In Raffinerie Tirlementoise/Financiere-Franklin Roosevel for instance it was subscribed to forward the minutes and decisions by the board of directors of the divested plant to the GVH during the first three years. The remedy served the proper fulfilment of the divestiture and the prevention of collusion between the former owner and the divested asset.

2.2 Interim measures

The Issues Paper raised the idea of the application of interim measures to ensure that the chosen corrective has its desired effect.

The wording of the Competition Act does not allow the application of interim measures in merger cases at all. The legal consequences of nullity of contracts if conditions are not fulfilled seem sufficient to withhold the parties from any kind of actions that would require the application of interim measures otherwise.

2.3 Contingent remedies

The Competition Act does not explicitly exclude the possibility of a contingent remedy, but the Competition Council has not applied it yet.

Somewhat similar to this are conditions that are formulated for the case of not fulfilling the original conditions ("subsequent conditions"). An example of this kind is the Group 4/Matávőr case where Matáv, the leading telecommunications company was obliged to provide non-discriminatory access to an over-band data-transfer service in the monitoring (security) market. For the case of insufficient demand due to

the lack of purchasing power in this sector, Matáv was prohibited to provide this service to any company on this market.

3. Design issues – effectiveness

The Competition Council has not yet faced serious dilemmas at the determination of remedies. The following examples try to illustrate the clear-cut approach the Competition Council has taken in divestiture cases.

In UTA Pharma/Pharma Concept the competitive concern was a horizontal effect resulting from the merger. Through the transaction the acquiring undertaking would have become a monopolist on the market of pharmacies in a quite small part of the geographic market affected by the deal. In this market, in the town of Szécsény only two pharmacies existed both of them were owned by the merging parties, respectively. In its decision the Competition Council required the selling of one of the two pharmacies.

In Bayer/Aventis the remedy prescribed was a divestiture previously ordered by the European Commission concerning the whole region. The Competition Council itself did not have to frame a remedy.

In Raffinerie Tirlementoise/Financiere-Franklin Roosevelt the divestiture affected a sugar plant jointly owned by two undertakings one of which was affected by the merger. The remedy consisted in the transferring of controlling rights of third company to a competitor in order to maintain structural competition on the sugar market.

Divestiture became a preferred remedy of horizontal concerns deriving from mergers. No vertical, conglomerate of portfolio issues were addressed by such conditions. However the relatively small number of mergers cleared subject to conditions does not make possible the drawing of general conclusions on the application of behavioural and structural remedies.

In theory the divestment of assets not affected by the merger is possible but no concerns were identified yet justifying the imposition of such remedies.

4. Implementation Administrability and Enforceability Issues

4.1 Ensuring the fulfilment of the conditions imposed on the parties

Once a remedy is applied there are possibilities to ensure its proper application. In Bayer/Aventis the authority asked for regular reports on the process of the divestiture. It is also possible to order a post-investigation to supervise the fulfilment of the undertakings and conditions offered by or imposed on the parties. In the jurisdiction of the GVH no precedence could be found for the appointment of a trustee. The Competition Act does not exclude the possibility of the appointment of it though it does not mention it either.

4.2 Up-front buyers

There have been three divestiture cases in Hungary, and an up-front buyer was identified only in one of these. However, in Raffinerie Tirlementoise/Financiere-Franklin Roosevelt the proposed condition, the transfer of controlling rights of Eastern Sugar, a sugar producing plant to another company did not proved to be a feasible solution. The Competition Council had to re-formulate the condition without an up-front buyer this time.

5. Table of cases

Number of the case	Parties (sector)	Competition threat/Remedy
VJ-104/1999	ALSTOM S. A. - ABB Handels und Verwaltungs AG (energetic equipment)	anti-competitive ancillary restraints/ *prohibition* of unnecessary ancillary restraints
Vj-152/1999	Matáv Kábel TV - Marczibányi Téri Művelődési Központ (Cable TV)	anti-competitive ancillary restraints/ *prohibition* of unnecessary ancillary restraints
Vj-176/1999	Deutsche Telekom AG - MediaOne International B.V. Westel Rádiótelefon Kft (mobile telecommunications)	discrimination, refusal to deal after vertical integration/ *non-discriminatory access* hold separate order
Vj-178/1999	Matáv Kábel TV –Marcali kábeltévés hálózata (Cable TV)	anti-competitive ancillary restraints/ *prohibition* of unnecessary ancillary restraints
VJ-74/2000	Matáv Kábel TV – Tele 6 Elektronika Kft (Cable TV)	anti-competitive ancillary restraints/ *prohibition* of unnecessary ancillary restraints
Vj-62/2001	Friesland Coberco Dairy Foods Holding N.V. - Koninklijke Numico N.V. (dairy products)	determination of the future of a competitor under reorganization p*rohibition of further acquisitions* in a further competitor in its reorganization process
Vj-116/2001	a Group 4 – Matávőr /Monitoring (property protection)	discrimination, refusal to deal after vertical integration/ *non-discriminatory access* hold separate order
VJ-127/2001	Raffinerie Tirlementoise S.A. - Financiere-Franklin Roosevelt S.A.S. (sugar production)	increased oligopolistic interdependence increased probability of collusion *divestiture*: transfer of controlling rights of a separate plant and company. Minutes of the meetings by the board of directors to be forwrded to the GVH.

Number of the case	Parties (sector)	Competition threat/Remedy
Vj-181/2001	Bayer AG- Aventis Crop Science Holding SA (chemicals)	discrimination, refusal to deal after vertical integration/ *divestiture* Hold separate order till divestiture is complete Information in every two months to GVH
Vj-182/2001	Richter, EGIS, Béres, Magyar Gyógyszer Tanácsadó, Szervezés és Szolgáltató, - Hungaropharma (pharmaceuticals)	discrimination, refusal to deal after vertical integration/ *non-discriminatory access*
Vj-39/2003	UTA Pharma Beteiligungs GmbH Pharma Concept Része-sedési és Szolgáltató Kft (pharmaceuticals)	Monopoly in a local market/ d*ivestiture*: selling of a pharmacy

ISRAEL

1. Executive Summary

- Merger control was first enacted in Israel in 1988. According to the Israeli Restrictive Trade Practices Act, 5748-1988, the General Director of the Israeli Antitrust Authority may condition a merger, and even block it, if it raises a reasonable concern of substantial injury to competition or to the public's interest.

- The general approach is that once the General Director is convinced a merger is likely to create or enhance market power, the merger should be blocked. However, in the rare cases where a merger does not raise competition concerns except in a specific segment of the merging parties' activity, the IAA considers the imposition of a divestiture obligation with respect to that segment.

- For the past two years, the IAA has been dealing with more mergers that raised substantial competitive concerns. Therefore, one can identify a slight increase in the number of approvals under conditions and an increase in the number of mergers that the General Director decided to block.

- In contrast to the past, the IAA is reluctant to impose sweeping conditions when considering distant competitive concerns; for example:

  a. where a monopoly was a party to a merger, the IAA used to instruct the monopoly to refrain from an abuse of its dominant position and literally repeated the Law's language, even if there was no evidence of a concrete competitive concern. Today such instructions are seldom used.

  b. in some cases, the IAA required parties to submit a merger for the General Director's approval even in cases where the notification thresholds that were set by the Law weren't met. The IAA found this practice inefficient and does not use it anymore.

  c. the IAA, trying to avoid the blocking of a merger, approved a merger but instructed the parties not to unite their distribution channels, thus eliminating some of the merger's efficiencies. Today, if the IAA feels that the unification of the distribution channels of the parties to the merger might harm competition, it tends to block the merger.

- The IAA has some doubts and concerns with respect to the effectiveness of some of the merger remedies; for example, it finds that it lacks efficient tools to ensure the implementation of "firewalls" and that some interpretation issues may rise with respect to this type of condition. In addition, it finds that there are practical obstacles confronting divestiture undertakings in light of the unique character of the Israeli economy. To this end, the IAA decided to make use of trustees in order to ensure the sale of assets that are under a divestiture condition.

- The General Director refrains from behavioural conditions, unless there are some prima facie indicia that the Law is likely to be violated, or that a violation occurred in the past.

2. In General

The analysis of mergers and acquisitions constitutes an important part of the Israeli Antitrust Authority's (hereinafter: "**IAA**") work. According to the Restrictive Trade Practices Act, 5748-1988 (hereinafter: "**the Antitrust Law**" or "**the Law**"), mergers that cross certain thresholds should obtain the approval of the General Director before consummation of the transaction.

The Law sets a review period of thirty days, in which the General Director has to reach a decision, unless the Antitrust Tribunal extends the period (or the merging parties give their consent to an extended period). Where the IAA fails to reach a decision within the prescribed time scale, the merger deems to be compatible with the Law.

A merger is defined in the Antitrust Law as any transaction that includes the acquisition of the essential assets of a company by another company or the acquisition of shares in a company by another company that confers on the purchasing company more than one quarter of the nominal value of the share capital issued at that time, or of the voting rights or, the right to appoint more than one quarter of the Board of Directors or, the right to participate in more than one quarter of the profits of the company.

The General Director is authorized to approve a merger, or approve a merger under conditions, and even block a merger if it raises a reasonable concern of material injury to competition or to the public's interest.

During the year 2002, the IAA considered a hundred and eighty-seven merger notifications (including transactions that were notified in 2001 but the decision regarding them was reached in the beginning of 2002). Of these a hundred and twenty-seven were in fact mergers that comply with the thresholds set by the Law. The IAA blocked 4% of the mergers; the IAA approved 16% of the mergers under conditions; and 80% of the mergers were approved. 1

This paper will describe some of the IAA's experience in the realm of merger remedies.

3. Main Tendencies

3.1 Tendency #1: A slight increase in the number of conditioned mergers

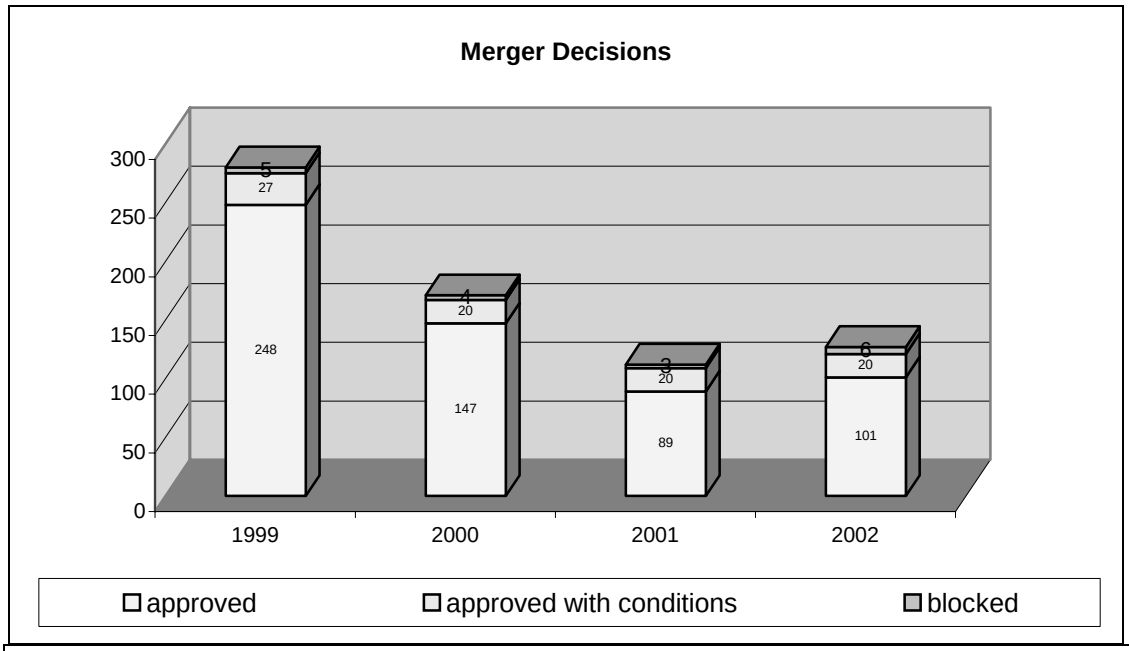
The IAA examined the percentage of mergers that were approved under conditions between the years 1999-2002 and identified a slight increase. One can attribute this increase to the economic slowdown, that Israel has been experiencing in the past two years. Many more mergers raised competition concerns and therefore the General Director was required more often to block mergers or at least intervene by imposing conditions that would lessen the competitive concerns.

Table 1

	Notified Transactions	Merger Decisions	Approved	Approved under conditions	Blocked
1999	316	280	88%	10%	2%
2000	230	171	86%	12%	2%
2001	160	112	79%	18%	3%
2002	158	127	80%	16%	4%

Notes :

- "Notified Transactions" refers to the number of applications that were submitted during the calendar year, and "Merger Decisions" refers to the number of decisions made in the calendar year. All other numbers relate to the number of decisions.
- The recession experienced in Israel since the end of 2000 has resulted in a substantial change in the character of merger applications. While the number of applications has fallen drastically since 1999, the number of problematic applications is on the rise, as firms attempt mergers that would not have been contemplated in better times and which brings with them significant consolidation in different markets.



Tendency #2: an increase in the imposition of structural remedies and a reduction in the imposition of behavioural remedies

4. Main Policy Changes

While in the past, the IAA imposed on the parties sweeping conditions in cases where the IAA recognised a distant concern that may have been realised in the future, today conditions are imposed only when closely related to specific and concrete competitive concerns. The following are a few examples of methods that the IAA used to employ in the past in dealing with distant concerns.

4.1 Conditions that Forbid Practices that are Already Forbidden Under the Law's Monopoly Provisions

The Antitrust Law was not widely enforced until 1994. One of the ways that the IAA used in order to assimilate the Law and its principles to the public was to repeat the Law's prohibitions in the conditions it imposed on mergers. Specifically, where a monopoly was a party to a merger, the IAA instructed the monopoly to refrain from an abuse of its dominant position and literally repeated the Law's language, even if there was no evidence of a concrete competitive concern. For example, in several cases one can find conditions that prohibit the monopoly to tie, discriminate, unreasonably refuse to supply, or undertake any other behaviour with equivalent effects, because of the mere fact that one of the parties was a monopoly. This was also the case in mergers to monopolies.

Over the years, the Antitrust Law gained widespread attention and consequently a substantial increase in the public's awareness. Hence, the IAA gradually inferred that this type of condition is not necessary and that the Law's norms are clear and coherent enough.

Nowadays, the IAA's working presumption is that the parties (including monopolies) are fully aware of the fact that the Law and its prohibitions apply on them even in case that this is not ordered explicitly in the decision.

4.2 Lowering of the Notification Thresholds through Conditions to a Merger

In 1997, the IAA reviewed a merger between Koor Industries Ltd. and Columbus Capital Corp. of the Claridge Group (hereinafter: "**Claridge**"). This merger was to combine one of the largest concerns operating in Israel in that days- Koor, and an important foreign investor in the Israeli market- Claridge.

The merger was reviewed in light of the special structure and characteristics of the Israeli "island market", i.e. high concentration, very few large concerns that possess large shares of the industrial product and hold a substantial part of the domestic monopolies.

Moreover, the IAA evaluated the merger's competitive effects given that both parties were traditionally co-operating with a third large concern- I.D.B. Specifically, what mainly troubled the IAA was the joint possession of Koor and I.D.B in Mashav Initiation & Development Ltd., a large company holding the Israeli cement monopoly.

It was therefore found that the merger would actually join vast co-operations together in the hands of the merged entity. The IAA found that unless conditioned, the merger, in the specific circumstances of the Israeli economy, would substantially reinforce the range of co-operations among the three largest concerns in Israel, and would raise a reasonable concern of material injury to actual or potential competition in the different fields of activity of those concerns.

The IAA decided to approve the merger under several conditions. One of the conditions was a requirement to notify the IAA of every new business co-operation or joint venture and of any new entity that the parties would hold in cross ownership with I.D.B. in which any of the parties would possess, following the consummation of the transaction, 20 per cent or more of any of the rights.

This sweeping condition lowered the threshold of notification that is required by the Law from 25 percent to 20 percent regarding transactions between Koor-Claridge on the one hand and I.D.B on the other hand.

In this case, the IAA thought that this condition, along side with other conditions, would reduce the concerns that the merger raised in connection with the parties' relations with I.D.B.

Later on, the IAA decided to cancel the condition in light of Koor and Claridge's decision to reduce their holdings in Mashav. The IAA viewed this move as a substantial change of circumstance - reducing the joint interests of the merged entity and I.D.B. Therefore the IAA found that cancelling the condition is justified.

In a different case, concerning private security companies, the IAA's analysis established that the purchaser, although not a monopoly, acquired increasing market shares by buying out smaller companies. This practice was found potentially harmful to competition. Thus, the IAA imposed a condition according to which the company was required to notify the IAA of **all** agreements that would be reached with other companies that provide security services. The IAA's experience showed that many of the transactions that were reported to it as result of this condition were not problematic at all, and actually the burden on the parties, as well as on the IAA's staff was redundant.

4.3 Prohibiting the Unification of Distribution Channels

Another type of condition that was imposed on parties on several occasions was a condition, according to which the merging parties can merge but cannot unite their distribution systems.

For example, in a merger between two large food suppliers that wanted to cooperate in marketing ice cream, the IAA approved the establishment of a joint subsidiary but prohibited the subsidiary from using the parents' distribution systems and prohibited the parents of the joint venture from using the distribution system of the subsidiary.

Later on, the parties approached the IAA asking for an easing of the conditions. The IAA decided to allow them to utilize one of the parties' existing distribution channels for the ice cream joint venture.

Today, the IAA is in the opinion that conditions of this type are a way of escaping the difficult decision of blocking a merger. Such conditions eliminate at least some of the efficiencies, which are the real essence of the merger. Therefore, if the merger raises substantial concerns to competition they should be blocked and not approved under conditions that in fact eliminate the efficiencies of the merger.

Conditions such as those that were discussed in this chapter are seldom imposed nowadays on merging parties and the IAA makes vast efforts to draft practical, focused and problem-oriented conditions.

5. Effectiveness of Conditions

5.1 Firewalls

The more common type of conditions imposed on parties to a merger is the setting up of "firewalls". The firewalls can be behavioural, such as the restriction of information-sharing, or structural, such as the separation of active managements; ensuring that employees, managers or directors of one business won't take part in the other; promising the existence of separate distribution, selling, buying and employment systems.

The IAA finds that when imposing behavioural oriented firewalls it does not have efficient tools to confirm that parties implement the conditions. The implementation of these conditions can involve interpretation issues and can lead to an absurd. A good example of this is a case where parties, who were restricted in their communication, approached the IAA and asked for specific authorization for meeting in a social event. On the other hand, in other cases, the conditions are not implemented at all or are partially implemented. In order to enforce such conditions and verify their implementation, the IAA has to allocate many resources in order to collect evidence of infringement.

Due to the abovementioned reflections as to the effectiveness of such conditions, the IAA tends to prefer the imposition of structural remedies. All the same, the IAA continues to impose behavioural conditions when a concrete concern arises. Such conditions function as a warning that sets the appropriate behavioural code for parties.

5.2 Divestiture

A less common condition the IAA imposes is divestiture ("must sell clause"). The IAA seldom imposes this undertaking since, in the small economy of Israel, it is considered to be burdensome and extreme.

The findings of the IAA's follow-up after the implementation of divestiture conditions are that parties encounter difficulties in carrying out such sales and often infringe upon the condition.

One could attribute such difficulties to Israel's being a small economy, in which the capital is concentrated in a few hands and each market is combined of only few competitors.

Moreover, due to the market's size, word about any condition of this nature would be quickly spread among the potential buyers and will make it much more difficult for the seller to obtain a decent price in return for the asset.

Due to the difficulties, parties tend not to comply with the timetable proscribed for the sale and approach the IAA from time to time to ask for extensions.

Hence, the IAA decided to make use of trusts accompanied with explicit court instructions for the sale in order to ensure the implementation of the condition and avoid its infringement.

Below is an example of a merger in which the divestiture condition was not found effective and an example of a tool the IAA decided to embrace when imposing a divestiture condition.

5.3 Retail Chains- an Example of Lack of Effectiveness

In December 1999, the IAA examined a merger between two small retail chains that merged to the third largest retail chain in Israel.

The merger raised competitive concerns in three geographical areas in which prior to the merger there had been no presence of a retail chain except for the two merging parties.

The General Director decided to approve the merger under a divestiture condition according to which the parties must sell one store in each of the three problematic areas to a third party within 6 months by means of a tender. The divestiture conditions were not implemented as will be detailed in the following paragraphs.

A few months after reaching the decision, the IAA was asked by the parties to extend the period for sale claiming that there were no acceptable bids to the tender that was published. After the parties secondly solicited the tender (this time under appropriate terms) the state of things was as follows:

a. *Area 1*: the profitability of the store that was offered for sale was substantially lower than the store that the parties intended to leave in their possession. Only few bids were submitted, offering very low prices. After a few months, the IAA discovered that the offer was placed under a minimum price and minimum thresholds for the bid. The IAA made clear that the terms of the tender are not acceptable and the only thing the parties may do in order to receive a higher price

is to offer the more profitable store in the bid. Since no offers were submitted and, due to the fact that a long duration had passed and there had been a change in the competitive situation in the area, the IAA decided to cancel the sale condition.

b. *Area 2*: the parties claimed that the conditions of the approval must be revised due to a change in circumstances. Their assertion was that because of the entrance of new competitors to the area, competition was sufficient and thus the sale is no longer required. The IAA examined their assertions and found that a grocery shop that was opened in the relevant area is not real competition to a retail chain. Only two offers were submitted at the tender offering very low prices. An extension of the sale period was given and after a few months, the IAA found that there was no need for the condition since there was a change in the competitive situation in the area. A number of new retail chains were opened nearby and the IAA's examination showed that the entrance of new competitors reduced the market share of the parties.

c. *Area 3*: as with the assertions the parties raised regarding area 2, the parties claimed there was sufficient competition in area 3. In this case the IAA was convinced that this was true since a new retail chain entered the area.

5.4 International Telecommunications Services- an Appointment of a Trustee

"Golden Lines 012 LTD." and "Barak 013 LTD" are two of the three companies licensed by the Israeli Ministry of Communications to provide international telecommunication services.

In September 2002, the IAA inspected a merger between Monitin Press LTD. and Golden Lines as a result of the merger, Monitin was to become the controlling shareholder of Golden Lines. At the same time, the owner of Monitin held a substantial part of Barak's debentures. The IAA found that the possession of Barak's debentures created a concrete interest on the part of the owners of Monitin in ensuring the profitability of Barak and its capability to pay back the principal and the interest on the debentures. Consequently, the IAA was concerned about concerted practices in the international telecommunication services market.

Therefore, the merger was approved subject to a "must sell obligation" according to which the owner of Monitin had to sell the debentures of "Barak 013 LTD." he possessed according to a certain timetable set in the decision and subject to other terms aimed at reducing the incentive to engage in concerted practices.

The timetable set for the sale determines that all debentures must be sold in two phases by the end of 2004. This two-phase sale was required due to the sellers claim that it would not be able to sell all debentures in a year. His assertion was that if he would be required to sell all debentures in a year he would be forced to sell under unfavourable terms and at a relatively low price. Potential buyers would take advantage of the tight timetable and would negotiate vigorously.

Although the IAA agreed to extend the period for sale, it insisted on ensuring the implementation of the sale. The mechanism the IAA required to this end was the appointment of a trustee who will take over the non-sold debentures at the end of the selling period and will sell them according to the instruction of court.

6. Divestiture - A General Remark

The IAA does not usually require the sale of assets prior to the approval of the merger. The IAA usually requires the parties to sell the asset within a period of at least a number of months and sometimes within more than a year. Therefore, the IAA doesn't usually adopt a policy of "fix it first" or of requiring

an up front buyer. Postponement of the consummation of the merger for such a long period will actually be equivalent to blocking the merger.

7. Conclusion

The IAA regularly examines the conditions it set in specific mergers *post factum*, including their implementation and effectiveness. Today, the IAA strives to set economically oriented conditions that relate to concrete concerns and require minimum enforcement measures.

The question of the effectiveness of different remedies is substantial and the IAA is still looking for a way to impose conditions that will assure full compliance with minimum enforcement endeavours.

NOTES

1. In addition, the IAA reached six decisions concerning the amendment or cancellation of conditions that were imposed in the past.

JAPAN

1. Introduction

Although M & As through mergers, etc. may be substantially to restrain competition in any field of trade, problems may be overcome by introducing appropriate remedies. Although the types of remedies should be considered individually and concretely for each case, the principle is to restore competition that may be diminished through such M & As by ensuring that the company group concerned cannot control market conditions such as price, etc.

In the publicized examples of prior consultation[1] concerning the examination of M & As in Japan from FY1993 – FY2002, there were 43 cases[2] where remedies were implemented[3]. Listed below are some examples of those cases by types of remedies.

2. Types of Remedies

While the following are typical remedies, one remedy does not exclude other remedies; in some cases multiple measures may need to be considered.

2.1 Acquisitions, etc.

The most effective measure to restore competition, in whole or in part, that may be diminished by M & As, is to create new competitors or to strengthen existing ones. As examples, measures such as a partial divesture of business, and/or cancellation of inter-company joint relationships (giving up voting rights, lowering the ratio of voting rights, discontinuation of interlocking directorates, etc.), etc. may be considered. Among the publicized cases in Japan, the following is an example of a partial divesture of business.

2.1.1 Business consolidation by Nippon Paper Industries Co., Ltd. and Daishowa Paper Manufacturing Co., Ltd through the establishment of a holding company

This was a case of business consolidation between paper manufacturing companies. The proposed consolidation raised concerns about increasing the market power of the parties concerned in addition to parallel action among larger manufacturers, including the parties , by their higher concentration in such major paper markets as high-grade printing paper, fine-coated printing paper, coated-paper, and light-coated paper. Therefore, the consolidation might be substantially to restrain competition in these fields of trade. In response, the parties proposed divesting to a third party, within three years, manufacturing facilities equivalent to 500,000 tons annually of paper product capacity which accounted for 8% of the total production of 5,900,000 tons, and related operations. The divesture was in the area of major paper products for printing and information use such as coated paper and high-grade printing paper, where demand was expected to rise.

However, there may be some cases where it is not easy to find a suitable party to whom some of the business of the company group (e.g. manufacturing and sales or research and development) can be

transferred due to circumstances such as falling demand or small market size. In such cases, it may be appropriate to set up cost-basis trading rights (long-term trading rights) for competitors, such as in the following case.

2.1.2 Merger between Mitsui Chemicals, Inc. and Sumitomo Chemical Co., Ltd.[4]

This was a merger between chemical products manufacturers. With respect to small-lot trading of aniline as well as resorcin and meta/para-cresol, the Japan Fair Trade Commission (JFTC) concluded that the proposed merger might be substantially to restrain competition in this field of trade since there were no competitors capable of exerting a preventive effect in relation to any of these products and there was not enough pressure from imports. In response, the merging parties proposed that within two years of setting up the new company, cost-basis trading rights would be provided for trading companies or competitors in the markets for each product in amounts equivalent to the external sales volumes of one of the parties concerned and that when establishing the trading rights, they would report to the JFTC on the details of related long-term trading rights and implementation methods.[5]

2.2 Measures to promote imports and market entry

As mentioned above, where it is not possible to partially divest the business of the company group as a remedy due to falling demand, etc., one solution to restoring competition, in whole or in part, that may be diminished by M & As is to promote imports or market entry.

For instance, in some cases competition can be restored by 1) promoting imports by allowing importers to use storage facilities necessary for import, or 2) licensing the patents, etc. possessed by the company concerned to competitors or new entrants at appropriate terms and conditions, such as in the following example.

2.2.1 Merger between Chichibu Onoda Co., Ltd. and Nippon Cement Co., Ltd.

This was a merger between cement manufacturers that together with another concurrent merger would have made the domestic sales of the top-three companies in Japan account for a market share of 80%. As one of the merger remedies, the merging parties proposed leasing a large coastal service station (storage and shipment station of cement) to importers.

2.2.2 Business Consolidation by Japan Airlines and Japan Airsystem Co., Ltd. through the establishment of a holding company

This was a case of business consolidation between major airlines, which the JFTC was aware might be substantially to restrain competition in the domestic air passenger transport business field, etc., for the following reasons:

1. The number of major airlines would have been reduced from three to two, thus facilitating the previous “parallel” fare-setting action by major airlines.

2. As the number of airlines operating on an air route decreases, the proportion of routes where Specified Flights Discount Fare is offered for all flights falls and the size of such discounts becomes lower; hence competition would have been seriously affected by a reduction in the number of major airlines.

3. In addition, it would have been difficult for newcomers to enter the market due to factors such as limitations on the number of slots (the number of takeoffs/landings allowed) at congested airports, etc., so the entry of new players was unlikely to provide competitive pressure to deter concerted "parallel" fare-setting actions.

In view of the JFTC's concerns, the parties involved proposed measures to promote entry by new airlines such as 1) return of some takeoff and landing slots at airports, 2) leasing airport facilities used by the parties concerned (boarding bridges, gate parking spots, check-in counters, etc.) to the new airlines, and 3) cooperation with new airlines by means of undertaking various services such as aircraft maintenance.

2.3 Measures to restrain the behaviour of the company group concerned

Furthermore, in some cases it is possible to restore competition by restricting the behaviour of the company group concerned. For instance, it may be possible to prevent the market from becoming closed or exclusive by prohibiting discriminatory treatment of businesses that are not in inter-company joint relationships regarding the use, etc. of essential facilities for doing business. The following is a typical example.

2.3.1 Acquisition of stocks of JSAT Co., Ltd. by NTT Communications Co., Ltd.

This was a case of stock acquisition concerning satellite telecommunications businesses. The JFTC was concerned that the proposed acquisition might be substantially to restrain competition in the domestic field of private leased circuits using satellites, as JAST's overall business capabilities would have substantially increased. To remedy this, the parties concerned proposed trading with other satellite communications businesses under fair and proper terms and conditions; moreover, in case of providing service by connecting with satellite communications operators, appropriate connection rates and technical conditions would also be fixed by connection agreements, etc. made under fair terms and conditions.

2.4 Ensuring that remedies are properly implemented

It is desirable to implement remedies before M & As proceed. The JFTC can confirm by the filing system if remedies were or will be done. Further, in Japan, remedies are made effective by such measures as requiring them to be stated in the filing report of mergers and acquisitions, etc. which are subject to prior filing[6], and by 1) extending the period to render cease and desist orders[7] and 2) imposing criminal sanctions on false descriptions, if the descriptions in the filing report prove untrue.

Furthermore, when behavioural remedies are introduced, the JFTC monitors the deviant behaviour of the parties concerned through various means, including reports on the parties' business activities for a certain period (several years to 10 years) following the M & A s.

NOTES

1. In Japan, in some cases merging parties voluntarily hold prior consultations with the JFTC to avoid risks such as the block of mergers, etc. Most cases that may potentially become a problem in light of the Antimonopoly Act as considered by the JFTC are cases in which the parties concerned hold prior consultations. Further, in Japan, those cases of business consolidation which require careful consideration under the Antimonopoly Act are examined at the time of prior consultation in the present circumstances. Hence, guidelines on prior consultation were publicized in December 2002 to ensure fairness in implementing procedures (see DAFEE/COMP/WP3/WD (2003)5).

2. There are examples involving multiple cases, hence, on a net basis of examples this corresponds to 39 examples.

3. This includes not only remedies taken by the parties concerned after the JFTC pointed out that the cases might be substantially to restrain competition, but also measures independently taken by the parties concerned prior to such remarks by the JFTC.

4. In this case the combination itself was cancelled due to independent reasons of the parties concerned.

5. In addition, the parties concerned proposed that if requested by the trading companies, etc., the parties would provide product information and storage tanks, and when requested by the JFTC, the merger parties concerned would report on the progress of carrying out all measures.

6. Regarding mergers, business acquisitions and division of businesses, it is stipulated under the law that the implementation of such actions is prohibited for 30 days from the filing.

7. In case of violation of the Antimonopoly Act, the JFTC takes cease-and-desist orders within 30 days of the filing (within 90 days of the response to the second request). If there is a false description in the filing, however, this period shall not apply.

KOREA

1. Introduction

In Korea, anti-competitive mergers are prohibited under the Monopoly Regulation and Fair Trade Act(MRFTA). The KFTC imposes merger remedies against violators and when they fail to comply with a given remedy, compliance securing mechanism such as compulsory enforcement charges and criminal penalties will be put in motion.

1.1 General Principles on Merger Remedies

Merger remedies are applied when the concerned merger brings about substantial lessening of competition. Such mergers should be ones that pose an obvious and demonstrable threat to competition, not the uncertain potential threat.

The KFTC can select an appropriate remedy according to the types of mergers. Such remedies include prohibition, disposition of all or part of shares, resignation of an officer and sales of asset. With the revision of the MRFTA in 1999, 'restriction on the type or scope of management that may prevent competition restrictive effects of given business combination' has been newly included as remedies. Such measure is to enhance remedy effectiveness by securing flexibility and creativity in remedy design.

While mergers restrict competition, it may have a beneficial effect of improving corporate competitiveness. Therefore, remedies are confined to the least restrictive means that effectively eliminate the threats to competition triggered by merger. Merger reviews are conducted strictly from the perspective of competition law while industrial policy considerations outside the realm of the KFTC are not given weight. In this regard, the KFTC is complying with the 'general principles on merger remedies' suggested on the OECD Secretariat Report.

1.2 Types of Merger Remedies

Merger remedies stipulated under the MRFTA fall largely into two categories, structural remedies and behavioural remedies. While restriction on the type or scope of management is subject to the latter category, sales of asset, disposition of stocks and resignation of an officer belong to the former category. The MRFTA recognizes the interlocking directorate as one type of mergers and hence the resignation of an officer can be imposed on such action.

1.3 Implementation of Merger Remedies – Recent Trend

Since the introduction of the MRFTA in 1980, merger remedies had been imposed only twice until 1994. However, the implementation has become more frequent since 1998. The KFTC has imposed merger remedies three times in 1998, twice in 1999, four times in 2000, once in 2001 and twice in 2002. While the number fluctuates somewhat, the implementation has become frequent after 1998.

Looking at the types of remedies shows that structural remedies take up half of all merger remedies. Structural remedies have not been imposed for 10 years after being applied twice in 1982. However, implementation has become more frequent recently. The remedies have been applied once in '98, once in

'00, twice in '02 and once in '03. The rest of merger remedies are behavioural such as setting the ceiling on increase rate of price.

The recent increase in the implementation of remedies can be largely attributed to the surge in M&A. After the financial crisis in 1997, corporate restructuring efforts led to a rapid increase in M&A and during the process, many companies engaged in horizontal and vertical mergers seeking to increase its market dominance while conglomerate mergers, a major form of mergers in the past, declined compared to other two types of merger.

1.4 Contingent Merger Remedies and Post Merger Remedies

The KFTC does not impose contingent merger remedies or post merger remedies. In legal context, mergers are not subject to the sanction of competition authorities in Korea. Instead, merger is, in principle, permitted and even for anti-competitive mergers, remedies rather than conditional sanctions are imposed to dissolve the illegality of the merger.

In Korea, merger review determines the illegality of given merger based on its threat to competition expected at the time of the review while the likelihood of such threat after the merger approval is not taken into consideration. Even when such likelihood is reasonably predicted at the time of the review under certain market conditions at certain time of the future, merger remedies cannot be imposed unless such threat is certain and substantial at present or in near future. As such, contingent merger remedies and post merger remedies cannot be imposed by the KFTC and have never been put to motion.

From the perspective of policymakers, contingent and post merger remedies have both merits and demerits. Above all, such remedies increase market unpredictability as effects of mergers are re-evaluated after the approval of mergers. Also, if anti-competitive problems arise after the merger approval, competition authorities could regulate the concerned enterprise for abusing its market-dominant position.

On the other hand, given that merger review is conducted based on the estimation of future situation, identification of the threat to competition is inevitably restricted to the substantial degree. Furthermore, the fact that the threat to competition posed by the merger is uncertain at the present time does not necessarily lead to the denial of the possibility that the anti-competitive effect ensued could be brought about by the merger in question. Especially, there could be a case where anti-competitive harms caused by a merger, though uncertain at the present time, need be prevented on the ground that those harms are reasonably expected to occur under certain future market condition. In this case, those harms should be ones that cannot be tackled through the behavioural regulation and can be dissolved only by the means of merger regulation.

1.5 Interim Remedies

Competition authorities should ensure that concerned mergers are not completed during the review process. Remedies imposed after the completion of a merger incur a huge cost to merging parties while the expected effects of remedies are greatly reduced. However, interim measures are not necessary in Korea. Since stock acquisition is subject to post-notification in Korea, the KFTC does not have the means to temporarily halt the merger process during review. Moreover, the MRFTA bans closing the merger within 30 days (extension to 60 days possible) after the pre-notification of mergers involving an enterprise with the total asset or turnover of 2 trillion won.

2. Structural Remedies

Structural remedies including asset divestiture have the advantage of addressing directly the problematic part of the concerned mergers. Moreover, structural remedies can avoid side effects

accompanying behavioural remedies that lead to market intervention for a certain period of time by controlling business activities after the merger such as price, market share or terms and conditions of transaction, thus reducing economic efficiency and incurring the cost of monitoring to a great extent. In this vein, the implementation of structural remedies has become more frequent as was mentioned above.

Structural remedies were imposed mainly on horizontal mergers that pose an explicit threat to competition. Under the MRFTA, structural remedies are imposed, following the same procedures as transfer of business. However, the MRFTA does not stipulate details such as the scope of business that should be transferred, transfer process, transfer timeline and so on. Therefore, the scope of transferable business is not confined to an entirety of an ongoing business. Neither is the transfer process limited to clean sweep approach. Competition authorities do not intervene in buyer selection or sales price fixing process.

In actuality, the KFTC only designates the scope of asset that should be divested and the divestiture timeline when ordering business transfer to anti-competitive mergers. Concerned enterprises are not required to settle on the price or buyer before the divestiture. The KFTC only requires merging parties to complete business transfer within a certain period of time after remedies are put in motion.

While the MRFTA is without provisions on the scope of asset for divestiture, the KFTC usually limits the scope to assets that are directly related with harmful effects of anti-competitive mergers. Whether competition authorities can include within a divestiture order assets not directly employed in the related markets to bring competition to pre-merger level is purely hypothetical question in Korea. Nevertheless, if competition authorities extend the scope of assets in order to enhance competition beyond pre-merger level, such action cannot be thought to be within the realm of merger remedies. In other words, even if an enterprise enjoying the economies of scope before the merger enhances its market dominance through the merger not only in the concerned market but also in the market that is outside but highly related with concerned market, it is undesirable that the competition authorities order the sale of assets outside the concerned market.

The KFTC does not require merging parties to complete divestiture or buyer selection before the merger approval. Asset divestiture cannot be a precondition of merger approval since divestiture is one of remedies imposed against anti-competitive mergers. However, the KFTC has the mechanism at hand to ensure compliance with divestiture measure. The KFTC can levy compulsory enforcement charges against non-complying parties. In detail, the KFTC can impose enforcement charges to a maximum 3/10,000 of concerned merger value per day from the day after the remedy deadline to the day of compliance. Moreover, the KFTC can lodge the complaint to the prosecution. Given that there was only one case of delayed compliance and no case of non-compliance up to now, the compliance mechanism of compulsory enforcement charges and prosecution is believed to be effective.

While there was no case in which the KFTC ordered monitoring trustees to be nominated as part of merger remedy, its orders explicitly include the statement that merging parties should not engage in any acts that could hinder the divestiture. While the KFTC does not have provisions on monitoring trustees, such measures seem to be useful at times. Concerned merging parties could attempt to injure the value of assets to prevent the asset acquiring party from rising as a strong competitor. If the KFTC decides to employ monitoring trustees, such trustees should be at least given the right to collect information and impose interim measures to ensure that the value of assets is preserved until the divestiture is completed and should be required to report to the competition authorities to inform the KFTC of the progress in divestiture process.

Cases of Asset Divestiture (Box 1)

- In December 2002, the KFTC imposed structural remedies on Kolon Co. that sought to acquire the nylon film business of Kohap Corp.

- Kolon Co., a chemical textile manufacturer and a leader in the nylon film market with the market share of 45.89%, acquired Kohap, a third in the market with the share of 13.1%.

- As a result of merger, the market share of Kolon increased to 59% and the gap between Kolon and the second player widened to 29.9% from the previous 16.8%. Factors that could weaken the threat to competition such as import penetration and new entrants to market were not found.

- The KFTC ordered Kolon to sell within 2 months all production facilities acquired from Kohap except for uncompleted single-line production facility to the third party who does not have affiliate relationship with Kolon and required Kolon not to engage in any activities that might hinder divestiture process during the compliance period.

3. Behavioural Remedies

While structural remedies are the most effective tools of eliminating threats to competition, such remedies remove efficiencies that might come with merger as well. Depending on market situation and the type of mergers, threats to competition triggered by merger can be eliminated using means other than divestiture. Therefore, behavioural remedies could be imposed to remove threats to competition while securing the benefits of enhanced efficiencies.

The KFTC prefers applying behavioural remedies on horizontal and conglomerate mergers and considers it desirable to impose behavioural remedies on innovation market. When a given merger triggers the monopoly of essential facilities, intellectual property rights(IPR) and license rather than the monopoly from increased market share, in other words, when an anti-competitive merger is related to specific production factors, ensuring the third party access to facilities or IPR would eliminate the threat without seriously compromising the would-be efficiency of the merger.

Unlike structural remedies, behavioural remedies take many forms and competition authorities have to devise appropriate behavioural remedies depending on the characteristic of relevant market or the type of mergers. In the same vein, under the MRFTA, behavioural remedies are stipulated as 'restriction on the type or scope of management that may prevent competition restrictive effects of given business combination.'

Behavioural remedies applied by the KFTC takes various forms such as imposing a ceiling on sales price of the item combined by merging parties in local market, a ceiling on increased rate of sales price in local market, setting an annual quota for the mandatory purchase from non-affiliate parts suppliers and prohibition on unfair treatment against suppliers. The implementation period for a behavioural remedy is determined depending on forecast about future market condition. The KFTC usually applies behavioural remedies for five years in sectors where market condition slowly changes and three in rapidly-changing sectors and undertake reviews to determine whether to continue a given remedy. The same compliance securing mechanism is applied in behavioural remedies as in structural remedies.

Case of Behavioural Remedies (Box 2)

- On Jan. 2003, the KFTC imposed behavioural remedies on a merger between LG Homeshopping Co. and Ulsan Cable TV Co.
- LG Homeshopping Co. runs home shopping channel and Ulsan Cable TV Co. is a cable operator in Ulsan province. Since the business of the acquired firm is an instrument to broadcasting the program of the acquiring firm, such merger was considered vertical.
- The relevant market of the merger was confined to the regional market of Ulsan Cable TV Co. since cable operators run their business within an area authorized by the Ministry of Information and Communication and the market of home shopping channel is limited to the zone where relevant cable operators air the program.
- Ulsan Cable TV Co., an acquired party is a monopoly in cable operation market with its exclusive business permit in Ulsan province. LG Homeshopping is a leader out of 5 home shopping channels with the market share of 60.5% in Ulsan.
- The merger would join two monopolies in different sectors, home shopping channel and cable operation and hence, merging parties could exclude competitors in each market, leveraging its dominant position. In other words, LG Homeshopping Co. could prevent Ulsan Cable TV Co. From airing programs of its 4 homeshopping channel providers and at the same time refuse to provide its programs to new entrants of cable operation market, a potential competitor to Ulsan Cable TV.
- The KFTC imposed behavioural remedies on the merger, requiring LG Homeshopping Co. not to unduly refuse to provide its programs to competitors of Ulsan Cable TV or unfairly treat such competitors.
- Moreover, the KFTC ordered Ulsan Cable TV Co.not to unduly reject transactions with or unfairly treat competitors of LG Homeshopping Co. when delivering their service to subscribers.
- Especially, Ulsan Cable TV Co. was required to report to the KFTC its list of channel allocation within 30 days after the starting date of remedies and was to notify the KFTC of any further changes in allocation within 30 days after the change.
- Whether to terminate the aforementioned remedies would be determined every three years from the starting date of the previous remedy and the KFTC will conduct a review within 90 days from the starting date of the third year and make a decision.

4. Other Issues

International cooperation is very important in trans-border mergers given that the review of national competition authorities on such mergers affects a number of other countries. Korea has not witnessed a case where such review adversely affects its local market. However, international cooperation need be promoted in trans-border mergers, a topic of interest to competition authorities worldwide. Given that core issues such as the manner, scope and intensity of international cooperation is closely related to economic sovereignty of states, future discussion should be made on the base of various but specific alternatives.

LITHUANIA

Merger review is supposed to tell how to eliminate a threat to competition posed by a merger. Lithuanian Competition Council fully agrees with the four general principles contained in a recent speech by Deborah Majoras and cited in the Merger Remedies Roundtable Issues paper. However, the idea of supplementing the aforementioned principles with the principle of relying on post-merger remedies to take care of competition problems if and when they actually arise seems to be controversial. It is true that quite often competition authority does have discretion concerning the choice of remedies including an alternative not to impose any *ex ante* remedy. The Competition Council in Lithuania is no exception. The Lithuanian Competition Law can be interpreted as allowing such possibility. However, if such approach were used systematically then competition authority would de facto abandon merger control and it should be hard to find reasonable justification for doing so. It seems that only under very unusual and exceptional circumstances it might be reasonable to restrain from *ex ante* remedies. Furthermore, there might be dangerous to attempt to formulate explicit rules stipulating when such approach could be used. It could be tempting to test the limits of such rules by allowing some mergers to proceed and making it much more costly to deal with *ex post*. The expected costs would most likely outweigh the expected benefits.

Concerning another focal problems raised in the Roundtable Issues paper, that is the choice between a structural and behavioural approach and implementation of remedies, the Competition Council considers a structural approach to be superior choice in most of the cases. This belief is based mostly on a relatively short experience (only a decade) of a merger review. To illustrate it the rest of this contribution will be devoted to two actual merger cases that the Competition Council of the Republic of Lithuania had to deal with several years ago and one complicated merger case that the Competition Council prepared to investigate but did not have to since the merger was abandoned. All of those mergers were horizontal and after considering various alternatives the Competition Council had little doubt that structural approach should be used in selection of adequate remedies.

1. A merger of business undertakings involved in scrap metal purchasing and processing

In 2000 closed stock company *Vitoma* notified the Competition Council about its intent to acquire shares of four companies offered for privatisation, that is 70.09 percent of shares of stock company *Antrimeta*, 70 percent of shares of the closed stock company *Ikrova*, 70 percent of shares of the closed stock company *Metalo lauzas*, and 70 percent of shares of the closed stock company *Antriniai metalai*. All of those companies were involved in purchasing and processing of scrap metal, the relevant market defined as purchasing of scrap metal in the territory of Lithuania. The sum of the pre-merger market shares of all involved companies was close to 48 percent and the sum of the pre-merger market shares of the target companies made up approximately 22.5 percent. The Competition Council came to the conclusion that the proposed merger would have established a dominant position and thus would have resulted in a substantial restriction of competition in the relevant market. Upon making the final decision the Competition Council took into account the evidence concerning significant economies of scale, presence of buyer power, relative weakness of the sellers, difficulty of a large-scale entry, and long-term export contracts with a large foreign buyer. All these circumstances were conducive to the ability to depress prices post-merger in the relevant upstream market. *Vitoma* did not propose any remedies at that time and the Competition Council refused to grant a permission to implement the concentration on the basis of the submitted notification.

After some time *Vitoma* submitted a new notification to the Competition Council concerning the same acquisition, however, simultaneously proposing to sell some of its physical assets. Even though they did

not constitute stand-alone ongoing business such divestiture would have resulted in a significant reduction of *Vitoma's* productive capacity. The new investigation also showed recent changes in the distribution of market shares. *Vitoma's* market share decreased because of a new entry. This was related among other factors to the substantial decrease of the licence fee set by the government. The Competition Council accepted the proposed remedies and permitted concentration under certain matching conditions and obligations.

In our view this case can be characterized by the following features:

- Horizontal merger;
- Structural remedy: divestiture of business related assets;
- Effectiveness: eliminated threat to competition;
- Administrability: clean sweep divestiture, upfront buyers.

2. A merger of breweries

In 2000 *Carlsberg* A/S and *Orkla* ASA announced their plans to create *Carlsberg Breweries* A/S. The new company was supposed to be owned 60 percent by *Carlsberg* A/S and 40 percent by *Orkla* ASA. Despite the fact that foreign companies were involved in this merger it did threaten competition in Lithuania. All three largest Lithuanian breweries, that is stock company *Kalnapilis,* closed stock company *Utenos alus*, and stock company *Svyturys,* were directly or indirectly controlled by the merging foreign companies. The sum of pre-merger market shares of the aforementioned Lithuanian breweries was approximately 60 percent, however, they had more than 90 percent in the premium beer segment. The Competition Council came to the conclusion that intended concentration would have strengthened a dominant position in the relevant market (*Kalnapilis* and *Utenos alus* were already controlled by the same parent company) and therefore would have significantly restricted competition. The Competition Council informed representatives of the merging parties and started negotiations concerning adequate remedies. Since all three Lithuanian breweries directly affected by the merger were approximately of equal size the Competition Council insisted that the only adequate remedy was to sell one of the breweries in a time period prescribed by the Competition Council. Thus the final decision contained the following conditions and obligations. First of all, *Carlsberg* A/S (parent company of *Svyturys*) and/or BBH (parent company of *Utenos alus* and *Kalnapilis*) were obligated to sell an unspecified brewery (either *Svyturys* or *Kalnapilis* or *Utenos alus*) within the prescribed time limit. Secondly, until the divestiture *Carlsberg* A/S was obligated to maintain viability of the aforementioned breweries. Later the Competition Council agreed to extend imposed time limit for divestiture for a reasonably short period of time and finally one of the breweries (*Kalnapilis*) was divested.

In our view this case can be characterized by the following features:

- Horizontal merger;
- Structural remedy: divestiture of stand-alone ongoing business;
- Effectiveness: eliminated threat to competition;
- Administrability: clean sweep divestiture completed in a short period of time, however, some monitoring was required to ensure compliance with obligations.

3. Intended merger of banks

In 2001 the Competition Council received a request from the Estonian bank AS *Hansapank* to permit the acquisition of more than 90 percent of the shares of the stock company *Lietuvos taupomasis bankas* (Lithuanian Savings Bank) which was owned by the state and offered for privatisation. This was a horizontal concentration in the market of financial services but by itself it did not threaten to create a dominant position. However, almost at the same time when the Competition Council was reviewing the merger the announcement was made by *Forenings Sparbanken* AS (*Swedbank*) and *Skandinaviska Enskilda Banken* AB (SEB) about their intention to merge. *Swedbank* was a strategic shareholder of AS *Hansapank* and SEB was a strategic shareholder of *Vilniaus Bankas*. The sum of market shares of the two largest Lithuanian banks, that is *Vilniaus Bankas* and *Lietuvos taupomasis bankas* exceeded 40 percent threshold for several key financial services. Thus it was very likely that the latter merger would have created a dominant position in Lithuania. Nevertheless, the intended merger of Swedish banks was not even notified to the EU Commission at that time. Therefore the Competition Council only communicated its view to the relevant parties and governmental institutions in Lithuania that the only possible solution if both mergers took place would have been divestiture of one of the banks in Lithuania but before the beginning of implementation of the merger of Swedish banks there was no ground to block the acquisition of *Lietuvos taupomasis bankas* by AS *Hansapank*. The Competition Council also contacted the European Commission and Swedish competition authority.

Later the Competition Council received a letter from the SEB and *Swedbank* confirming that the merging parties agreed with the divesture of one of the banks in Lithuania in case their merger was allowed to proceed. However, having received the statement of objections from the European Commission the SEB and *Swedbank* abandoned their intentions to merge.

In our opinion this case can be characterized by the following features:

- Two separate horizontal mergers;
- Structural remedy: divestiture of stand-alone ongoing business if the second merger takes place;
- Effectiveness: eliminated threat to competition;
- Administrability: clean sweep divestiture but unlikely in a short period of time, extended monitoring would have been needed ensure compliance.

NETHERLANDS

1. Introduction

This paper will first briefly describe the treatment of remedies under Dutch Merger Control. It will then reply to the items and questions raised in the OECD Merger Remedies Issues Paper.

Together with this paper we attach the English version of the *'Guidelines for the Contents, Submission and Implementation of Remedies in Relation to Concentrations'* (the Remedies Guidelines) which were published by The Netherlands Competition Authority (the NMa) on 17 December 2002. We would like to draw your attention to the fact that the only official version is the Dutch one (‘*Richtsnoeren voor de inhoud, indiening en tenuitvoerlegging van remedies bij concentraties’*) which can be found on the website of the NMa: http://www.nmanet.nl/nl/Images/11_5838.pdf. The English translation is still in draft form and has not been published yet; it should therefore only be used for the purposes of preparing the discussion for the Merger Remedies Roundtable.

2. Remedies under Dutch Merger Control

Dutch Merger Control is a relatively young regime, the Dutch Competition Act (the Act) entered into force in January 1998. The Merger Control provisions in the Act mirror to a large extent the European Merger Control Regulation (the ECMR).

Dutch Merger control is a pre-merger mandatory filing system that consists of two phases: the notification phase and the licensing phase. In the notification phase the NMa has a deadline of four weeks, starting from the day of the filing of the merger, in which to announce whether a licence is required in order to implement the notified merger. A licence will be required if the NMa has reasons to assume that as a result of the notified merger a dominant position may arise or may be strengthened which will appreciably restrict competition on the Dutch market or a part of it. If a licence is required and subsequently applied for (by means of another notification which requires much more information then the one in the notification phase), the NMa will have a deadline of thirteen weeks, starting from the day of filing the request for a licence, in which to decide whether a licence will be granted. The licence will be rejected whenever the merger will lead to the creation or strengthening of a dominant position on the Dutch market or a part of it.

The provisions in the Act only explicitly enable the NMa to accept remedies in the licensing phase. There are no articles in the Act regarding remedies in the notification phase.

According to the Act, the NMa may only issue a licence for the implementation of a merger subject to 'restrictions and/or instructions' in the licensing phase.

However, in the Explanatory Memorandum to the Act, the legislator mentions the possibility, in certain circumstances, of modifying the notified merger in the notification phase in order to avoid the competition concerns which may arise from the merger. The Explanatory Memorandum refers to the possibility that the notifying parties may modify the notified concentration in the notification phase, if they so wish, to avoid having to enter into the licensing phase. The NMa, therefore, will only have the power to accept or reject the modification proposed by the notifying parties but is not entitled to issue a decision subject to restrictions and/or instructions like in the licensing phase. This means that the NMa has little flexibility when it comes to trying to solve possible competition problems arising from the merger in the

notification phase and, what is more important, has no express powers to enforce the implementation of remedies in the notification phase.

Despite these limitations, it is the practice of the NMa, where possible, to consider modifications proposed by the notified parties in the notification phase.

As a matter of fact, at the moment of writing, there is approximately the same amount of merger cases where modifications have been accepted in the notification phase than merger cases where remedies have been accepted in the licensing phase.

For more details regarding the remedies in the notification phase, see paragraphs 48 to 55 of the Remedies Guidelines.

For the sake of simplicity, from now on the term 'remedies' will be used for both remedies and modifications except where it is necessary to make a specification.

The NMa encourages the parties to a notifiable merger that may raise competition issues to contact the NMa at an early pre-notification stage in order to discuss these issues and start thinking of possible solutions.

When the possibility of solving the competition problems exists, the NMa makes it clear that it is up to the parties to the merger to take the initiative to propose remedies. At this stage, the NMa will only go as far as trying to inform the notifying parties of the competition problems that have been identified. Furthermore, it is up to the notifying parties to convince the NMa that the proposed remedies will solve the competition problems and that the remedies can be implemented in a timely manner.

Once the proposed remedies have been submitted, it is the practice of the NMa to carry out a market test amongst other market players in order to test the effectiveness and the feasibility of the proposals.

If the NMa accepts the remedies and the parties go ahead and implement the merger in breach of these remedies, the NMa has the power to impose fines and/or daily penalty payments. In addition, in the event of failure to comply with the remedies attached to the license, this shall constitute acting without a license. It is also not excluded that, in case of a merger that is implemented in breach of the accepted modification, the merger agreement(s) may be declared null and void by a Dutch civil court.

With regard to the type of remedies, the NMa has a clear preference for structural remedies. Structural remedies provide for a structural lasting solution and, in principle, require no further supervision after implementation. The NMa does not have a special Remedies Unit and cannot afford dedicating excessive time in the monitoring of remedies. As indicated in the Remedies Guidelines, remedies should require none or only limited supervision by the NMa.

However, the NMa is prepared to accept behavioural remedies in certain circumstances where structural remedies do not provide the adequate solution to the problem or cannot be implemented and as long as the behavioural remedy will provide an adequate solution. In some cases, a combination of structural and behavioural remedies may provide the appropriate solution.

Behavioural remedies cannot be accepted in a notification phase due to the limitations that the NMa has regarding the enforcement of remedies and in particular those requiring monitoring. Remedies in the notification phase have to be structural, simple and clearly solve the identified problems.

At the moment of writing, the vast majority of remedies accepted by the NMa are divestment remedies.

The practice of the NMa concerning the submission and the implementation of remedies closely follows the practice under the ECMR (as described in the 2001 Commission Notice on Remedies). For more detailed information see paragraphs 27 to 47 of the Remedies Guidelines.

3. Replies to the questions raised in the Merger Remedies Issues Paper

The NMa does not have experience on all the issues raised in the questions of the issues paper; we will therefore limit our replies mainly to those questions where we can talk from our own experience.

3.I Introduction

Do delegates agree with the above four general principles? Should they be expanded to consider the adequacy of relying on post-merger remedies to take care of competition problems if and when they actually arise? Under what conditions would it be acceptable to rely on post-merger remedies?

Although none of these principles are legally required in the Act, it can be said that we agree with them.

With regard to the first one: *remedies should not be applied unless there is in fact a threat to competition*, the following can be said. Dutch merger review is subject to a strict timetable, particularly in the notification phase where we only have four weeks to decide whether to request a licence. The amount of information required in the notification phase is small and in this phase the NMa has no powers to force third parties to provide information. At this stage it is therefore sufficient to request a licence if the NMa has reasons to assume that a threat to competition may arise. The notification phase is meant to be a preliminary investigation and it is really in the license phase where an in-depth investigation will take place in order to ascertain with sufficient certainty the existence of a threat to competition.

In practice, there are companies which are not prepared to undergo an in-depth investigation and are ready to offer remedies at an early stage in a notification phase even if it cannot at this stage be ascertained that competition will be threatened but only may be threatened. This is a trade-off that some notifying parties are willing to go ahead with. This might lead to situations where the remedy offered by the notifying parties are overly strict comparing to (the certainty of) the competition problem.

In order to mitigate this, the NMa encourages the parties to make use of early pre-notification meetings. In addition, once the filing has been made, the Act allows the NMa to stop the clock in order to request additional information necessary for the investigation. As a result there is a tendency to extend the notification phase and to gather sufficient information in order to identify with a higher degree of certainty the competition problem. At the moment of writing, in all cases where remedies have been offered and accepted in the notification phase, the NMa has had more than four weeks to investigate the case.

The introduction of post-merger remedies whenever the threat to competition is uncertain at the moment of investigating the merger requires dedicating a certain amount of resources to monitoring the developments on the markets. The NMa does not have the means to heavily monitor remedies so from a practical point of view, the use of these type of ex-post solutions would only be possible in exceptional cases.

How significant, if at all, is the possibility that competition authorities and merging parties will agree to remedies that err on the overly strict side? In what situations are such risks likely to be especially high and what, if anything, can be done to reduce them?

See reply to question 1 above.

Can delegates supply examples of mergers in which they chose to rely on standard post-merger prohibitions and penalties, rather than to impose ex ante *behavioural or structural remedies to take care of unusually uncertain or weak threats to competition? Were the parties subject to any reporting requirements in those cases? How did these mergers work out?*

We agree.

3.2 Range of Remedies

1. Do delegates have examples of contingent merger remedies? If so, how difficult was it to specify a sufficiently objective triggering event, and how did the remedy work?

1. No examples.

3.3 Design Issues - Effectiveness

In terms of designing and implementing merger remedies, how important are notification requirements and/or the ability to impose interim measures aimed at either postponing closure or ensuring that assets are held separate post-merger pending examination by the competition authority?

Notification requirements and the ability to impose interim measures are certainly important in designing and implementing remedies, whether of a structural or a behavioural nature. The NMa has used both instruments in its remedy practice. For example in divestment remedies the NMa requires the notifying parties to appoint an independent trustee responsible for maintaining the part of the undertaking to be divested during the interim period as a separate, viable, marketable and competitive entity. This has proved to be an efficient way to limit the attempts of the notifying parties to undermine the success of the buyer. Reporting obligations are also imposed on the trustee. This allows the NMa to regularly follow the developments taking place and to be able to intervene on a timely manner where necessary.

Do delegates agree that divestiture is the generally preferred solution for problematic mergers but that this preference is stronger with horizontal as compared with vertical mergers? What are some market characteristics that might militate in favour of using behavioural instead of structural remedies?

Yes. Behavioural remedies may be appropriate to ensure that competitors have equal access to certain facilities of a vertically integrated entity or to important infrastructure. In a particular case where a divestment was not possible, a strict separation of two companies guaranteeing that each company would continue to exist as a separate company and to act independently of each other on the market provided the adequate solution to the competition problems identified by the NMa.

The flexibility of behavioural remedies may be appropriate for markets undergoing liberalisation or rapidly evolving markets where the lasting effect of a divestment remedy may be disproportionate. In markets where R&D plays an important role, the use of licensing remedies is in some cases the best way to allow the entry of another player without interrupting the existent research efforts.

Is the preference for structural as compared with behavioural remedies decreasing? If so, to what extent does this reflect a general trend towards greater enforcement actions against vertical mergers, a larger share of mergers taking place in rapidly changing sectors, and/or some other factor(s)?

No.

In the context of structural remedies, , what are the pros and cons of insisting on the sale of an on going business? Can your competition authority include within a divestiture order assets not directly employed in markets where the merger threatens competition. If possible, please describe a good example of this being done.

The NMa, as indicated in its Remedies Guidelines, has a clear preference for the sale of an on-going business. In order to accept a divestment remedy, the parts of the undertaking to be divested must satisfy a number of criteria. Firstly, the part to be divested must be viable. A viable part of an undertaking must be understood, in general, to be an existing part of the undertaking that can operate on a stand-alone basis, in other words autonomously and independently of the notifying parties. Secondly, this part of the undertaking must, in fact, be in a position to compete with the combined entity resulting from the merger effectively and in a lasting manner.

Only in exceptional circumstances the NMa is prepared to accept as a remedy the divestiture of a combination of parts of numerous undertakings involved in the merger. The underlying reason behind this is simply that it is less likely that all these different parts will be operational immediately in such a way to allow the purchaser to compete immediately and effectively against the merged entity.

The NMa may include within a divestiture order assets not directly employed in markets where the merger threatens competition. This may be necessary in order to ensure that the part to be divested is operational immediately and its market share is also transferred immediately. This may happen, for instance, in cases where the divested part of the undertaking on its own does not provide sufficient guarantees that the undertaking will be operational immediately. It may occur, for example, that a production facility that manufactures various products will have to be divested in full because the production facilities will only then be able to compete independently and successfully, despite the fact that it also manufactures products in relation to which no competition problems have been identified.

To what extent does your competition authority follow a "clean sweep" policy in divestiture orders, i.e. transferring an ongoing business from one buyer to one seller rather than mixing assets from both acquiring and target firms and perhaps selling to a number of buyers? Has there been much criticism of this approach from small and medium sized business, and if so, what has been the response to that resistance?

The NMa follows a 'clean sweep' approach. See reply to question 4 above.

What special challenges to remedy design are found in industries undergoing liberalization or in industries undergoing rapid technological change?

With regard to markets undergoing liberalisation, issues such as the duration of the remedies, the ways in which new entry into the market can be made possible and the ways in which the market can be made more transparent for the customer in order to increase its switching possibilities have provided challenges in designing the appropriate remedies.

Are there any examples of remedies intended to lower switching costs either in industries being liberalized or other sectors.

No examples.

What considerations influence the appropriate term and/or review period for behavioural remedies?

We do not have much experience on this issue.

What are the advantages and disadvantages of having something like the European Commission's Remedies Unit or the USFTC's Compliance Division implicated in both remedy design and enforcement?

We see the advantages of having a special Remedies Unit, such as the building up and pooling of expertise and ensuring the consistency of the practice. The work related with remedies is different in nature from the pure competitive assessment, so people would have the opportunity to be properly trained on the matter. Furthermore, it may also be positive for the cases to have two sets of people, some focusing on the competition problem and others on the design and implementation issues of the remedies.

3.4 Implementation - Administrability and Enforceability Issues

How essential is it to employ monitoring and divestiture trustees to ensure that merger remedies are effectively implemented? What kinds of information and powers must the trustees have? Does your jurisdiction publish standard terms for monitoring and divestiture trusteeships?

The NMa requires the notifying parties to appoint an independent trustee, approved beforehand by the NMa, in order to maintain the part of the undertaking to be divested during the interim period as separate, viable, marketable and competitive entity (the 'hold-separate trustee'). The parties are also required to appoint a trustee, also approved beforehand by the NMa, for the divestiture itself (the 'divestiture trustee').

The NMa has no time or means to carry out these tasks itself; it is therefore necessary to employ trustees to ensure that the remedies are effectively implemented.

For detailed information regarding the approval of the trustee and its mandate see paragraphs 36 to 41 of the Remedies Guidelines. We have not published standard terms for monitoring and divestiture trusteeships, but we follow to a large extent those published by the European Commission.

How much does your competition authority rely on undertakings to ensure merger remedies are implemented? How successful has this proved to be?

We rely as little as possible on the undertakings; therefore, as a general rule, the appointment of a trustee will be required. In one of NMa's first remedy cases the NMa did not appoint a trustee; this did not prove to be successful and took up a lot of time and effort on our part.

How much does your competition authority rely on up-front buyers or a fix-it-first approach to divestitures? What, in your experience, are the pros and cons of these approaches?

If there is insufficient certainty with regard to the feasibility of the remedy or if the identity of the purchaser proves to be crucial for the success of the remedy, it is possible that the NMa will accept the remedy on condition that the concentration is only implemented after the part of the undertaking to be divested is transferred to a purchase approved 'up-front' by the NMa.

We have no substantial experience in this sort of remedy yet.

What role, if any, should a competition authority play in the pricing of assets to be divested?

The authority should play no role in the pricing of assets to be divested. The authority should go as far as making clear that the assets will have to be divested at whatever price, even if this means a very low one.

How often have crown jewels been included in your merger remedies, and how often has the sale of a crown jewel proved necessary? How have such remedies generally worked out?

Never.

What are the situations in which firewalls are most likely to be needed and what practical measures can be taken to make them effective?

No experience on this issue.

What are the pros and cons of allowing competition authorities to revisit notified mergers which they did not oppose, or of competition authorities obtaining such a power in consent orders? Would such powers significantly assist competition authorities in ensuring that merging parties do not withhold or hide important information from the competition authority? What can be done to ensure that a power to re-open a merger review does not inordinately reduce parties' incentives to enter into consent agreements with the competition authority? Should there be an absolute time limit on the power to impose merger remedies, and should that depend on whether or not the merger has: a) been notified; and/or b) been the subject of a consent order?

Competition authorities should be able to revisit notified mergers which they did not oppose whenever it can be proved that the notifying parties submitted incorrect or incomplete information which may have resulted in another outcome of the case.

In some exceptional situations, where it proves necessary to monitor the market after the implementation of the remedy, a review power may be allowed explicitly in a consent order. In any case there should be a time limit for a review power.

What do delegates think of Lexecon's suggestion that merger control could be used as a means of introducing through the "back door", a form of ex ante regulation that could not be imposed through general competition law? In what sectors, if any, is that particularly likely?

We believe that merger control should not be used as a back door to introduce regulation.

3.5 International Co-operation and the Importance of Follow-up

So far, the NMa does not have experience on international co-operation on merger remedies. We are a member of the ECA network (the network of the European Competition Authorities association) and we keep each other informed about those multi-jurisdictional mergers that are notified under our jurisdictions. The aim of this network is to promote contacts between competition authorities dealing with the same merger in order to co-ordinate efforts where necessary and, where possible, to avoid incompatible outcomes. However, so far, we have not dealt with a case where co-ordination regarding remedies has been necessary. It also has to be said that this is an informal network that does not impose obligations to co-ordinate on any member.

In order for the NMa to be able to suspend consideration of a merger in order to permit international co-operation on merger remedies, the Act would have to be modified. A provision of this sort already exists in article 22 of the ECMR, where it is possible to refer merger cases jointly with other authorities to the European Commission.

Another way of making this possible could be through some kind of international, multilateral or bilateral, agreement.

ANNEX

GUIDELINES FOR REMEDIES

Guidelines for the Contents, Submission and Implementation of Remedies in Relation to Concentrations

Contents

1. Introduction

The aim of concentration control is to ensure that competition concerns do not arise on the Dutch market or a part of it as a result of concentrations of undertakings. It is NMa's task, where appropriate, to present a plausible case or show that competition concerns will arise. It is the responsibility of undertakings that intend to bring about a concentration (hereinafter "the parties"), to propose measures, if they so wish, which eliminate these competition concerns, so-called "remedies".[1] The *Guidelines for Remedies* (hereinafter "the Guidelines") aim to provide insight into the substantive criteria which these remedies must meet, in the opinion of NMa, and the way these remedies should be submitted and implemented. The Guidelines aim to make it simpler for the parties, when submitting remedies, to anticipate the criteria which NMa, in general, applies to remedies, which will facilitate the quick handling of cases. In this regard, it should be noted that the concrete assessment of the proposed remedies always depends on the particular circumstances of the individual case. Partly in the light of the experience which NMa has obtained with regard to remedies since its establishment, but also in the light of international developments in this area, NMa considers it desirable to formalise its present insights with regard to remedies in respect of proposed concentrations.[2] These insights, of course, will also be developed and refined further after the Guidelines have been published.

2. General Principles

The Competition Act provides for preventive concentration control by NMa, which consists of two phases. Pursuant to section 34 of the Competition Act, it is prohibited to bring about a concentration without notifying the Director-General of the Netherlands Competition Authority (hereinafter "the Director-General of NMa") until four weeks have passed since the notification (the so-called 'notification phase'). After receiving the notification, the Director-General of NMa, pursuant to section 37(1) of the Competition Act, announces within four weeks whether a licence is required in order to realise the concentration to which the notification relates. Pursuant to section 37(2), the Director-General of NMa may decide that a licence is required for the concentration in question, if he has reason to assume that a dominant position may arise or be strengthened as a result of the concentration, which will appreciably impede effective competition on the Dutch market or a part of it. If a licence is required and is subsequently applied for, the Director-General of NMa will take a decision on whether a licence will be granted, in accordance with section 44(1) of the Competition Act, within 13 weeks of receiving the application for a licence (the so-called 'licensing phase').

Remedies in the Licensing Phase

Pursuant to section 41(4) of the Competition Act, the Director-General of NMa is authorised to grant a licence for the realisation of a concentration subject to restrictions and/or instructions. The restrictions and instructions, subject to which the Director-General of NMa may issue a licence, shall have the purpose of compelling the parties to take measures that are necessary to ensure that a dominant position does not arise or is not strengthened as a result of the concentration, which has the effect of appreciably impeding effective competition on the Dutch market or a part thereof.[3] If these measures were not to be taken, a licence could not be granted, pursuant to section 41(2) of the Competition Act, since a dominant position would arise or be strengthened as a result of the proposed concentration, which would have the effect of appreciably impeding effective competition on the Dutch market or a part of it.

Remedies in the Notification Phase

In certain circumstances, the competition concerns that may arise if the proposed concentration were to be realised in an unmodified form may be avoided in the notification phase. In such cases, a licence would no longer be required for the concentration and it would therefore not be necessary to go through the licensing phase. The legislator has provided for this possibility in the Explanatory Memorandum to the Competition Act.[4] The Explanatory Memorandum refers to the possibility that the parties may modify the notified concentration in the notification phase, if they so wish, to avoid reaching the licensing phase. The Competition Act does not provide for the possibility of taking a decision in the notification phase subject to restrictions and/or instructions. The term "remedies" will be used below to refer both to modifications made by the parties in the notification phase, which eliminate the competition concerns identified, and the remedies proposed by the parties in the licensing phase, which eliminate competition concerns identified and which may be attached to a licence as restrictions and/or instructions.

Principles for the Submission and Assessment of Remedies

The Director-General of NMa encourages parties, in the case of concentrations which may possibly give rise to competition problems, to contact NMa prior to the notification of the proposed concentration (during the so-called 'prenotification phase'). This makes it possible to obtain insight at an early stage into the possible competition problems associated with the proposed concentration and possible solutions to these may therefore also be explored at an early stage.

The principle on which remedies are based is that the parties have to take the initiative in making proposals for remedies, after NMa has informed the parties of the competition problems that have been identified.

The proposed remedies must be effective. The parties must convince the Director-General of NMa that the proposed remedies will solve the competition problems that have been identified entirely and that the remedies can actually be implemented and can be implemented in good time. The proposals for remedies must be clear and detailed and must be submitted in good time to enable the Director-General of NMa to assess the effects of the remedies.[5]

NMa will also present the remedies to market players to obtain their opinions with regard to the effectiveness and feasibility of the proposed remedies.[6]

In addition, remedies should require no or only limited supervision by NMa. In all cases, however, NMa will supervise compliance with the remedies and, if necessary, will act to enforce them (see points 11 and 12).

If no suitable remedies are offered which solve all the competition problems, a licence will be required in the notification phase or a licence will be refused in the licensing phase.

The remedies proposed by the parties in the licensing phase may be linked to a licence as restrictions and/or instructions. If the parties do not heed the restrictions linked to the licence, this shall constitute acting without a licence in terms of section 41(1) of the Competition Act. The Director-General of NMa may impose a fine and/or an order subject to a penalty, in accordance with section 74(1)(4) of the Competition Act, with the aim of reversing the failure to heed the restrictions attached to the licence.[7] In the event of a failure to comply with the instructions attached to the licence, the Director-General of NMa may impose a fine and/or an order subject to a penalty with the purpose of nevertheless enforcing compliance with the instructions in question, pursuant to section 75 of the Competition Act.

If the parties bring about a concentration, after the competition problems identified have been solved by modifying the notification and after the Director-General of NMa has concluded that a licence is not required, and if this concentration is not in compliance with the modified notification, they will act in contravention of section 34 of the Competition Act. In accordance with section 74(1)(1) of the Competition Act, a fine and/or an order subject to a penalty may be imposed with the aim of reversing the infringement.[8]

All the chapters of the Guidelines, with the exception of chapter 5, apply both to remedies in the licensing phase and remedies in the notification phase, unless stated otherwise in the text. In chapter 5, the criteria which apply specifically to a modification of the notification in the notification phase will be discussed since, in contrast to a licence, no restrictions and/or instructions may be attached to a decision pursuant to section 37(1) of the Competition Act.

As applicable and where appropriate, these Guidelines establish a link with the European Commission's policy on remedies, as set out in a Commission Notice[9] (hereinafter "the Commission Notice on Remedies").[10]

3. Types of Remedies

A. General

In general, two types of remedies may be distinguished, namely "structural remedies" and "behavioural remedies". Structural remedies, such as the divestiture of one or more parts of the undertakings[11] to be merged, affect the relationships of control and bring about a structural change in the market. Behavioural remedies, on the other hand, imply that the undertaking resulting from the concentration will behave in a particular way or will refrain from certain behaviour.[12] Behavioural remedies therefore imply continuous regulation of the behaviour of undertakings.

In addition to structural remedies and behavioural remedies, a distinction may also be made for so-called 'quasi structural remedies'. Quasi structural remedies are remedies which do not have a structural character, but do have lasting and (more or less structural) effects on the market. An example of such a remedy is the issuing of an exclusive and privative licence. In this case, despite the fact that the new undertaking retains its proprietary rights, and in this sense this is not a structural remedy, the result, in effect, is that the new undertaking may not make use of certain assets. Quasi structural remedies will not be dealt with specifically in the Guidelines.

Generally, remedies ought to be of a structural nature,[13] given the fact that the purpose of the remedies is to ensure that a dominant position does not arise or is not strengthened that would have the effect of appreciably impeding effective competition on the Dutch market or a part thereof. Structural remedies are preferable to behavioural remedies. [14] Structural remedies change the structure of the market in a lasting manner and, in principle, require no further supervision after they have been implemented. [15] The most frequent form of structural remedy, divestiture of one or more parts of an undertaking, will be discussed below. A few comments will be made with regard to behavioural remedies.

B. Structural Remedies: Divestiture

Issues Relating to the Divestiture of Parts of Undertakings

Divestiture may serve to eliminate the horizontal overlap between the activities of parties, to combat the effects of vertical market closure, to break structural links between the parties and competitors, or to eliminate other effects on competition resulting from the realisation of the proposed concentration.[16] The parts of the undertaking to be divested must satisfy a number of criteria.[17] Firstly, the part of the

undertaking to be divested must be viable. A viable part of the undertaking must be understood, in general, to be an existing part of the undertaking that can operate on a stand-alone basis,[18] in other words autonomously and independently of the parties.[19] Furthermore, this part of the undertaking must, in fact, be in a position to compete with the new undertaking effectively and in a lasting manner.

Divestiture Package

Depending on the circumstances of the case, the part of the undertaking to be divested may be a part of the undertaking of the purchaser involved in the concentration or of the undertaking that is acquired. The part of the undertaking to be divested will be part of a divestiture package. In addition to the part of the undertaking to be divested, a divestiture package must contain all those elements required to ensure that an undertaking can continue to operate, such as agreements with third parties, the existing customer base, (sales) staff, etc. It is also essential that the part of the undertaking to be divested is operational immediately, so that the market share associated with it is transferred immediately and in a lasting manner. In order to achieve this, it may be necessary in certain cases also to include activities in the divestiture package in an area in which competition concerns have not been raised. This may occur, for instance, in cases where the divested part of the undertaking on its own does not provide sufficient guarantees that the undertaking will be operational immediately.[20] Furthermore, additional assets may also be necessary, for instance, to transfer the scale advantages and the advantage of a broad portfolio (or the advantage of vertical integration) enjoyed by the seller of the part of the undertaking to be divested.

With a view to removing existing barriers to entry, it will be sufficient in exceptional cases for the divestiture to consist of only certain assets, such as intellectual property rights, or the divestiture of production capacity, rather than the divestiture of the entire part of the undertaking. In these cases, it is necessary that the purchaser of the part of the undertaking to be divested (hereinafter "the purchaser") already has at its disposal the resources necessary to operate on the market in combination with the assets or production capacity to be divested.

Finally, only in exceptional cases will divestiture consist of a combination of parts of numerous undertakings involved in the concentration. After all, in contrast to the divestiture of a part of a single undertaking, it is less likely that the parts of one or more different undertakings will be operational immediately, so that the purchaser of the combination of the parts of the undertaking, which are to be divested, is able to compete immediately and effectively.

Marketability of Parts of the Undertaking To Be Divested and Availability of Suitable Purchasers

Whether the part of the undertaking to be divested will, in fact, be able to compete effectively and in a lasting manner with the new undertaking also depends to a large extent on the suitability of the purchaser. In submitting a remedy, the parties must have considered the extent to which the part of the undertaking to be divested will attract suitable purchasers and must indicate, stating their reasons, whether the part of the undertaking to be divested is able to be sold and whether there are suitable purchasers[21] to allow the parts of the undertaking in fact to be divested and to compete effectively and in a lasting manner with the new undertaking. If there is insufficient certainty with regard to the marketability of the part of the undertaking to be divested and/or the availability of suitable purchasers, in principle the remedy will not be acceptable. If there is doubt regarding the marketability of the part of the undertaking to be divested, the parties may include a provision in the remedies to the effect that an alternative part of the undertaking will be divested if their original proposal does not prove feasible.[22] Of course, this alternative divestiture package must also meet all the criteria applicable to remedies.

If there is insufficient certainty with regard to the feasibility of the remedy or if the identity of the purchaser proves to be crucial for the success of the remedy, it is possible that NMa will accept the remedy

on condition that the concentration is only realised after the part of the undertaking to be divested is transferred to a purchaser approved by NMa. This requirement is also referred to as the 'up-front purchaser' requirement.

Even if the divestiture of part of the undertaking is accepted by NMa as a remedy, the actual transfer remains the responsibility of the parties. The Director-General of NMa is authorised to take action to enforce the law if the sale and transfer are not realised. If this proves necessary, the parties are required to increase the marketability of a part of the undertaking to be divested in order to implement the remedy accepted by NMa, for instance by including additional assets.

C. Behavioural Remedies

Purely behavioural remedies should be avoided as far as possible (see point 17). Behavioural remedies will not be accepted under any circumstances in the notification phase (see point 53).[23] Nevertheless, in the licensing phase such non-structural remedies may solve competition problems under certain circumstances. This must be assessed, however, on a case-by-case basis. Under certain circumstances, for instance, ensuring that competitors will have equal access to certain facilities of a vertically integrated entity or to important infrastructure may ensure that competition is not adversely affected. Another example is issuing a licence in cases where divestiture is not possible from an objective point of view.[24] A strict organisational, accounting and legal separation of certain parts of an undertaking within the merged entity (by including certain parts of a group at arm's length to other parts of the same group) was regarded by NMa in a particular case[25] to be an adequate solution to the competition problem. In two very specific cases, a remedy such as this was accepted but, in general, NMa will not accept these types of remedies.[26]

In certain cases, a combination of structural and behavioural remedies is appropriate. For instance, if a certain part of the undertaking remains with the seller (a structural remedy), the seller may be obliged to maintain and continue this part of the undertaking and, in doing so, in principle to achieve the same turnover as was previously achieved, as well as to report to NMa on this periodically (a behavioural remedy).[27] In this way, the behavioural remedy supports a structural remedy and consequently contributes to the solution of the competition problem.

4. Submission, Assessment and Implementation of Remedies

A. Submission of Remedies

The general principles set out in point 5 above apply to the submission of remedies. In the licensing phase, NMa will inform the parties of the competition problems identified at the latest when it issues its Statement of Objections.[28] With regard to the notification phase, refer to point 48 of the Guidelines.

Basic Requirements for the Submission of Remedies

In any event, the following criteria must be met when submitting remedies:[29]

- the proposal for remedies must be submitted in good time and in writing (in the licensing phase at the latest three weeks prior to the expiry of the period of 13 weeks and in the notification phase preferably no later than one week prior to the end of the period of four weeks (see point 51));
- the proposal must include an extensive, clear and detailed description of the nature and scope of the remedies, so that a comprehensive assessment is possible;[30]
- a written explanation must be included with the proposal which shows that the remedies will eliminate all the competition problems identified, that they are feasible and how the remedies will be implemented;

- as appropriate, the explanation must also include the actions that must be taken to dispose of a part of the undertaking and the timetable for doing so; and
- a non-confidential version of the documents referred to in this point (the proposal for remedies, the description of these and the explanation) must be submitted with the proposal, on the basis of which NMa can carry out market testing (see point 8) amongst market players with regard to the effectiveness and feasibility of the proposed remedies.

B. Assessment of Remedies

Only remedies which satisfy the criteria referred to in point 28 will be assessed by NMa. If it appears from NMa's assessment and/or market testing that the proposed remedies are not adequate to remove the competition concerns with certainty or if the parties have not complied with the Guidelines in any other respect, they will be informed of this without delay.

Depending on the circumstances of the specific case, the parties may subsequently propose modified remedies. With regard to the strict legal terms, both in the notification phase and in the licensing phase, it is important in such situations that NMa is able to determine immediately that the modified remedies are adequate to eliminate the competition concerns, in the light of the earlier assessment and market testing. Complex modifications are therefore not accepted. In the light of the short statutory term of four weeks within which the assessment of the notification must be completed, NMa has no further possibility for assessing the modified remedies in the notification phase.

In discussions in relation to an amendment or a (new) amendment of the notification, or in relation to the submission of remedies or amendments thereof, NMa will under no circumstances be able to provide certainty beforehand that a license will not be required in the notification phase for the proposed modified concentration or, alternatively, that a licence will be granted after submission of the (modified) remedies.

If, in the opinion of the Director-General of NMa, it appears that the proposed (modified) remedies solve the competition problems, a licence will not be required for the concentration in its modified form in the notification phase. If this involves a concentration case in the licensing phase, a licence will be granted pursuant to section 41(4) of the Competition Act, subject to restrictions and/or instructions.

C. Implementation of Remedies

An important part of a proposal for remedies is the way in which the proposed remedies will be implemented. The way the remedies are implemented should aim at providing certainty that the remedies will actually be implemented and that the effects intended by the remedies will occur. The (most frequently occurring) remedy, namely the divestiture of part of the undertaking, will be discussed below in more detail in relation to how such certainty with regard to the implementation of the remedies can be obtained. As appropriate, these principles may apply *mutatis mutandis* to remedies other than divestiture.[31]

Term for Divestiture

The parties are required to set out in the remedies the term within which the part of the undertaking will finally be divested. This term should be as short as possible. In principle, NMa assumes a maximum term of six months. The term for the divestiture commences on the day that the Director-General of NMa takes his decision, as referred to in section 37(1) or section 41(4) of the Competition Act.[32]

Maintenance of the Part of the Undertaking To Be Divested during the Interim Period

The parties are required to declare in writing that they will maintain the part of the undertaking during the interim period[33] (from the moment at which the decision is taken up to its actual divestiture)

independently of and separately from the parties, and will guarantee its viability, marketability and competitive strength. In particular, this means that the parties will undertake, for instance:

a) to maintain the fixed assets, know-how, commercial information, which is confidential or subject to intellectual property rights, the customer base and the technical and commercial competences of the employees;
b) to ensure that all relevant management and administrative positions are filled, that there is sufficient capital and credit, and that all the other conditions are met which are necessary to compete optimally;
c) not to do anything or omit to do anything and not to continue or tolerate any development or allow any development to be continued or tolerated, which may hamper or obstruct the implementation of the remedies; and
d) if necessary or desirable, to transfer the management of the part of the undertaking to be divested to a separate management, not consisting of people who comprise the management of the retained activities.

Trustee(s)

The parties are required to appoint an independent trustee (procurator), approved beforehand by NMa, who will supervise full compliance with the parties' commitment to maintain the part of the undertaking to be divested during the interim period as a separate, viable, marketable and competitive entity (the "hold-separate trustee").[34] It is the trustee's task to promote the interests of the part of the undertaking to be divested to the best of his ability.

The parties are also required to appoint an independent trustee, approved by NMa beforehand, for the divestiture itself (the "divestiture trustee"). This trustee will supervise the progress of the divestiture process, in particular the efforts made by the parties to find a suitable purchaser. This trustee may be a different person to the person who supervises the commitment of the parties to maintain the part of the undertaking to be divested during the interim period.

In case the parties are not able to transfer the part of the undertaking within the stipulated term, the remedies should include a provision that instructions (and a power of attorney) will be issued to an independent trustee, approved beforehand by NMa, to sell and transfer the part of the undertaking within a specified term at any price,[35] after NMa has approved the purchaser.[36] This trustee may be a different person to the trustee(s) referred to earlier.[37] As in the case of the sale and transfer by the parties, it may be necessary, on its sale and transfer, to increase the marketability of the part of the undertaking to be divested, for instance, by including additional assets (see point 24).

Approval of the Trustee(s) by NMa

NMa has to approve the choice of trustee, as stated above in points 36 to 38. The trustee must be a reputable expert and will usually be a commercial bank, management consultancy firm, firm of accountants or a similar institution, depending on the specific duties to be carried out. In certain cases, it may also be necessary for the trustee to have adequate knowledge of the branch. The trustee must be independent of the parties, must have the professional competence necessary for carrying out his duties and may not have conflicting interests. The parties must provide NMa in good time with all relevant data necessary to assess whether the trustee meets the stated requirements. The cost of all services carried out by the trustee in the course of his duties will be met by the parties. The remuneration scheme must be such that it does not detract from the independence or the effectiveness of the trustee in carrying out his mandate. The parties must appoint the trustee within a week after NMa has given its approval.

The Mandate of the Trustee(s)

On the instructions of the parties, the trustee will carry out a number of specific duties on behalf of NMa to ensure the strict implementation of the remedies by the parties. These duties must be described accurately and clearly in the remedies and must be worked out and set out in the trustee's mandate. The mandate must include all provisions necessary to enable the trustee to carry out his duties in accordance with the remedies. The supervisory tasks and powers of the trustee must therefore be set out clearly in this mandate. In addition, the mandate must contain the obligation to report periodically and to present a final report to NMa. The mandate should stipulate that the trustee may only be discharged of his responsibilities with the consent of NMa. In the mandate, the parties must undertake to grant the trustee their full co-operation and, where possible, their support to enable him to carry out his duties properly. This includes, for instance, granting full access to the accounts, databases and the documents of the parties. In addition, the trustee must be able make use of the services of the parties' employees. NMa must approve the trustee's mandate beforehand.

Approval of the Purchaser and the Purchase Agreement

The remedies must include a provision that the parties or the trustee will only proceed with the divestiture and transfer after NMa has approved the proposed purchaser and the purchase and transfer agreements and all other agreements between the purchaser and the seller. In addition, the following criteria shall apply: the purchaser must be fully independent of the parties and their group undertakings and the purchaser must have sufficient financial means, proven expertise and an incentive to continue the part of the undertaking to be divested on a lasting basis as an effective competitor of the parties. In addition, the acquisition of the part of the undertaking by the proposed purchaser may not result *prima facie* in the emergence of a new competition problem.

The parties or the trustee must present a sufficiently plausible case that the proposed purchaser meets the stipulated criteria and that the part of the undertaking will be divested in accordance with the remedies. Prior to granting its approval, NMa may request a meeting with the proposed purchaser in order to ascertain whether the stipulated criteria have been met. If different purchasers are proposed for various parts of the undertaking, each proposed purchaser must be approved separately by NMa.

If links continue to exist between the seller and the purchaser after the divestiture intended to ensure compliance with the remedies has taken place, for instance in the form of supply or co-operative relationships, possible non-compliance by the seller, for example, may have an adverse effect on the opportunities that the purchaser has to compete effectively and the extent to which the purchaser will actually do so. In the light of this, it may be necessary for the parties to include adequate provision for the payment of damages and/or penalties in the transfer contracts.

In certain cases, NMa may require the purchaser to enter into contracts with third parties for the supply of essential parts or services to which the purchaser does not have access, prior to the transfer of the part of the undertaking to be divested.

If, on the basis of the data which it has at its disposal, NMa determines that the proposed purchaser does not meet the criteria stipulated by NMa, NMa shall inform the parties without delay that it will not grant its approval of the proposed purchaser.

In order to guarantee the structural effect of the divestiture, the parties or the new entity will not be permitted to reacquire an economic interest in the divested part of the undertaking.

If there is any possible doubt as to whether certain (future) practices will be compatible with the agreed remedies, the parties or the new undertaking must contact NMa in advance. Needless to say, in this

regard they will not do or omit to do anything, continue or tolerate (or allow to be continued or tolerated) any situation that hampers or obstructs the implementation of the remedies. In all instances, NMa will ensure that the parties comply with the remedies and, where necessary, the Director-General of NMa shall take action to enforce them (see points 11 and 12).

5. Remedies in the Notification Phase: Specific Requirements with Regard to the Modification of the Notification

If circumstances permit, during the notification phase the parties will be informed of the competition problems identified by NMa before a decision stipulating that a licence is required is taken in terms of section 37(2) of the Competition Act. It is possible that the parties will attempt to avoid the licensing phase by modifying the notification. In principle, in order to avoid the licensing phase, NMa is willing to investigate whether a modification proposed by the parties eliminates the competition problem identified in the notification.[38] On the basis of the experience acquired up until now with possible modifications to notifications, it appears that a modification of the notification can only be accepted under exceptional circumstances and must satisfy a number of minimum requirements. This will be discussed below.

Timely Consultation on and Timely Submission of a Modification of the Notification by the Parties

With a view to the strict and short statutory term within which a decision must be taken in the notification phase, it is preferable that the parties contact NMa prior to the notification, if there is reason to do so, in order to obtain insight into possible competition problems and possible solutions to these during the prenotification phase (see point 5). This increases the probability that notification will be given of a concentration that will not require a licence.

If the parties are informed of the competition problem identified by NMa during the processing of the notification and wish to avoid the licensing phase, they may first consider withdrawing the notification and submitting a new modified notification. In this case, a new term of four weeks for the assessment of the proposed (modified) concentration will commence.

If the parties do not withdraw the notification, as referred to in point 50, but wish to attempt to remove the competition problems in the notification which is already being processed, they must submit a fully detailed proposal for the modification of the notification (in accordance with the provisions of chapter 4) as soon as possible, preferably[39] no later than one week prior to the termination of the period of four weeks within which a decision must be taken. NMa must have sufficient time to assess the proposal to modify the notification and to carry out market testing.

Cases in Which a Modification of the Notification Is Possible and the Criteria Which This Modification Must Meet

A modification of the notification may only be accepted if the competition problem is very clear and precisely defined and the parties' proposals without doubt provide a comprehensive solution to this problem.[40] The modification of the notification must contain measures which are easy to implement and the proposal must be described in detail. The parties must indicate why the modification of the notification will remove the competition concerns identified by NMa.

In addition, there must be sufficient certainty with regard to the actual implementation of the modification of the notification. A modification of the notification must have a lasting[41] character and should preferably mean that a certain part of the undertaking of one of the parties to the concentration will not be transferred to another party to the concentration. The part of the undertaking will remain with the seller involved in the concentration or, prior to the realisation of the concentration, will be transferred to a market player approved by NMa, which is not involved in the concentration. It must be ascertained that the

part of the undertaking, to which the modification of the original notification applies, is no longer a part of the proposed concentration of the parties. NMa may also stipulate that the modification of the notification must provide for the maintenance of the part of the undertaking as a viable and competitive entity.

In exceptional cases a part of the undertaking may not remain with the seller who is a party to the concentration, nor may it be transferred in the short term to a market player who is not involved in the concentration. The part of the undertaking will first be transferred to the undertaking formed as part of the notified concentration before being sold by this undertaking to a market player which is not involved in the concentration. Only in exceptional cases will NMa accept a modification of the notification, as described in this point. The parties will have to provide arguments to show that such an exceptional case has arisen. In addition, the actual divestiture must be certain at the moment that the notification is modified. In this regard, NMa will accept as sufficient certainty the mandate (and the power of attorney) issued to the trustee to sell the part of the undertaking that is to the divested (by auction).[42]

The trustee's mandate must also include a number of provisions with regard to the maintenance of the part of the undertaking during the interim period and with regard to the approval of the purchaser. The provisions of points 35 to 47 apply to this *mutatis mutandis*. In the event of a modification of the notification, however, a single trustee, who supervises both the maintenance of the part of the undertaking to be sold and the final sale and transfer itself, will usually be sufficient.[43] In deviation from point 40, only at NMa’s request is it necessary to include a provision in the modified notification with regard to periodic reporting by the trustee to NMa on the maintenance of the part of the undertaking to be divested independently of the parties during the interim period and on the progress of the sale.[44]

6. Revision and Commencement

The Guidelines contain NMa's present insights with regard to remedies in relation to proposed concentrations. These insights are subject evolve continuously. The Director-General of NMa may withdraw or amend the Guidelines at all times.

The Guidelines shall take effect as of the day following their publication in the *Netherlands Government Gazette*.

NOTES

1. "Remedies" is also the English term for commitments proposed by parties attached as conditions and obligations to the European Commission's decision granting approval under EC Directive (EEC) 4064/89 and 447/98.

2. This is based on the possibilities which the Competition Act currently offers NMa. Any future statutory amendments may result in amendments to the Guidelines.

3. Explanatory Memorandum to the amendment of the Competition Act (*Parliamentary Proceedings* II, 1995-1996, 24 707, No. 3, pp. 40 and 78)), and the Memorandum following the report (*Parliamentary Proceedings* II, 1996-1997, 24 707, No. 6, p. 97).

4. Explanatory Memorandum to the amendment of the Competition Act, point 10.7.3 (*Parliamentary Proceedings* II, 1995-1996, 24 707, No. 3, p. 39).

5. For a more detailed description of the criteria which the submission of remedies must meet, see point 28.

6. This is referred to by the term "market testing".

7. Explanatory Memorandum to the amendment of the Competition Act (*Parliamentary Proceedings* II, 1995-1996, 24 707, No. 3, p. 96).

8. In addition, the validity of the agreements by which the concentration is realised is by no means guaranteed under civil law. See the Explanatory Memorandum to the amendment of the Competition Act, point 10.7.3 (*Parliamentary Proceedings* II, 1995-1996, 24 707, No. 3, p. 39) and section 3:40 of the Netherlands Civil Code (in principle, a conflict with a mandatory statutory provision causes a juristic act to be null and void). Multilateral juristic acts which build upon a juristic act which is null and void (and which themselves also do not give rise to a concentration and are therefore null and void) are voidable subject to the circumstances in accordance with section 6:229 of the Netherlands Civil Code.

9. Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No. 447/98, OJEC C68/3 of 2 March 2001.

10. The Competition Act deviates in any case from the European Concentration Directive in the following respects. The European Commission attaches conditions and obligations to its decision both in the first phase and in the second phase, but only to guarantee that the undertakings involved comply with the commitments which they have entered into with the Commission and with a view to ensuring that the concentration is compatible with the common market (Article 8(2) of the Concentration Directive). Under the Competition Act, restrictions and/or instructions may be imposed (in theory) in the licensing phase without the parties having submitted proposals in this regard. Under the Competition Act, restrictions and/or instructions may not be attached to a decision in the notification phase.

11. Hereinafter the terms "part of an undertaking" en "parts of an undertaking" will relate to a part or parts of a company.

12. For instance, that they do not discriminate between customers.

13. See the Memorandum following the report received on 23 October 1996 (*Parliamentary Proceedings II*, 1996-1997, 24 707, No. 6, pp. 97 and 98).

14. See the decision of the Director-General of NMa of 31 July 1998 in case 47/*RAI-Jaarbeurs*, points 225 and 226.

15. In all cases, NMa will ensure that the parties comply with the remedies and, if necessary, it will act to enforce them (see points 11 and 12).

16. See, for instance, the decision of the Director-General of NMa of 20 October 1999 in case 1331/*PNEM/MEGA-EDON*, the decision of the Director-General of NMa of 13 March 2000 in case 1528/*Wegener Arcade-VNU Dagbladen* and the decision of the Director-General of NMa of 20 February 2001 in case 2209/ *Gran Dorado – Center Parcs*.

17. *Cf.* Commission Notice in Relation to Remedies, point 14.

18. Parts of the undertaking which already operate as independent undertakings are preferred.

19. Except possibly during an interim period.

20. It may occur that a production facility that manufactures various products will have to be divested in full because the production facilities will only then be able to compete independently and successfully, despite the fact that it also manufactures products in relation to which no competition problems have been identified.

21. The parties should preferably also state, with reasons, the undertakings to which they think they will be able to sell the parts of the undertaking to be divested. See points 41 *et seq.* of the Guidelines.

22. In the decision of the Director-General of NMa of 20 October 1999 in case 1331/*PNEM/MEGA-EDON*, point 232, two options were given with regard to the parts of the undertaking to be divested by the parties.

23. Supporting obligations, such as a reporting obligation, may be linked to structural remedies.

24. For the examples referred to, see the ruling of the Court of First Instance of 25 March 1999 in the case of *Gencor v. the Commission of the European Communities*, point 319.

25. See the decision of the Director-General of NMa of 31 July 1998 in case 47/*RAI-Jaarbeurs*, points 219 *et seq.*

26. See the decision of 13 March 2000 in case 1528/*Wegener-VNU Dagbladen* and the decision of 12 May 2000 in case 1538/*De Telegraaf-De Limburger*. In these cases, the parties undertook to guarantee the independence of two daily newspapers of each other and to ensure that both publications continued to exist as separate companies with their own Supervisory Boards, which were required to give their approval beforehand to decisions which are of importance for the independence of each of the daily newspapers. In the one case, it was of primary importance that only a small part of the distribution areas of both daily newspapers overlapped and, in the other case, that one of the daily newspapers would almost certainly disappear from the market without the acquisition. In addition, the specific nature of the daily newspaper sector was deemed to be important because the independence of the editorial boards plays a major role in relation to daily newspapers as a product.

27. See the decision of the Director-General of NMa of 7 July 1999 in case 1132/ *FCDF – De Kievit*, points 241 *et seq.*

28. In cases where competition concerns arise, NMa has developed a practice of setting out its provisional assessment of concentrations in the licensing phase and the considerations and results of its investigation on which these are based in a document entitled Statement of Objections. The Statement of Objections are

generally sent to the parties involved and other interested parties in the licensing phase four weeks before to the end of the thirteen-week term.

29. In these points, in general a link is made to the practice of the European Commission, as set out in the Commission Notice in Relation to Remedies, points 34, 41 and 46.

30. If part of the undertaking is divested, for instance, the remedy must include a clear description of everything that will be divested. The description must relate to all elements of the part of the undertaking to be divested, insofar as these are important in assessing the competitive strength of the part of the undertaking to be divested. As appropriate, it will be necessary to give a detailed description of, for instance, the present structure and positions, relevant activities (for instance activities relating to R&D, production, distribution, sales and marketing), the intangible assets (for instance intellectual property rights) and to include a list of staff, customers and all the supply, sales, service and other relevant agreements. If a lack of clarity may arise in this regard, a clear specification should also be given of the assets which are not divested.

31. In these points a link is made, in general, to the practice of the European Commission, as set out in the Commission Notice in Relation to Remedies, point 44 *et seq*.

32. It should be borne in mind that divestiture may result in a new concentration in terms of section 34 of the Competition Act (and therefore may not be realised without notifying the Director-General of NMa of this and after four weeks have passed) or the concentration may be subject to a concentration regime outside the Netherlands.

33. If the parties have already found a purchaser for the part of the undertaking to be divested and have, in fact, sold this part of the undertaking at the moment that the decision is taken, the interim period does not apply. The provisions of points 35 to 40 are therefore not applicable. In this regard, see also point 23.

34. In the exceptional case of behavioural remedies, NMa may require the parties to appoint an independent trustee approved beforehand by NMa, who will supervise *de facto* and proper compliance with the behavioural remedies.

35. This price may also be negative.

36. See point 39 *et seq*.

37. NMa retains the authority to stipulate that this trustee must be a different trustee to the trustee(s) mentioned earlier.

38. See point 4.

39. This depends partly on the moment of which NMa notifies the parties of the competition concerns.

40. In the decision of the Director-General of NMa of 23 December 1998 in case 1132/*FCDF – De Kievit*, points 90 to 100, for instance, the proposed modification of the notification was not accepted in the notification phase because the possibility that the proposal would not solve the competition problem in a lasting manner could not be excluded and ultimately the dominant position of FCDF on the market for farm milk would nevertheless be strengthened.

41. Modifications of the notification, which do not have a lasting character, but relate to a certain (future) practice of the undertaking in question, are not accepted in the notification phase as a remedy for eliminating possible competition concerns due to the fact that section 34, in conjunction with section 74, of the Competition Act does not offer NMa the possibility of enforcing compliance with behavioural remedies.

42. See, for instance, the decision of the Director-General of NMa of 19 December 2000 in case 2141/ *Rémy Cointreau – Bols*, points 94 to 96.

43. *Cf.* point 38.

44. *Cf.* The decision of the Director-General of NMa of 20 February 2001 in case 2209/ *Gran Dorado – Center Parcs*, point 9.

NORWAY

1. Introduction

Question 1

Do delegates agree with the above four general principles? Should they be expanded to consider the adequacy of relying on post-merger remedies to take care of competition problems if and when they actually arise? Under what conditions would it be acceptable to rely on post-merger remedies?

According to the Norwegian Competition Act, it is a requirement for intervention against an acquisition that it will create, or strengthen, a significant restriction of competition. The competition authorities' discretion with respect to the *creation* of a significant restriction of competition is relatively limited, as they must demonstrate causality between the acquisition and the restriction of competition. In addition, the restriction of competition must be significant. But if competition is significantly restricted before an acquisition, the requirements for *strengthening* are not that strict. Remedies are therefore not applied unless there is in fact a threat to competition.

This principle was not questioned by the Committee that in April this year put forward a proposal for a new Competition Act (The White Paper), or by the Norwegian Competition Authority (the NCA), with respect to merger review.

To ensure enforceability, remedies offered by the parties are transformed into conditions for letting a concentration proceed. The general limitations on conditions that can be imposed in government decisions include both a requirement that the conditions are objectively connected with the decision, and that the conditions are proportional, i.e. do not exceed what is necessary to counter the adverse effects of the concentration. No suggestions have been made to change this approach. To what extent competition authorities have a duty to actively explore alternative solutions is a more open issue. In the White Paper regarding the proposed Competition Act the Committee states clearly that the parties will have a duty to decide whether remedies should be considered in a case.

Merger review cannot be used to engage in industrial planning. However, in the White Paper on the Draft Competition Act, a minority within the Committee, including the representatives from the competition authorities, has suggested a provision for regulating markets under certain conditions, even if a practice is not prohibited according to the new prohibitions, that will be harmonised with Art 81 and 82 EC/ Art 53 and 54 EEA.

That competition authorities should be flexible and creative in devising remedies is perhaps not so obvious in practice as it would seem. Flexibility can be time-consuming, and accepting new types of remedies may increase the risk of using ineffective remedies. To what extent competition authorities should be creative may also be an issue for debate. If authorities see that a new approach to remedies can restore competition in a market, they should of course indicate the possibility to the parties. However, the main role of competition authorities should be to explain as clearly as possible the harms to competition that arise from a concentration. The creativity with respect to finding solutions should primarily rest with the parties.

If there is uncertainty as to whether a restriction of competition will arise, the NCA will let the concentration go ahead, and resort to the general competition rules if competition should turn out to become restricted. If competition problems should arise, the NCA will have to build a case based on Section 3-10 in the present Competition Act, and prohibit the anti-competitive behaviour. The Draft Competition Act is harmonised with EC legislation, with prohibitions similar to Art 81 and 82 EC/ Art 53 and 54 EEA. A majority within the Committee has suggested that orders in such cases might include structural remedies.

Question 2

How significant, if at all, is the possibility that competition authorities and merging parties will agree to remedies that err on the overly strict side? In what situations are such risks likely to be especially high and what, if anything, can be done to reduce them?

In Norway it is unlikely that the competition authorities and the parties should agree to remedies that err on the overly strict side. It is clearly stated in the Competition Act that economic efficiency is the aim of competition regulation, and competition a means to achieve this aim, and efficiencies are always considered thoroughly. Even if the NCA should have an inclination to err "on the safe side", it is doubtful that the parties should accept it. The parties frequently challenge decisions in merger cases, and appeals have in many cases been successful.

As parties often have been allowed to proceed with the transaction before competition authorities have reached a final decision, it is in many cases not essential for the parties that a decision is reached quickly. When the NCA to a greater extent uses its power to prohibit integration until a decision is made, this might change. The White Paper on the new Competition Act contains an automatic prohibition against integration in phase I, while this will be decided on a case-by-case basis in phase II.

With the present Competition Act, the focus of the NCA is very much on identifying threats to competition. Discussions on remedies start at a late stage, and this might also contribute to reduce the risk of agreeing on overly strict remedies.

Question 3

Can delegates supply examples of mergers in which they chose to rely on standard post-merger prohibitions and penalties, rather than to impose ex ante *behavioural or structural remedies to take care of unusually uncertain or weak threats to competition? Were the parties subject to any reporting requirements in those cases? How did these mergers work out?*

With respect to the mutual acquisition of shares of Tamro (a distributor of pharmaceutical products) and Apokjeden (a chain of pharmacies), the NCA in May 2000 in a Statement of Objections warned that it would intervene. Apokjeden had a very dominant position in the retail market, and the concentration was found to create a significant restriction of competition in the wholesale market as well. In August 2000, when the NCA made its decision, the market situation had changed. The Health Authority had changed its criteria for giving concessions to new pharmacies, making market entrance more likely, and the market share of Apokjeden had been reduced from 75 to between 40 and 50 per cent of the market. In view of this, the NCA concluded that there was no legal basis for an intervention. However, the NCA stated that it would follow the development in this market closely, and required the parties to report quarterly the development with respect to members and turnover in Apokjeden, as well as the parties' markets shares.

2. Range of remedies

Contingent remedies have not been used in Norwegian merger cases.

3. Design Issues - Effectiveness

Question 1

In terms of designing and implementing merger remedies, how important are notification requirements and/or the ability to impose interim measures aimed at either postponing closure or ensuring that assets are held separate post-merger pending examination by the competition authority?

There are no notification requirements in the present Competition Act, and the necessity of a duty to notify has been under discussion in the ongoing revision of the legislation. It is not obvious that a duty to notify is necessary in a small country like Norway, as the NCA is likely to learn about any important merger plans. However, a duty to notify will probably be introduced with the new legislation.

The ability to impose interim measures on the other hand can be crucial. As this currently is subject to a case-by-case decision of the NCA, there have been cases where a subsequent divesting of merged assets have been considered impossible or inefficient. The White Paper Draft Competition Act has a clause that bars closing initially during the merger review, and leaves it for the NCA to decide in phase II.

Questions 2 and 3

Do delegates agree that divestiture is the generally preferred solution for problematic mergers but that this preference is stronger with horizontal as compared with vertical mergers? What are some market characteristics that might militate in favour of using behavioural instead of structural remedies?

Is the preference for structural as compared with behavioural remedies decreasing? If so, to what extent does this reflect a general trend towards greater enforcement actions against vertical mergers, a larger share of mergers taking place in rapidly changing sectors, and/or some other factor(s)?

A count of the NCA's decisions in the period 1994-2002 shows that in the 14 cases where mergers were accepted conditionally, solely behavioural remedies were used in 5 cases, while a combination of structural and behavioural remedies were used in 6 cases. A preference for structural remedies has evolved, partly influenced by developments in international law, but also as a result of a growing scepticism with respect to the effectiveness of behavioural remedies. In the White Paper the Committee jointly expressed a preference for structural remedies. The NCA tries to avoid the use of such behavioural remedies that might put the Authority in a position as a continuous regulator.

Question 4

In the context of structural remedies, , what are the pros and cons of insisting on the sale of an on going business? Can your competition authority include within a divestiture order assets not directly employed in markets where the merger threatens competition. If possible, please describe a good example of this being done.

The probability of a divested business succeeding is normally higher when an on-going business is sold, but such a requirement may not be proportional. A less interventionist approach may be called for in many of the cases that are handled by the NCA.

If necessary to restore competition, the Authority may however require the divesting of assets not directly employed in markets where the merger threatens competition.

Question 5

To what extent does your competition authority follow a "clean sweep" policy in divestiture orders, i.e. transferring an ongoing business from one buyer to one seller rather than mixing assets from both acquiring and target firms and perhaps selling to a number of buyers? Has there been much criticism of this approach from small and medium sized business, and if so, what has been the response to that resistance?

There is no "clean sweep" policy in divestiture orders. The divested assets are often specified, but in several cases it is left to the parties to choose which assets to divest, and these can also be stated as a given quantity. Apart from the requirement that a buyer should be independent from the parties, the NCA does not have a policy of specifying preferences with respect to buyers.

Question 6

What special challenges to remedy design are found in industries undergoing liberalization or in industries undergoing rapid technological change?

Remedy design is particularly difficult in industries undergoing liberalization, compare the case regarding Apokjeden mentioned above, where the market changed completely in three months. Similarly, technological change may render the remedies unnecessary or insufficient.

Question 7

Are there any examples of remedies intended to lower switching costs either in industries being liberalized or other sectors.

A remedy to lower switching costs was used in 1998 when SAS bought shares in Wideroes. The airlines were not allowed to combine trips with the two companies in corporate discount schemes and agreements with travel agencies.

Question 8

What considerations influence the appropriate term and/or review period for behavioural remedies?

Most markets change rapidly, and according to the Norwegian Competition Act, 5 years constitute an appropriate term for interventions, including merger cases that are accepted with remedies. The Act allows for a maximum term of 10 years, but the NCA has always used 5 years. In one instance, within the airline industry, a merger decision with behavioural remedies has been partly prolonged after the 5-year period.

Question 9

What are the advantages and disadvantages of having something like the European Commission's Remedies Unit or the USFTC's Compliance Division implicated in both remedy design and enforcement?

The NCA has found it useful to involve its investigation unit in remedy design, to assist in formulating remedies into conditions that are enforceable.

4. Implementation - Administrability and Enforceability Issues

Question 1

How essential is it to employ monitoring and divestiture trustees to ensure that merger remedies are effectively implemented? What kinds of information and powers must the trustees have? Does your jurisdiction publish standard terms for monitoring and divestiture trusteeships?

The NCA has not used trustees to ensure implementation of merger remedies. Monitoring behavioural remedies is a task that best can be carried out by the NCA.

The implementation of divestitures may require competence the NCA does not possess, and trustees will possibly be used in the future to assist in implementing divestitures. This will probably require more detailed merger decisions than is normally used today, as well as clear and detailed mandates.

Question 2

How much does your competition authority rely on undertakings to ensure merger remedies are implemented? How successful has this proved to be?

The NCA relies on the undertakings to ensure implementation of merger remedies, and no systematic evaluation of implementation and effects of remedies has been undertaken. It is considered to have a preventive effect that undertakings may be punished for not complying with the competition authorities' decisions.

With respect to implementation of structural remedies the outcome in general has been satisfactory. In a couple of cases the time limits have been exceeded with a few weeks. In some cases there have been lengthy discussions with the undertakings with respect to the extent of the divestiture and on the possibilities of finding a buyer.

As no systematic evaluation has been carried out with respect to the implementation of behavioural remedies, and they wary a lot, it is difficult to generalize. Remedies that are to be carried out immediately, like the altering of contracts and reporting requirements, are normally implemented by the undertakings. Remedies that regulate behaviour over a longer period may lack in implementation if no interested parties are aware of their existence.

Question 3

How much does your competition authority rely on up-front buyers or a fix-it-first approach to divestitures? What, in your experience, are the pros and cons of these approaches?

The NCA has never insisted on an up-front buyer or a fix-it-first approach.

Question 4

What role, if any, should a competition authority play in the pricing of assets to be divested?

As a rule, the NCA does not engage in the pricing of assets, as this requires a competence the NCA does not possess. In one case, the NCA has the right to set a minimum price if the parties are not successful in their attempts at divesting certain assets.

Question 5

How often have crown jewels been included in your merger remedies, and how often has the sale of a crown jewel proved necessary? How have such remedies generally worked out?

The concept of crown jewels has not been used. In several cases the parties have been given a choice with respect to what assets to divest.

Question 6

What are the situations in which firewalls are most likely to be needed and what practical measures can be taken to make them effective?

Firewalls have been tried in a case that involved the Postal Services' activities within competition markets. There was a concern with respect to the possibility for cross-subsidisation between monopoly and competition areas. It is doubtful whether the remedies had the intended effect.

Question 7

What are the pros and cons of allowing competition authorities to revisit notified mergers which they did not oppose, or of competition authorities obtaining such a power in consent orders? Would such powers significantly assist competition authorities in ensuring that merging parties do not withhold or hide important information from the competition authority? What can be done to ensure that a power to re-open a merger review does not inordinately reduce parties' incentives to enter into consent agreements with the competition authority? Should there be an absolute time limit on the power to impose merger remedies, and should that depend on whether or not the merger has: a) been notified; and/or b) been the subject of a consent order?

With the present Competition Act, notification is voluntary, and it seems doubtful that a possibility to revisit mergers would assist significantly with respect to getting sufficient information.

Question 8

What do delegates think of Lexecon's suggestion that merger control could be used as a means of introducing through the "back door", a form of ex ante regulation that could not be imposed through general competition law? In what sectors, if any, is that particularly likely?

The development with respect to remedies in Norwegian merger cases does not support Lexecon's suggestion.

5. International Co-operation and the Importance of Follow-Up

Questions 1 to 4

Is there evidence that inadequate international co-operation on merger remedies is resulting in a significant loss of efficiencies from actual or potential mergers affecting more than one national market?

Do existing international differences in merger remedy policies have the effect of transferring power to the most restrictive competition authority?

Is there evidence that merging parties are engaging in strategic gaming because of imperfect co-ordination on merger remedies, including playing off one competition authority against another? If so, what should be done about that?

What legal obstacles, if any, would competition authorities have to surmount to suspend consideration of a merger in order to permit international co-operation on merger remedies? Could such suspensions be employed to grant one or possibly two competition authorities "lead agency" status in working out an appropriate remedy, while permitting the suspending authority(ies) eventually to reject or modify the resulting remedy?

The NCA is concerned that inadequate international co-operation in merger cases may lead to efficiency losses, and believes there is scope for improvements with respect to cooperation.

Considering Norway and its neighbouring countries, the legal framework is somewhat different.

While Norway applies the substantive test of "substantial lessening of competition", Sweden, Denmark and Finland apply a "dominance" test. There is a possibility that this may cause diverging results in merger analysis. To reduce this risk with respect to the integrated Nordic power market, the competition authorities have co-operated on the development of a harmonised analytical framework regarding the power market.

With respect to procedural rules, the timetables differ, but if Norway changes the rules according to the Draft Competition Act, these will converge. There are already examples of the agencies conferring in multi-jurisdictional mergers. Also agencies have waited to conclude officially, till one of the other agencies has reached its conclusion.

Among Denmark, Iceland and Norway, confidential information can now be shared in competition cases. Thus it will be possible to discuss merger cases in detail, as well as remedies. In a Nordic context, an ad hoc consultation group, similar to the one set up with respect to the power market, is possibly a more realistic approach than giving one authority "lead agency" status in working out remedies.

SWEDEN

Commitments concerning concentrations between undertakings - Summary of a report from a Nordic working group 2003

1. Introduction

Decisions by competition authorities in concentration cases are sometimes made after the parties to a concentration have given voluntary commitments. In order for a commitment to be effective, it shall eliminate the anti-competitive effects identified from the planned concentration.

A workgroup set up by the Nordic competition authorities has compiled the experiences gained by the authorities in concentration cases where parties have provided voluntary commitments. Lawyers with experience of concentration cases have also submitted their views for the report. The following provides a summary of the report.

2. Legislative framework

The competition authorities in Denmark, Finland and Sweden, and to a certain extent the Norwegian competition authority, are guided by EU legislative practice and guidelines in their examination of concentration cases. There are, however, differences between these countries concerning i.a. mandatory notification, the powers of the competition authorities, as well as the scope for imposing sanctions concerning concentrations between undertakings.

Certain concentrations are to be notified to the national competition authority in accordance with Swedish, Danish and Finnish legislation. Mandatory notification is determined on the basis of the turnover of the parties involved. Mandatory notification does not occur in Norway where an investigation into a concentration takes place on the initiative of the competition authority, or after the parties have made a voluntary notification to the authority. Proposals for the new Competition Act in Norway provide for mandatory notification.

In the countries mentioned above, a concentration which leads to a dominant position that significantly impedes competition can be prohibited. As an alternative to prohibition, the parties may be required or voluntarily undertake to take measures to remedy identified obstacles to competition.

The Norwegian and Danish competition authorities have the power to prohibit a concentration. In Sweden and Finland it is the Stockholm City Court and the Market Court respectively which at the request of the competition authority makes a decision on prohibition. In all countries, these decisions to prohibit a concentration may be appealed to a higher instance.

If the parties do not follow a voluntary commitment, or an obligation, then under Danish and Finnish law the parties may be subject to a fine, or a decision on approval may be revoked. In Norway, in addition to fines the parties may also receive a prison sentence when a commitment is not followed, whereas under Swedish legislation in such cases a fine may be imposed.

3. Structural commitments

During the period when there have been opportunities to intervene against mergers in the Nordic countries, both structural and other types of commitments have been made in a number of cases. In the 14 cases in Norway which the competition authority has cleared with commitments from the parties, solely structural conditions were stipulated in three cases, a combination of structural and non-structural conditions in six cases, and solely non-structural conditions in five cases. In Sweden the corresponding figures are four, five and seven respectively out of a total of 16 cases. In Denmark a total of six cases were approved with commitments. A combination of structural and non-structural commitments has been applied in four cases and solely non-structural commitments in two cases. In Finland a total of 16 cases have been approved with commitments.

A review of the cases shows that in Sweden, Norway, Denmark and Finland many different forms of structural commitments are accepted, both divestiture of whole or parts of an enterprise, including plants, capacity, parts of ownership and trademarks. When divesting capacity the requirement is not always linked to a specific unit but to a certain production capacity that can be taken over by existing or potential competitors to the merging parties. Divestiture of minority share holdings in competing companies and divestiture of trademarks are also accepted as remedies. There are also examples of requirements for divesting owner shares to reduce the parties' influence or control in an enterprise.

On many occasions there have been discussions on how to facilitate the establishment of other enterprises. In this connection requirements have been imposed on both the entity to be purchased and on the possible purchaser.

The competition authorities frequently require that the entity to be divested shall be a viable business, that is capable of operating on its own, independently of the merging parties.

The purchaser's characteristics will normally be important when divestiture of an activity/enterprise is accepted as a commitment. The competition authorities normally require that purchasers shall, directly and indirectly, be independent of the merging parties, and may also require that the purchaser shall be approved by the competition authority.

Structural commitments are often used in combination with non-structural commitments in order to ensure that the desired effect of the structural commitment is achieved or because the structural commitment alone is not enough to restore the competitive situation. An example of this is divestiture of units/ enterprises in combination with access to raw materials or infrastructure.

4. Non-structural commitments

Non-structural commitments have been used in some cases where it appears that it would not have been possible to implement structural commitments, or in cases where competition problems would occur as a consequence of special conditions on the market.

Non-structural commitments have mainly required the parties act or refrain from acting in a certain way. For example the parties must not discriminate when it comes to prices, discounts, supply conditions and the like. Obligations to guarantee a competitor supply of raw materials and access to infrastructure such as warehouses and distribution networks have also been stipulated. There are also examples of conditions regulating third parties' access to licences guaranteed by the merging parties. Commitments have also been used to reduce vertical control by means of prohibitions against exclusive purchasing obligations or other types of purchasing obligations, as well as prohibitions against exclusive supply obligations.

Non-structural commitments might also be based on regulating the future structure of a market, for example, that the parties refrain from exercising influence in some types of enterprises which can have an effect on the independent behaviour of other players in the market. Prohibitions have also been laid down against having representatives on the board of directors of other companies, normally competitors, as well as conditions for co-operation in a trade association. Other examples are obligations to notify the sale of an enterprise or other units that the parties will close down in the future, and prohibitions against non-competition clauses in certain agreements.

In Sweden, Denmark and Finland commitments of a non-structural nature are usually not limited in time, but the parties can apply for exemption/release from the obligations where conditions have changed. In Norway non-structural commitments apply for a limited period, normally five years, but may be extended.

The lawyers consulted have stated that structural commitments are preferable from a practical and administrative view since such commitments are simpler to verify. However, several lawyers express the view that the competition authorities should to a greater extent consider accepting non-structural commitments that are normally less interventionist for the merging parties. Even though it may be difficult to draw up such commitments, as they can bring about greater uncertainty for the parties when it comes to fulfilling the conditions, a number of lawyers consider greater flexibility on the part of the competition authorities would be desirable.

5. Formulation of commitments

The analysis carried out by competition authorities on a concentration between undertakings and the evaluation of the commitments provided must take account of conditions in the near future. Known and expected changes in market conditions such as product development, market access and legislation are factors considered in the analysis.

The formulation of structural commitments specifies activities which are to be divested, the time period within which the divestment should take place, and the requirements which are imposed on the buyer with respect to competitiveness, competence and financial solidity. Deadlines for divestment are normally confidential with respect to third parties and are normally no longer than one or two years.

In the formulation of non-structural commitments, account is taken of issues concerning the applicable period, follow-up and dissemination of information to third parties. When formulating commitments of a non-structural nature, clarity is of great importance, since in many cases it will be necessary to monitor and follow these up over a longer period than is the case for structural commitments. Under certain conditions, it is essential that third parties are made aware of the contents of a commitment.

The lawyers consulted have stated that it is essential that the competition authority provides clear information to the parties about the competition problems that have been identified, and that discussions on commitments are not taken up at too late a stage in the authority's decision-making process. In addition, they also stated that the seller and the target company should be contacted prior to the acceptance of the commitment since they are the parties most familiar with the assets to be transferred.

6. Implementation of commitments

Experience from the Nordic countries and their implementation of commitments shows that there can be problems with both structural and non-structural commitments and that these problems are typically of different kinds.

Structural commitments often have a shorter time period within which a divestiture shall be implemented. Sweden, Norway and Finland have all handled cases where the merging parties have not carried out the divestiture within the prescribed period. In Denmark there are no examples where the time limits have not been fulfilled. A reason for this might be the requirement that the divestiture shall be administered by a trustee when the time limit is exceeded.

The time limit for the divestiture is often kept confidential in order to provide the merged company with good conditions for divestment. However, in Denmark there has been one example of the sale of a strategic minority shareholding, where the time limit was not confidential. This was to avoid losses for other shareholders in the company in question arising from changes in the share price. Another important problem connected with divestiture is to find a suitable purchaser. The responsibility for finding a suitable purchaser is ultimately in the hands of the merged company. However, at the same time it is necessary that the competition authority states the demands to be made on the purchaser, for example, concerning knowledge of the business and financial solidity. This is necessary to ensure that the purchaser can operate the purchased enterprise, thus contributing to the maintenance of competition in the market.

It is furthermore important to stipulate in advance what shall be divested, and the condition of the assets to be divested.

As regards non-structural commitments there might be problems connected with supervising the fulfilment of the commitment. Non-structural commitments also typically run over a longer period than structural commitments. As a rule there is thus a greater need for follow-up by the competition authorities than when it concerns structural commitments.

For certain types of non-structural commitments, for example amendment to an agreement, it is usually sufficient that the merging parties notify fulfilment of the commitment. For other kinds of commitments it might be much more difficult to determine if the commitment is fulfilled.

Little experience has been gained from the use of a trustee. Sweden and Denmark have each had one case where a trustee has been used. Both cases concerned a large divestiture. In the Swedish case the trustee was also used for the implementation of non-structural commitments. The Finnish Competition Authority has more extensive experience of the use of a trustee.

Reactions from lawyers on the use of a trustee are generally positive. One of the lawyers points out that the use of a trustee is best suited for structural commitments. It is also pointed out that it is important that both the authority and the merging parties have confidence in the trustee and that the trustee has a good knowledge of the sector in question. One lawyer maintains that it is important that the time limit is extended so the trustee can become familiar with the market involved. On the other hand, another lawyer argued that significant costs are connected with the use of a trustee for the merged company. One proposal is that the authority regularly undertakes follow-up.

7. Follow-up and supervision of commitments

The competition authorities have not stipulated rules according to which they automatically follow up commitments in merger cases. Thus the process after the closing of a merger case is decided on a case to case basis.

The process for the follow-up of commitments depends to a high degree on whether the commitment is structural or non-structural. The countries are in agreement that follow-up and control is easier when it comes to structural commitments. The reason for this is mainly that such commitments from the very outset contain an obligation to perform a specific action and thus do not concern continuous behaviour. The need for follow-up and control is thus especially relevant for non-structural commitments.

Control of *structural* commitments primarily concerns three issues: 1) Ensuring that the parties endeavour to sell off the assets in question within the time limit, 2) to see to it that the enterprise/assets are run in an acceptable way up to the time of the divestiture, and 3) to ensure that the divested assets are not repurchased immediately afterwards.

As regards *non-structural* commitments the competition authorities have had to ask the parties to report on how they have acted with respect to different commitments. In certain cases this is included in the commitment. Thus the parties have the responsibility to keep the authorities informed about the fulfilment of the commitments. In the Nordic countries there have also been cases in which a third party has complained over non-fulfilment of a commitment.

All countries are able to impose sanctions on the parties if they do not fulfil the commitments. So far no country has exercised this option.

Several lawyers have pointed out that it is important that the authorities verify that the commitments are fulfilled. A few lawyers have stated that in cases where time limits are stipulated for the fulfilment of a commitment, it should be possible to extend such time limits, if it becomes apparent that it is impossible to fulfil the commitment within the time limit.

8. Summary of recommendations

The Nordic working group arrived at the following recommendations, set out below, based on the current experiences of competition authorities in concentration cases where the parties have provided voluntary commitments. Given the background that the authorities, particularly in Denmark, Finland and Sweden, are guided by legal praxis in the European Union, the recommendations are largely in line with the guidelines as is evident from the Notice issued by the European Commission on commitments.

The examination of concentration cases usually involves short deadlines. It is thus important to consider at as early a stage as possible in the examination process, whether a commitment might be required. Any commitments issued must, however, be put in relation to and help to reduce the anti-competitive effects identified by the competition authority in its examination of the concentration.

Structural commitments are often to be preferred as these have more enduring effects on the structure of the market, and after implementation require less follow-up on the part of the competition authorities than is the case for non-structural commitments. Commitments should be formulated such that difficulties concerning interpretation do not occur in connection with implementation or follow-up of the commitment. This applies not least to commitments formulated in such a way that their implementation is dependent on other events or conditions, e.g. the acquiring parties attain a certain market share. In addition, foreseeable changes in the future such as amendments to legislation etc should be taken account of when the commitment is being formulated.

This is particularly the case when the parties are involved in large or complicated economic units as it may be necessary to specify which companies are covered by the commitment. In addition to companies in the parties' groups, there may also be other companies in which the parties have a controlling ownership interest or there may be companies which have such interests in the merging parties.

9. Structural commitments

By means of a structural commitment, a competitive unit shall be created which can work as a counterweight to the strong company unit created by the concentration itself. The commitment must clearly state:

- what is to be divested,
- requirements imposed on the purchaser, and
- the deadlines to be applied.

The *business to be divested* shall be competitive in the long-term and able to operate independently of the parties to the concentration. Specifying which assets are to be divested as opposed to e.g. stating that a divested facility should have a certain minimum production capacity, makes it easier to determine whether a structural commitment has been fulfilled. The detailed requirements to be imposed on the activity may be decided on a case to case basis depending on the conditions existing in the appropriate market, and also on the basis of the competition authority's examination of the case. The competition authorities should pay particular attention to the fact that the parties to the concentration may have an interest in defining as narrowly as possible what requirements are necessary for the divested activity to be run competitively.

The commitment should also specify how the assets which are to be divested should be administered by the parties up to the point where the divestment takes place, in order to maintain the value of the assets.

The conditions for operating the divested activity competitively are largely dependent on i.a. the competence of the *purchaser*. The commitment should also state that the purchaser shall be independent of the parties to the concentration and be approved by the competition authority. In this context, account should also be taken of additional requirements to be imposed on the buyer, such as industrial know-how, technical competence and financial solidity.

In some cases, it may be desirable that the concentration is not implemented until the parties have made a binding agreement with a buyer approved by the competition authority. This may be the case, for instance, when the intended effects of the divestment are largely dependent on the competence of the buyer. Such a delay in the implementation of the concentration can, however, lead to disproportionately high costs for the parties in relation to the effects they might have had on the competition.

As regards the *period* for divestment, account must also be taken of the opportunities to implement the sale on conditions acceptable to the parties, and also as a desirable goal the ability to quickly reduce the market power created by the concentration. As a starting point the divestment should take place within 6-12 months after the competition authority has made a decision not to intervene against the concentration. In this context account should also be taken of the fact that the longer the period allowed for divestment, the greater the risk of value losses in assets and that personnel leave the company. In order to avoid unnecessary delay in divestment, the commitment can specify the time by which the parties should have started the sales process. From the commitment, it may also be evident that if the divestment does not take place within the prescribed period, an external trustee should be appointed to carry out the sale.

Moreover, it is often appropriate in the commitment to regulate the conditions for the parties to repurchase divested assets e.g. repurchase is not allowed, directly or indirectly, within five years. If repurchase subsequently takes place, consideration may be given to whether the commitment should cover an obligation for the parties to inform the competition authority about this.

A *structural commitment must often be combined with a non-structural commitment* in order to ensure that desired effects from the divestment are attained. One example of this is when a divestment is combined with a party undertaking to supply certain raw materials of importance in the operation of the divested activity. This applies, in particular, to small economies such as exist in the Nordic countries where the number of appropriate suppliers is often limited. Such business relations can, however, have a negative impact on the purchaser's ability to operate independently of the parties to the concentration. Alternatively, consideration can be given to whether the divestment should also cover units/assets of the parties supplying

the necessary raw materials etc. This can include units/assets related to markets on which no restrictions on competition occur directly as a result of the concentration in question.

10. Non-structural commitments

Non-structural commitments are often directed towards vertical control on the part of the parties e.g. where the parties are in long-term purchasing and supply agreements or where they have control over infrastructure or strategic key technologies. Such situations can further strengthen existing barriers to entry in a market or barriers which could arise as a result of the concentration. In such cases, a commitment from the parties to terminate and not enter into such agreements, grant infrastructure access to competitors etc may be sufficient to counteract the anti-competitive effects arising from the concentration. A non-structural commitment should cover:

- the period during which the commitment is applicable,
- the conditions under which the commitment shall apply,
- how the follow-up shall take place, and
- possible mechanisms by which information may be disseminated to third parties.

Commitments without limitation as regards *the duration of their applicability* may involve substantial monitoring efforts. This applies particularly to dynamic markets where market conditions can change rapidly, and for this reason a commitment may no longer be appropriate after a period of, for instance, five years. In particular under such circumstances, it may be necessary that a commitment is time-limited with the possibility of extension depending on how the market changes. In static markets, under certain conditions, non-time-limited commitments may be appropriate in view of the fact that the parties can apply to the competition authority in order to have a commitment revoked as a result of changes in market conditions. Under Norwegian law a commitment without a time limitation can normally not be issued. However, consideration can be given to whether to apply the maximum period of 10 years under the law instead of the five years which is the main rule laid down by the legislation.

Since non-structural commitments often regulate the actions of the parties over a number of years, the means by which the competition authority *follows up* the parties' fulfilment of the commitment is critical. The authority should thus develop internal routines on how the follow-up of a commitment shall be ensured and implemented.

As regards the follow-up of a commitment, both structural and non-structural, it is of interest not only to follow up the commitment, but also to verify that it fulfils its intended effects. Until now such follow-up has only been carried out to a limited extent by the Nordic competition authorities.

It should be clear from a commitment how to ensure in the first instance that *information is disseminated* to third parties. This can take place through the third parties receiving information on the competition authority's decision, together with a description of the commitment, publication of the contents of the decision through press releases and information on the authority's web site. The parties may also, where appropriate, undertake to incorporate the commitment in their agreements with third parties. Customers and others affected by the commitment can thus more easily determine what their rights are and at the same time check that the parties are observing the commitment.

UNITED KINGDOM

Background to UK merger legislation as it relates to remedies

Prior to June 2003, the UK operated a tri-partite two-stage process for investigating and determining merger transactions (the "old law"). The Office of Fair Trading (OFT) carried out an initial Phase I investigation of all qualifying mergers and gave its advice on the competition issues to the Secretary of State for Trade and Industry. It was for the Secretary of State to decide, usually in accordance with the OFT's advice, whether the merger should be cleared unconditionally or referred to the Competition Commission (CC) for a more detailed, Phase II, investigation. The CC would report on its findings including, if necessary, any recommendation as to remedy. Again, however, it would be for the Secretary of State to decide – on the basis of the CC's report and the advice of the OFT – whether any remedy was required and if so the nature of that remedy.

Since April 1990, it has been possible for the Secretary of State to accept undertakings from the parties to a merger to address the competition concerns identified at the Phase I stage instead of making a reference to the CC. Initially this applied only to divestment undertakings but in 1994 this power was extended to include behavioural undertakings as to future conduct. Such undertakings tend to be referred to as 'undertakings in lieu'.

Following the introduction of the merger provisions of the Enterprise Act 2002 (the "new law") in June 2003, the Secretary of State's decision making role has been taken out of most merger situations. It is now for the OFT to decide whether a merger should be referred to the CC on competition grounds (the Secretary of State retains the ability to make a reference on wider public interest (i.e. national security) grounds). The CC continues to carry out the Phase II investigation but as well as reporting on the merger also determines and negotiates any remedy required to address the adverse effects on competition which it has identified.

However, no mergers have yet been through a Phase II investigation, nor any undertakings in lieu accepted, under the new law. Therefore, all the examples which follow have been obtained under the old law. That said, while the process for obtaining remedies under the new law is slightly different it is unlikely that the scope or terms of remedies will be very different from those obtained previously.

1. Introduction

The Issues Paper for the roundtable discussion states four general principles in devising merger remedies:

- Remedies should not be applied unless there is in fact a threat to competition.
- Remedies should be least restrictive means to effectively eliminate the competition problem(s) posed by a merger.
- Reinforcing the previous point, competition authorities typically have no mandate to use merger review to engage in industrial planning.

- Competition authorities "…must be flexible and creative in devising remedies…".

1. Do delegates agree with the above four general principles? Should they be expanded to consider the adequacy of relying on post-merger remedies to take care of competition problems if and when they actually arise? Under what conditions would it be acceptable to rely on post-merger remedies?

We broadly agree with the four principles. They provide a useful framework within which to devise appropriate remedies (including remedy undertakings at Phase I of the assessment).

On the question of post-merger remedies, while it is technically possible for the UK competition authorities to revise undertakings after they have been given, in response to changes in circumstances, it is not possible to amend the remedy itself (e.g. because it was wrong).

It would be unwise frequently to rely on post-merger remedies. There is a key distinction between *ex ante* measures to maintain competitive incentives post merger and *ex post* intervention to curb and penalise abuse of dominant market power. Moreover, the detection, demonstration and remedy of adverse post-merger behaviour is likely to be necessarily imperfect and/or costly. The control of market structures to preserve competitive incentives is far more likely to be effective, efficient and certain than attempts to control corporate conduct post merger. Any post merger remedy would also only address future behaviour and be of little benefit to customers disadvantaged since the merger. That said, there may be rare cases where post-merger remedies can efficiently cure (or deter) risks to competition arising from the merger.

2. How significant, if at all, is the possibility that competition authorities and merging parties will agree to remedies that err on the overly strict side? In what situations are such risks likely to be especially high and what, if anything, can be done to reduce them?

There may be some risk of overly strict remedies being proposed at Phase I – given that the competition authority's knowledge of the affected market will not be as full at Phase I as it might be following a Phase II investigation. But the safeguard against this risk is to proceed to Phase II. The safeguard is not perfect if the parties are very keen to avoid the cost that a Phase II investigation might entail. At Phase II there are two-sided risks (and at Phase I there is also the risk of unduly lax remedies). Internal disciplines and appeal procedures offer ways of reducing risks.

These risks might be further reduced by allowing third parties the opportunity to see and comment on the wording of any 'draft' undertakings as part of a public consultation process.

3. Can delegates supply examples of mergers in which they chose to rely on standard post-merger prohibitions and penalties, rather than to impose ex ante behavioural or structural remedies to take care of unusually uncertain or weak threats to competition? Were the parties subject to any reporting requirements in those cases? How did these mergers work out?

Not a practice that the UK would follow.

2. Range of remedies

1. Do delegates have examples of contingent merger remedies? If so, how difficult was it to specify a sufficiently objective triggering event, and how did the remedy work?

The UK has no other examples of contingent merger remedies.

3. Design issues

1. In terms of designing and implementing merger remedies, how important are notification requirements and/or the ability to impose interim measures aimed at either postponing closure or ensuring that assets are held separate post-merger pending examination by the competition authority?

The UK has a voluntary system of merger notification and so the competition authorities may be considering mergers still at the proposed stage or which have already been completed. In the case of proposed mergers both the old law and the new law prevent the parties from completing the transaction if it is referred to the CC for Phase II investigation and report. However, under the old law the OFT could only seek to obtain 'hold separate' or 'stand still' undertakings from the acquirer in a completed merger following the reference of that merger to the CC. Given that reference might be up to four months from the date of completion of the merger this was less than ideal; there have been cases where integration of the merging businesses has limited a competition authority's ability to construct the preferred remedy. Under the new law introduced in June 2003, the OFT can, in addition, now seek initial undertakings from any of the parties concerned in completed mergers to prevent any pre-emptive action before the decision on reference has been made. This could include a requirement to hold any assets or businesses separate.

The new law should combine the benefits of a flexible voluntary notification system – the merging parties being able to decide whether to notify the transaction before or after completion – with the ability for the OFT to seek 'hold separate' undertakings where required.

2. Do delegates agree that divestiture is the generally preferred solution for problematic mergers but that this preference is stronger with horizontal as compared with vertical mergers? What are some market characteristics that might militate in favour of using behavioural instead of structural remedies?

As mentioned above, merger regulation is, by its nature, *ex ante* intervention to maintain competitive incentives by preventing anti-competitive structural changes in markets. It is, moreover, intended to avoid the need for complex ongoing monitoring of firms' behaviour. Given that a horizontal or vertical merger involves a structural change to a market, a structural remedy will often be the most appropriate solution where the merger gives rise to competition concerns.

Nevertheless, it might be preferable to seek behavioural undertakings where divestment would be impracticable or disproportionate to the adverse effects arising from the merger. The case of *Granada Group PLC/Rental Holdings* involved the merger of the two major television and video consumer rental companies in the UK. The merger was considered to raise competition concerns but mainly as regards existing [and future] long term renters where there appeared to be substantial consumer inertia and lack of price sensitivity. The Secretary of State, on the advice of the OFT, accepted undertakings in lieu of reference designed to protect the interests of long term renters in terms of price and switching to new or replacement equipment.

At the same time it may be necessary to support a structural (divestment) remedy with behavioural undertakings. In *Arriva plc/ Lutonian Buses Limited* the merger involved the acquisition by the major bus operator in Luton of its main, although much smaller, competitor. The CC found against the merger and recommended that Arriva be required to dispose of Lutonian, to a buyer approved by the OFT, but also that Arriva should give supporting behavioural undertakings. These supporting undertakings were intended to prevent Arriva from varying its existing bus services or setting up new bus services to compete more closely with those of Lutonian. This was in order to allow the new owner of Lutonian a period of time (3 years) within which to establish the divested business as a viable and effective competitor.

3. Is the preference for structural as compared with behavioural remedies decreasing? If so, to what extent does this reflect a general trend towards greater enforcement actions against vertical mergers, a larger share of mergers taking place in rapidly changing sectors, and/or some other factor(s)?

The OFT does not see a strong basis to conclude that there has been any decrease within the UK in the preference for structural rather than behavioural remedies (e.g. in its recent report into the bids for Safeway the CC recommended, and the Secretary of State agreed, structural remedies). That said, there may be a slightly increased tendency to seek behavioural remedies as an alternative to prohibition (e.g. in the recent gas storage case). But the number of such cases is few and it is difficult to tell whether this is a changing trend or simply reflects the nature of a few recent mergers.

4. In the context of structural remedies, what are the pros and cons of insisting on the sale of an on going business? Can your competition authority include within a divestiture order assets not directly employed in markets where the merger threatens competition. If possible, please describe a good example of this being done.

Within the UK, the preference has been to seek the divestment of an on-going business where at all possible, assuming this is not a disproportionate remedy. The great advantage of divesting an on-going business is that it provides a self-contained operation with all the necessary management, supply arrangements and customer contracts to provide an immediately competitive business. Any divestment is usually subject to the consent of the OFT. In carrying out this function we would wish to be assured for competition reasons that: the new owners have sufficient experience of the markets involved; they will continue to operate the business within the market where competition would otherwise be lost; and they will have the incentives to operate as an effective competitor.

Given that any remedy must be limited to addressing the specific adverse effects arising from the merger, the UK competition authorities would find it difficult to require the divestment of assets not directly employed in those markets where competition is threatened by the merger. That said, where an acquirer has committed itself to the sale of a business it may be necessary to add assets to that business in order to make it attractive to prospective purchasers.

5. To what extent does your competition authority follow a "clean sweep" policy in divestiture orders, i.e. transferring an ongoing business from one buyer to one seller rather than mixing assets from both acquiring and target firms and perhaps selling to a number of buyers? Has there been much criticism of this approach from small and medium sized business, and if so, what has been the response to that resistance?

The UK tends to apply a 'clean sweep' approach. There are likely to be inherent problems in attempting to combine assets from the two merging enterprises in an attempt to recreate an on-going business. Whether a sale should be to a single buyer or several buyers is a matter that might need to be determined by the scale of the adverse effects that the remedy is intended to address. The loss of competition arising from the merger of companies A and B with 30% and 15% respectively in the supply of certain goods might not be addressed if the smaller business were to be divested among three acquirers (with no existing interests in that market) equally. The ability of any of those acquirers – with only 5% of the market – to constrain the activities of Company A would be much more limited than that of company B prior to the merger.

That said, it is often argued that it would be easier to sell a business in smaller parts to a number of buyers rather than as a single entity for which there might be more limited interest. But this is not a convincing argument against sale as a single entity where this is necessary to address the adverse effects of the merger.

6. What special challenges to remedy design are found in industries undergoing liberalization or in industries undergoing rapid technological change?

The most obvious complication in designing remedies to apply in such industries is that markets may be fast changing with the result that the counterfactual is hard to judge and any remedy may quickly become out of date and ineffective. Nevertheless, the maintenance of competitive structures is no less important in liberalised and/or dynamic industries.

7. Are there any examples of remedies intended to lower switching costs either in industries being liberalized or other sectors.

No recent merger examples come to mind, but switching costs were a background feature in the Lloyds Bank/Abbey National merger case in 2001. The separate CC monopoly report into the provision of banking services to small and medium sized enterprises led to remedies to address switching costs.

8. What considerations influence the appropriate term and/or review period for behavioural remedies?

It is often difficult to predict when a merger might no longer give rise to the adverse effects which the behavioural undertakings were intended to address. As a consequence, the UK competition authorities have tended to require that behavioural undertakings be open ended although this may contain a specific requirement to review after a period of time (e.g. 5 years). As a matter of law, any undertakings can be reviewed and either varied or released at any time if there has been a change of circumstances which would justify that. It is for the companies giving the undertakings to seek such a review and this does happen from time to time.

9. What are the advantages and disadvantages of having something like the European Commission's Remedies Unit or the USFTC's Compliance Division implicated in both remedy design and enforcement?

While there are certain advantages in building up expertise in remedy design and enforcement within a specialist unit, care needs to be taken not to lose the benefit of the experience gained by the case team in assessing the merger. To some extent this decision may be determined by the volume of cases for which remedies are likely to be required to be negotiated and monitored. Within the UK, the OFT has taken the view that, to date, the amount of merger remedies work it carries out is not sufficient to justify a specialist unit. However, the CC, given its expanded role to determine and negotiate undertakings post a Phase II investigation as well as to monitor the carrying out of any divestment undertakings, has set up a specialist unit to carry out all remedies design and enforcement.

4. Implementation – Administrability and Enforcement Issues

1. How essential is it to employ monitoring and divestiture trustees to ensure that merger remedies are effectively implemented? What kinds of information and powers must the trustees have? Does your jurisdiction publish standard terms for monitoring and divestiture trusteeships?

Until recently the UK competition authorities had not sought to include trustee provisions within remedy undertakings. Over the past few years, however, we have made some limited use of trustee provisions in divestment undertakings but usually only triggered if an acquirer has been unable to effect the required sale within a set period of time (say 6-9 months). In only one case (*SCR-Sibelco SA/Fife Silica Sands*) has the trustee provision actually been triggered. We have also made some limited use of the appointment of a Compliance Officer to monitor and advise on on-going compliance with particularly detailed behavioural undertakings (e.g. in *British Aerospace/MES*).

How much does your competition authority rely on undertakings to ensure merger remedies are implemented? How successful has this proved to be?

In all instances where a remedy is required to address adverse competition effects arising from a merger the UK competition authority (in the past the Secretary of State, in the future the OFT or CC) obtains formal undertakings from the party or parties concerned as to the nature of the remedy and the time within which it is to be achieved. If the remedy is not carried out within the required period the competition authority can made a statutory order requiring that the remedy be fulfilled. [In the UK it has never been necessary to seek such an order.]

3. How much does your competition authority rely on up-front buyers or a fix-it-first approach to divestitures? What, in your experience, are the pros and cons of these approaches?

The UK does not rely upon an up-front buyer or fix it first approach. As a voluntary notification system, the UK authorities may be considering proposed or completed transactions. In the case of the latter, the acquirer is implicitly accepting the commercial risk that some divestment might be required at a later date if the competition authorities subsequently have competition concerns. It is possible that – in a proposed transaction – a potential acquirer might approach the OFT for a view as to whether if a divestment were to be required a certain acquirer would be acceptable. With the usual caveats, the OFT is usually willing to give a non-binding view on such a proposal.

4. What role, if any, should a competition authority play in the pricing of assets to be divested?

The UK authorities do not and never have become involved in the pricing of assets to be divested. It has been the responsibility of the acquiring party (or in one case recently the divestment trustee – see above) to effect the divestment at whatever price can be achieved. The possibility that the assets to be sold only achieve bids at less than the acquirer's view of the 'market value' or, indeed, what it may have paid for the assets, is a commercial risk that the acquirer has to accept in making its bid for that business (if a proposed merger) or making the acquisition (if a completed deal).

5. How often have crown jewels been included in your merger remedies, and how often has the sale of a crown jewel proved necessary? How have such remedies generally worked out?

No examples/experience.

6. What are the situations in which firewalls are most likely to be needed and what practical measures can be taken to make them effective?

In the UK's experience firewalls are most likely to be required in bidding situations (actual or potential) where it is necessary to prevent the disclosure of competition sensitive information to persons outside of the firewall group. This might be necessary in a situation where the parties to a merger are aligned with different bidding groups competing to tender for a particular contract or programme. In the *British Aerospace/MES* merger, the parties were each part of competing groups bidding for certain US/UK military programmes. The behavioural undertakings – accepted in lieu of reference to the CC – sought to firewall the competing groups of personnel to prevent the disclosure of competition-sensitive information, either directly or indirectly, to persons outside those groups. These firewalls were in addition to firewalls that had been required by the contractual arrangement imposed on the bidding groups.

7. What are the pros and cons of allowing competition authorities to revisit notified mergers which they did not oppose, or of competition authorities obtaining such a power in consent orders? Would such powers significantly assist competition authorities in ensuring that merging parties do not withhold or hide important information from the competition authority? What can be done to ensure that a power to re-open a merger review does not inordinately reduce parties' incentives to enter into consent agreements with the competition authority? Should there be an absolute time limit on the power to impose merger remedies, and should that depend on whether or not the merger has: a) been notified; and/or b) been the subject of a consent order?

Merger legislation in the UK does not permit the competition authorities to re-visit mergers which have been cleared – although there could be scope for further investigation either as an abuse of a dominant position or a wider market investigation if competition concerns subsequently came to light. It is easy to see that parties to a merger may resist such an open-ended ability to re-visit a merger transaction. Parties to a merger could never be confident that a further merger investigation might not be launched – this, in turn, may act as a disincentive to invest in the acquired business and to compete aggressively.

8. What do delegates think of Lexecon's suggestion that merger control could be used as a means of introducing through the "back door", a form of ex ante regulation that could not be imposed through general competition law? In what sectors, if any, is that particularly likely?

We do not see this as a problem. The four principles discussed above rule out "back door" regulation. In particular, remedies should – and in the UK can – only seek to address the specific adverse effects arising from the merger situation.

5. International Co-Operation and the importance of follow-up

Is there evidence that inadequate international co-operation on merger remedies is resulting in a significant loss of efficiencies from actual or potential mergers affecting more than one national market?

Within the UK, the competition authorities can only seek a remedy to address the competition concerns arising within the UK. That the same merger situation might raise competition issues in other countries is not a factor that the UK would be able to take into account. Nor can the fact that the same merger – giving rise to competition concerns within the UK – may provide for efficiencies (and thus customer benefits) in other countries be taken as a mitigating factor by the UK competition authorities. Only if such benefits are merger-specific and accrue to UK customers can they be taken into account.

However, in view of the EC merger review system and other international collaboration, we doubt that major problems result from the national focus of NCA jurisdiction. Reform of the ECMR should help further.

2. Do existing international differences in merger remedy policies have the effect of transferring power to the most restrictive competition authority?

As markets become increasingly international then the prospect of mergers affecting competition in a number of countries becomes increasingly possible. For example, even without triggering the EC's Merger Regulation threshold it is possible that a merger situation may be required to be notified in several Member States. While each will make its own assessment of the effect of the merger upon domestic competition they will also need to take into account the remedies that other Member States might be seeking since this might impact upon domestic competition, in particular, where markets are wider than national. In such a situation it seems possible that the parties will be obliged to meet the requirements of most demanding competition authority. But again we doubt that major problems are common in practice and ECMR reforms should help further within Europe.

3. Is there evidence that merging parties are engaging in strategic gaming because of imperfect co-ordination on merger remedies, including playing off one competition authority against another? If so, what should be done about that?

The UK has no information to suggest that this is so but international co-operation is always a useful safeguard against such possibilities.

4. What legal obstacles, if any, would competition authorities have to surmount to suspend consideration of a merger in order to permit international co-operation on merger remedies? Could such

suspensions be employed to grant one or possibly two competition authorities "lead agency" status in working out an appropriate remedy, while permitting the suspending authority(ies) eventually to reject or modify the resulting remedy?

In the UK currently, it might be possible to delay reaching a decision on a proposed merger notified by an informal submission pending the outcome of remedy considerations by another competition authority (indeed, this has been done in one UK merger recently). However, in the case of other types of merger – either a completed merger or proposed merger notified by a formal merger notice – for which a decision must be made within a fixed statutory timescale, it would be much more difficult. In principle, the UK would only be justified in delaying such a decision where the merger raised competition concerns within the UK but the remedies being negotiated elsewhere might address those concerns. The UK authorities would find it difficult to postpone reaching a decision where a merger raised no competition concerns within the UK.

UNITED STATES

The Secretariat's July 16, 2003, "Merger Remedies Roundtable Issues Paper" does an admirable job of collecting and summarizing the recent thinking and trends in the United States and elsewhere on this important topic, and it poses numerous questions intended to generate thoughtful discussion. This paper is intended to articulate some of the principles that motivate the policies and practices of the United States competition enforcement agencies – the Antitrust Division of the United States Department of Justice, and the United States Federal Trade Commission (the "agencies") – to provide some more detail on how our policies work in practice, to provide some examples to illustrate our points, and to continue this worthwhile discussion.

Background

Understanding merger[1] remedies in the United States requires some understanding of how our premerger notification scheme works, and how it came into being. The basic merger control statutes, the Sherman Act and the Clayton Act, date back to 1890 and 1914, respectively, but, with certain exceptions for particular industries, there was no requirement to provide the government with advance notification of a transaction until the Congress passed the Hart-Scott-Rodino Act ("HSR Act") in 1976. As a result, until the HSR Act, most of the government's merger litigation was undertaken to undo a merger, rather than to prevent one from occurring. Although the government's litigation record on liability was favourable, at least before the Supreme Court, these victories did not always result in effective relief, because assets often became irreversibly scrambled during the time that it took to obtain an enforceable judgment. As a result of the lengthy litigation process, moreover, relief was often delayed until several years after the violation, and the harm from the merger thus continued.

Congress sought to fix this problem with the HSR Act, which requires merging parties to provide premerger notification to the government, and to observe waiting periods before closing their deal. If the government believes the merger is anticompetitive, it may seek a preliminary injunction in federal court before the merger takes place. The purpose of the preliminary injunction is to halt the transaction until the agencies can fully litigate the likely competitive effects of the pending merger. If a preliminary injunction is issued, then there will be a full trial to determine whether the injunction should be made permanent, or instead whether the injunction should be removed and the merger allowed to proceed.[2] This point is important: the agencies lack the legal authority to block a deal initially on their own; they must prove to an independent court that they are likely to prevail in the litigation on the merits, before they can obtain preliminary injunctive relief. In practice, the HSR Act is such a powerful enforcement tool that litigation is relatively rare – most parties negotiate a settlement with the government before litigation, usually by offering to fix the anticompetitive part of the deal by making a divestiture. Thus, while most problems are resolved through negotiation instead of litigation, it is the possibility that the agency will seek to block the transaction completely that drives the negotiation process, including the remedy policies that we describe below.[3]

1. Principles of Merger Remedy Policies

1.1 Merger Remedies are Implemented to Enforce the Law by Preventing the Anticompetitive Effects of Unlawful Mergers

The typical remedy for any competition law violation is designed to restore competition to the *status quo ante*, that is, to return competition to the state that existed before the violation occurred. For merger law enforcement, that goal is to restore competition to its premerger level, or to prevent its loss in the first instance. The goal is neither to "improve" deals that do not rise to the level of a violation, nor to make the competitive landscape better than the state of the world before the transaction. In each case, the remedy is tied to the anticompetitive effects likely to result from the merger. This law enforcement model thus implies a limited but important role for public enforcers in crafting merger remedies: to preserve competition in the market, or to restore it to its premerger state.[4]

At first glance, it may appear that the United States follows a more regulatory model, because almost all of our remedies are the result of negotiated settlements and are not imposed by a judge after a trial. Some commentators have expressed concern that the HSR Act gives the government so much procedural leverage that the agencies have unintentionally strayed toward the regulatory model.[5] The agencies are aware of the criticism, and they strive to avoid becoming regulators. At the same time, however, the agencies will insist on resolving the competitive problems they have identified and will resist a settlement that falls short. Because of important considerations about the competitive effectiveness of the remedy, moreover, it may be necessary to craft a remedy that seems to go beyond the narrow competitive issues surrounding product and geographic market definition and entry barriers. As discussed below, however, those decisions are made carefully, based on the particular facts of the market, and all such remedies are designed, at their base, to correct the unlawful aspects of the merger, and to do no more than that.

1.2 Crafting a Negotiated Remedy: Avoiding Risk and Minimizing Assumptions

Before the United States agencies accept a negotiated merger remedy, they must conclude that: (1) the merger would be (or was) illegal,[6] (2) absent an adequate settlement, an effort should be made to prevent (or undo) the merger, and (3) the proposed remedy would resolve the competitive concerns. In the premerger setting, if the agency persuades the court that the merger would be unlawful in one or more markets, there is a strong presumption that an injunction is the proper remedy, because an injunction will best prevent the acquisition of market power and will maintain the competitive status quo. So, if the agency is negotiating to settle a case, it will seek a remedy that will achieve that same goal. The divestiture is thus designed to preserve competition to the same extent that an injunction would have.

In negotiating such a settlement, the preferred remedy is a divestiture of an autonomous, ongoing business in the markets at issue – that is, divestiture of *all* of the assets of one of the firms relating to the markets – rather than divestiture of a collection of unrelated assets. Such a functioning business has already proven to the market that it is a viable, competitive force. Consumers will thus not have to bear the risk that the business will fail because of start-up problems that the functioning business has already surmounted.

There is a related reason the agencies prefer a divestiture of a functioning business instead of a divestiture of a collection of assets: the agencies are very reluctant to substitute their judgment for the market forces that created these particular firms, especially in industries where the agencies lack decades of experience as enforcers. Stated in the alternative, and as discussed in more detail later, agreeing to accept a divestiture of assets that do not comprise the entire business of one of the current market players requires the agency to make many assumptions about the viability and competitiveness of those assets. The risk of error would fall on consumers.

Accordingly, absent the many facts that would support those assumptions, the agencies pursue more cautious relief and seek a divestiture that closely reflects how the firms actually compete in the particular market. If the assets to be divested have functioned as a viable entity in the market, the agency will have greater confidence that they will continue to do so, and the agency can then focus on whether the divested assets will actually remedy the anticompetitive effects alleged in the complaint.

Finally, we caution that each case is unique, and each merger remedy must be evaluated in light of the theory of competitive harm alleged in the complaint. Although the principles outlined above are useful guideposts, they are not inflexible rules that apply in all instances. For example, in some cases, the allegation of market power will derive from an overlap of intellectual property rights, and physical assets will be of secondary importance, and divestiture of a functioning business unit may or may not be necessary. Similarly, the agencies have decades of experience in reviewing transactions in certain industries (for example banking and steel at the Department of Justice, and pharmaceuticals and petroleum at the FTC), and the risk of failure for a particular divestiture may be mitigated by our knowledge of how the markets (and broader industries) function, and by a successful track record of divestitures from previous cases.

2. Applying These Principles in Practice

2.1 Divestiture of an entire business

The preferred approach in crafting a divestiture is to require the merging firms to divest the entirety of one of the overlapping businesses to a new firm (generally new to the market, not a newly formed entity). When the parties agree to divest such a complete business, the agencies have generally allowed the parties four to six months to complete the task.[7] The agencies have accepted such remedies when they have concluded that the divestiture will constitute a "going concern," that there are suitable candidates to acquire the business, and that at least some of those candidates are willing to acquire, or are interested in acquiring, the business. When the parties agree to an order including such a remedy, the agencies generally allow the underlying acquisition to proceed, accept the proposal, and obtain an enforceable order.

The agencies have the legal authority to require divestiture of more than simply the specific assets that relate directly to the defined product and geographic markets. In order to ensure that a competitor can obtain the same scale and scope economies that one of the merging firms enjoyed, a divestiture may need to include assets outside of the relevant markets. The test is whether such a divestiture is required to preserve or restore competition to the same level as existed pre-merger.

2.2 Divestitures of more limited assets

Frequently, merging parties are reluctant to divest as much of a business as is required to assure that a going concern is transferred. Rather, they urge the agencies to accept less, and sometimes much less, than a going concern, and assert that such a limited divestiture will nonetheless preserve or restore the lost competition. Such offers can increase the risks concerning whether the divestiture will indeed preserve or restore the lost competition, because there is much less certainty that another firm can acquire those limited assets and begin to compete effectively. Accordingly, learning from experience, the agencies have sometimes modified their approach when presented with such offers. Although the agencies remain willing to consider these more limited, or alternative, divestitures, the agencies will generally require answers to many more questions.[8]

Moreover, even assuming that these questions are answered satisfactorily (from the perspective of maintaining competition), the agencies may also require other provisions (some of which are discussed below) to ensure that the divestiture succeeds.[9] In all events, the agency will retain the authority to review

the proposed acquirer and the purchase agreement, and the agency will reject either if the proposed divestiture would not adequately remedy the competitive harm from the underlying acquisition.

2.3 The "Upfront Buyer" and/or "Crown Jewel" Provisions

The agencies have developed several tools to mitigate the risk that a divestiture of limited assets might not be a workable remedy. There are two related methods of ensuring that a partial divestiture will be a set of assets attractive enough to compete in the marketplace: requirement of a buyer for the assets before the underlying transaction closes (the "upfront buyer"), or alternatively, requirement that the parties divest a more attractive set of assets if the initial divestiture fails to attract qualified buyers (the "crown jewel" provision).

The more commonly required provision for limited-asset divestitures in the premerger setting has been the requirement that the divestiture be done (or at least completely negotiated) before the agency allows the merger to proceed. The requirement of an upfront buyer allows the agency to review both the proposed remedy and the proposed acquirer – including the asset purchase agreement – *before* withdrawing its objections to the merger (and, thus, before the agency loses its ability to prevent the merger in the first place).[10]

The upfront buyer mechanism provides two main protections for competition. First, before the agency accepts a settlement requiring divestiture of assets that do not constitute a going concern, it can assure itself that a suitable buyer exists and that that buyer is in fact interested in acquiring those assets. Second, if the review of the proposed divestiture – by the agency and by the buyer – reveals that additional assets must be included in the divestiture, the agency can require the addition of those assets to the package before accepting the settlement. The combination of due diligence by both acquirer and agency and review of specific concrete assets reduces the risk that the divestiture will turn out, in hindsight, to have been insufficient.

Insisting on an upfront buyer can mitigate the risk to consumers that the remedy will fail. Although existence of an upfront buyer does not prove that the remedy will succeed, an upfront buyer does suggest that the assets are viable: someone is willing to pay for them. Therefore, because consumers bear the risk if a divestiture is inadequate, it is appropriate to place upon the parties the burden to demonstrate that any less-than-complete package will suffice, by bringing in an appropriate buyer that is able to conduct due diligence and that can insist on expanding the asset package if necessary.

At the same time, however, it is important to emphasize that the buyer's interests are not necessarily the same as the interests of consumers. The buyer's principal goal is to use the assets profitably, not necessarily to maintain competition at the level that existed prior to the merger. The agencies therefore must conduct their own due diligence on the divestiture and the proposed buyer to assure that the buyer has sufficient incentives to compete effectively.

Sometimes an upfront buyer provision will not be feasible because of factors that the agency acknowledges cannot fairly be held against the parties. For those situations where the timing of closing is critical, but there is a substantial risk that the divestiture may fail, the agencies have sometimes required a crown jewel provision.[11] This remedy allows the agencies to require the parties (or a divestiture trustee) to divest a more attractive package than the initial divestiture package.[12] The purpose of the crown jewel provision is to assure that if the parties fail to divest, notwithstanding good faith efforts, the divestiture trustee will have a divestiture package that is more readily divestible.[13] The decision whether to require a crown jewel provision depends upon the basic divestiture itself. If the parties are willing to divest a stand-alone business, such that some more attractive package of assets does not realistically offer a *more* independent business (or one that would be *more* readily divestible), and if the agency is persuaded that

approvable buyers exist and are interested in acquiring the assets, the agency is unlikely to require a crown jewel. Alternatively, if the initial package consists of limited assets, or if there is substantial doubt about the existence of willing and approvable acquirers, the agency may require the added protection of a crown jewel.[14]

2.4 Other Protective Provisions

Whenever the agencies negotiate a divestiture remedy, they attempt to protect against the things that can go "wrong," regardless of the parties' good faith efforts to comply. Especially when the parties will be allowed to complete their acquisition and divest months later, there are risks that the divestiture will not occur, that competition will be harmed before the divestiture occurs, or that assets will deteriorate pending divestiture. Accordingly, the agencies have often required a number of prophylactic measures to reduce those risks.

2.4.1 Divestiture Trustee

The agencies will generally require an order provision allowing the agency to appoint a trustee to accomplish the divestiture if the parties fail to meet their obligation. This obligation is discretionary; that is, the agency *may*, but need not, allow the parties time past their deadline if the parties are close to an acceptable divestiture, or the agency may appoint a trustee immediately. The appointment of a divestiture trustee does not substitute for possible court sanctions (monetary penalties) for a failure to divest on time – the agencies may seek both a trustee and a penalty. The purpose of the trustee provision is to allow the agency to take control over the process, removing the parties from any search for or negotiation with a buyer.

Trustee provisions are fairly routine and standardized. The parties are required to consent to the agency's choice of trustee, unless the parties raise legitimate concerns about the nominee. They must enter into an agreement with the trustee that gives the trustee all authority needed to find a buyer, to negotiate an asset purchase agreement, and to consummate the transaction. They must provide the trustee with any information that is requested, in order to aid the trustee's efforts. They must compensate the trustee, and any retained assistants or experts, according to an arrangement that is approved by the agency. Failure to comply with any of these requirements may subject the parties to additional sanctions under the order.

In the agencies' recent experience, the need to appoint a trustee has been infrequent. The parties generally take their divestiture obligations very seriously, and if they do not complete the divestiture by the ordered deadline, they usually complete it soon thereafter. The use of a trustee provision as a further assurance of compliance, however, remains a fundamental part of the agencies' merger remedy order.

2.4.2 Orders to Hold Separate and to Maintain Assets

Whenever the agencies consider allowing the underlying acquisition to proceed, with a divestiture to occur some months later, they will also consider whether the merging parties should be required: (1) to hold the business to be divested separate and apart from their other operations, and (2) to maintain those assets in a viable and competitive condition. Such obligations will usually be incorporated into an Order to Hold Separate and Maintain Assets. The purpose of such an order is to establish a separate business unit that is removed from the control of the merging parties and that remains viable and competitive prior to divestiture, and to prevent competitively sensitive information from flowing between the parties and that separate unit. The result should be that the separate unit continues to operate separate from the control of the new parent, pending divestiture, and that it remains a robust and viable enterprise.

As with divestiture trustee provisions, orders to hold separate and maintain assets are fairly standardized.[15] They require the merging parties to provide the held separate business with sufficient

operating funds, to fund capital projects according to the last regular capital budget (with exceptions allowed in consultation with the agency), to prevent improper flows of information between the entities, and to retain a competent workforce, among other standard provisions. Such orders also frequently provide that the parties will appoint an individual to serve as a monitor, who can observe closely that the held separate business is operating properly and that the parties are observing their obligations, and who can report to the agency on a regular basis. In the agencies' experience, the use of hold separate orders and monitors has greatly reduced the instances of assets deteriorating, business being lost by the business that will be divested, and information improperly being shared between entities that will soon be expected to compete with each other.

2.4.3 Other short-term provisions

Many recent divestitures have involved products for which there may be a substantial time required before any acquirer can begin effective or efficient production. These products have included pharmaceutical products,[16] agricultural chemicals, and other complex formulations.[17] In order to enable the acquirer to develop the skills needed to compete independently, but to allow the acquirer to begin competing immediately, many such divestiture orders have required the merging parties to provide product pursuant to a supply agreement, for a short and defined time period, at a price defined to approximate direct costs. Similarly, some orders have required the merging parties to provide technical assistance, through, *inter alia*, visits by key experts, to help the acquiring firm train its employees in difficult technologies, especially when intellectual property is being divested.[18]

In some industries, switching costs may deter existing customers from moving their business to the acquirer of the divested assets. The problem can be exacerbated if the merging firms have entered long term contracts. The agencies have attempted to address this problem by requiring the merging parties affirmatively to waive such long-term contracts, and in some instances to provide *pro rata* refunds, in order to enable the newly entering firm to compete for significant business.[19]

The key point about all such short-term provisions is that they are *in aid* of the fundamental divestiture. They are not *in lieu* of such relief. Although they can be very important to the success of the acquirer, they rarely can be an effective alternative to a successful divestiture and creation of an independent competitor.[20]

2.4.4 The Use of Monitors

The agencies have found that some merging firms have behaved strategically, despite the protections discussed above, and have threatened to undermine divestitures. In addition, the frequent contacts between the merging firms and the acquirer, necessary for supply agreements and similar arrangements, can raise issues that, absent quick intervention, may jeopardize the acquirer's progress toward complete independence. Accordingly, some orders allow the agencies to appoint a monitoring trustee to actively review compliance with interim order provisions, and to report to the agency staff (and in the DOJ's case, the court), on the parties' progress. Monitors can be especially useful when the theory of competitive harm is dependent on keeping sensitive information from being shared (or stolen), or when complex technical information must be provided to the acquirer. Depending upon the requirement being overseen, the monitor may be someone with technical expertise in the industry (to oversee, for example, the provision of technical assistance),[21] may be a lawyer with expertise in a particular regulatory regime (such as United States food and drug law),[22] or may be a consultant.[23]

3. International Consultation and Cooperation

Increasingly, the United States agencies have investigated mergers that have also been reviewed by other enforcement agencies, most often the European Commission's Directorate General for Competition (DG-COMP). These mergers have raised questions in markets that were broader than the United States. Sometimes the geographic market has been worldwide; sometimes smaller regional markets existed both in the U.S. and elsewhere. (Also, transnational mergers have implicated different product markets in different jurisdictions.) In such matters, the agencies have striven to coordinate and cooperate as much as possible with their sister agencies in other nations. Especially in those cases where markets may differ in the various jurisdictions, or where the merging firms have significantly different competitive positions (large share in one market, small in the other), a divestiture proposed to resolve concerns in one jurisdiction may be less likely to restore or maintain competition in the other. The reviewing authorities accordingly need to coordinate their efforts and take account of each others' concerns in attempting to reach a "global" settlement with the parties. These efforts may consume more time, but are critical to assure that a settlement fulfils the enforcement goals of all the agencies and leaves the parties with compatible, non-conflicting remedial obligations.[24]

Particularly in the context of parallel reviews that include an agency, like DG-COMP, that is subject to absolute, unwaivable decision deadlines, it can become difficult to reach a settlement within that deadline that satisfies the concerns of all of the reviewing authorities. The merging parties naturally focus their efforts and their communications on the agency with the absolute time deadlines, and they may – intentionally or not – tend to give less attention to the other reviewing agency. In several cases that the FTC has reviewed concurrently with the EC, the parties focused increasingly on the EC as the deadline approached. Because the parties had granted waivers that allowed inter-agency communication, the FTC was able to discuss the parties' proposals with the EC. In some cases, the parties' proposals might have satisfied the EC but they would not have maintained or restored competition in the United States.[25] The agencies have streamlined and otherwise improved their ongoing communications, and the U.S. agencies anticipate that timing or other logistical issues will be less problematic as we move forward.[26]

NOTES

1. The term "merger" is used throughout this paper to include acquisitions and any other similar transactions subject to the statutes enforced by the agencies.

2. The FTC generally conducts such full trials under its own rules for administrative adjudication, and the result is an order from the FTC, either allowing the merger to go forward, or prohibiting it. The DOJ conducts such trials before the same court that issued the injunction. The substantive legal and economic issues are the same in either setting.

3. This paper discusses mainly settlements and orders that are entered before a merger is completed. It should be noted, however, that much of the same analysis will apply when seeking to remedy unlawful mergers that have already taken place. In that regard, the law in the United States is clear that a merger may be challenged after it occurs, whether or not it had been subject to the premerger reporting laws. The same law and analysis applies for both consummated and unconsummated mergers. Although the remedy may be more difficult for consummated mergers (that fact being the primary impetus behind the Hart-Scott-Rodino Act), the expiration of waiting periods does not create any legal "safe harbor" for an anticompetitive merger. Another topic outside the scope of this paper (except as background above) is the fundamental enforcement tool of completely prohibiting a merger that would be unlawful (that is obtaining a permanent injunction blocking the deal); in those cases other issues about the scope of the remedy become moot.

4. By contrast, a more regulatory approach might contemplate the government being more expansive in selecting merger remedies, and at its limits might involve full-blown industrial planning, restructuring industries and businesses to conform to the enforcer's preferred industry organization.

5. *See, e.g.,* A. Douglas Melamed, *Antitrust: The New Regulation*, 10 Antitrust Magazine 13 (1995). It is indeed true that most merging firms do not litigate, because litigation is either too costly, or too risky to the deal itself.

6. In most settlements, the problematic aspects represent a (frequently small) portion of the entire merger. That is why most cases can settle: the parties agree to a divestiture to resolve the agency's competitive concerns, and they may proceed with the rest of the transaction and obtain the efficiencies that may result.

7. The parties must find an acquirer, negotiate and execute a purchase and sale agreement, obtain the agency's approval of the acquirer and the terms of the agreement, and complete the divestiture transaction within the required time period. Penalties and other remedies may attach if the parties fail to complete the divestiture on time.

8. For instance, to be satisfied with a divestiture of a more limited set of assets, the agency must understand: whether firms exist that could compete effectively in the market with the more limited set of assets; the relative importance of any economies of scale and scope; whether established trade relationships with consumers and suppliers are vital, trivial or neither; whether know-how or other "soft" intellectual property is important or unimportant; and so on.

9. "Success" can be measured many ways, but the two most basic measures are: (1) whether the assets are in fact divested to an approved acquirer on approved terms, and (2) whether that acquirer in fact enters into competition with the merged parties and others in the market(s) and continues to compete for some significant time.

10. The agencies differ somewhat in their upfront buyer procedures. Generally, when the DOJ resolves a case with a divestiture before the underlying transaction closes, it will not file the case in court, but will issue a press release to inform the public and affected business communities about the relief. The FTC generally requires the parties to sign a consent order to resolve the case.

11. The agencies differ in their requirements for crown jewel provisions. The FTC utilizes the remedy more often than the DOJ, and in fact, the DOJ will require a crown jewel only in rare instances.

12. Crown jewel provisions, as well as divestiture deadlines, are provisions within the public documents (complaint and order) released by the agencies. The agencies acknowledge the concern expressed by some that public knowledge of these requirements might lead to strategic behavior by potential acquirers (*e.g.*, waiting until near the deadline to make an offer, or waiting even later to try to acquire a "more attractive" package).

13. The crown jewel is *not* designed as a punitive provision. Indeed, the agencies may not use their merger remedies to *punish* parties. Nevertheless, the agencies recognize that crown jewel provisions can impose a significant cost on the parties for their failure to divest on time.

14. These considerations are similar to those that underlie the use of the upfront buyer. Thus, as more firms have committed to finding an upfront buyer, fewer recent orders have included crown jewel provisions.

15. Some recent FTC orders that include orders to hold separate are: *Shell/Pennzoil* (FTC Docket No. C-4059), *Phillips/Conoco* (C-4058), and *Bayer/Aventis* (C-4049). (All FTC complaints and orders since 1995 are available on the FTC's website. The DOJ has recently required a hold separate order in *United States v. Alcan* (Case Number 1:03CV02012, District Court for the District of Columbia, filed September 29, 2003) (available at www.usdoj.gov/atr).

16. *See, e.g., Pfizer/Pharmacia,* FTC Dkt. No. C-4075.

17. *Exxon/Mobil*, FTC Dkt. No. C-3907.

18. *See, e.g., Bayer/Aventis*, FTC Dkt. No. C-4049; *Dainippon*, FTC Dkt. No. C-4073. *Metso/Svedala*, FTC Dkt. No. C-4024; *INA/FAG*, FTC Dkt. No. C-4033; and *RHI*, FTC Dkt. No. C-4005.

19. *See MSC Software Corp.*, FTC No. 9299 (Order ¶ VII) for a termination and refund provision.

20. The most obvious concern is that the acquirer will be content to be a distributor of the merged firms, on very favorable terms.

21. *AHP*, FTC Dkt. No. C-3740.

22. *AHP*, FTC Dkt. No. C-3557.

23. See, *United States v. Premdor*.

24. See GE/Instrumentarium, September 16, 2003 DOJ press release at: http://www.atrnet.gov/subdocs/201271.htm and case filings at http://www.usdoj.gov/atr/cases/genera1.htm.

25. This experience led the U.S. agencies and the EC to include paragraphs 14 and 15 of their Best Practices on Cooperation in Merger Investigation that speak to the need to maintain communication and continue to coordinate the parallel procedures during the negotiation of settlements.

26. There may be legal limits to the ability of one competition authority to suspend consideration of a merger in order to permit international co-operation on merger remedies; the main obstacle would likely be a

statutory decision deadline - particularly like that in the EU Merger Regulation - that is not waivable with the consent of the merging parties. Nevertheless, in some instances the EC has reached a settlement that was accepted without further enforcement action by the U.S. agencies. But, in complex cases, a fixed decision deadline may make it difficult to negotiate and draft a settlement that completely satisfies all of the reviewing agencies. Better coordination, and complete cooperation from the parties, will increase the likelihood that the remedies will be effective in maintaining or restoring competition in all of the affected relevant markets.

SWITZERLAND

1. Introduction

The application of remedies in merger cases which pose problems to competition is an important tool for competition authorities. Remedies allow to avoid prohibitions of mergers where less restrictive means are sufficient to preserve effective competition. Remedies thus facilitate the realization of efficiencies without compromising competition.

In Switzerland, the legal basis for merger remedies is defined in the Federal Act on Cartels and Other Restraints of Competition (Act on Cartels, Acart). Article 10 Acart states that the Swiss Competition Commission "... *may prohibit the concentration or authorize it subject to conditions or obligations if it transpires from the investigation that the concentration*:

a) creates or strengthens a dominant position liable to eliminate effective competition, and
b) does not lead to a strengthening of competition in another market which outweighs the harmful effects of the dominant position."

An important implication of this formulation is that merger remedies can only be applied if there would otherwise be a serious harm to competition. In fact, the requirements (in terms of harm to competition) to apply merger remedies are the same as for a prohibition of a merger. Therefore, remedies can only be applied if the merger would result in the creation or strengthening of a dominant position.

The law gives the Swiss Competition Commission the authority to apply "conditions or obligations" on a merger but does not define what the conditions and obligations may consist of. The difference between conditions and charges are the consequences in case of failure to fulfil a remedy. While the failure to fulfil a condition automatically annihilates the approval of the merger, the failure to fulfil a charge entails pecuniary sanctions, but does not annihilate the approval of the merger.[1] Since it is usually very difficult to untangle a merger once it has taken place, conditions usually have to be fulfilled before the merger is consummated (condition precedent).

Since the law does not prescribe the measures that can be used as a remedy, the Swiss Competition Commission has a high degree of flexibility regarding their design. In general, however, a remedy must refer to the firm on which it is applied and must not depend on actions of third parties. Therefore, "contingent remedies" can usually not be applied.

As a general rule, merger remedies must be proportional in the sense that they must be apt, necessary and adequate to eliminate the competition problems of a merger. This implies that the remedies should be the least restrictive means to effectively eliminate the competition problems.

As a basic principle, it is up to the merging parties to propose remedies if the concentration turns out to pose competition problems. The Swiss Competition Commission does not have the competence to prescribe remedies on the merging parties. If a proposed merger poses competition problems, the merging parties basically have two options: they either withdraw the notification of the merger and file a new, modified notification, or they propose and consent to remedies which are apt to eliminate the competition problems. The Swiss Competition Commission either accepts or rejects the proposal made by the merging

parties after its examination. This procedure avoids that the competition authority actively "regulates" the structure of the market by proposing remedies to the parties and is a safeguard against the application of overly strict remedies.

Remedies can be implemented in two ways. They ¨can either be enacted in the final disposition clause or alternatively be taken account of within the competitive analysis of the merger (based on information supplied by the merging parties[2]). Since the assessment of remedies must take account of the competitive situation in a market, remedies are usually treated within the competitive analysis of a merger.

The Swiss law does not foresee the possibility to rely exclusively on standard post-merger prohibitions and penalties if a merger poses competition problems. For example, it is not possible to approve a merger that creates a dominant position under the condition that this position will not be abused. The reason for this is that merger control is primarily a structural policy. Merger control aims at avoiding the creation or strengthening of dominant positions capable of imposing harm to competition. Every dominant firm is subject to the provisions on abuse of a dominant position, regardless of whether it has been involved in a merger or not.

In summary, the Swiss competition law incorporates the principles that remedies should only be applied if there is a threat to competition, that remedies should be the least restrictive means to eliminate competition problems, that competition authorities should not have the mandate to use merger review to engage in industrial planning and that competition authorities should be flexible and creative in devising remedies.[3]

2. Range of Remedies

As has been mentioned in the previous section, the Swiss Competition Commission has a high degree of flexibility regarding the design of remedies. Table 1 gives an overview of remedies that have been applied in Switzerland. In most cases, structural remedies have been used. In one case, structural remedies have been combined with behavioural remedies (UBS / SBV merger).

Basically, three types of structural remedies are available to the competition authority:

- disposal of assets, shareholdings or voting rights;
- *measures to reduce market entry barriers* (e.g., elimination of exclusive agreements); and
- *measures to disentangle enterprises* (e.g., elimination of personal, financial or contractual connections with competitors).

Both conditions and obligations have been applied. However, conditions are usually preferred to obligations since their impact is more immediate. In addition, obligations require that their fulfilment is supervised after the merger took place.

Table 1: Overview of merger remedies applied in Switzerland

Case	**Industry**	*Type of merger*	*Type of remedy*	*Nature of remedy*	*Description of remedy*
Le Temps (RPW 1998/1, p. 40 ff.)	Newspaper publishing	joint venture	obligation	structural	Conditions guaranteeing the independence of the joint venture from the parent companies
UBS / SBV (RPW 1998/2, p. 278 ff.)	Banking	horizontal	obligation	structural/ behavioural	Sale of branches and subsidiaries, participation in joint ventures of the Swiss financial system, perpetuation of cumulated credits to SMEs
Bell AG / SEG-Poulets AG (RPW 1998/3, p. 392 ff.)	Meet products	horizontal	condition	structural	Sale of a subsidiary
Glaxo Wellcome PLC / SmithKline Beecham PLC (RPW 2001/2, p. 338 ff.)	Pharmaceuticals	horizontal	obligation	structural	Licensing of certain pharmaceuticals in order to increase competition
Tamedia / Belcom (RPW 2001/4, p. 721 ff.)	Newspaper publishing	horizontal	condition	structural	Sale of participation in competitor
Pfizer Inc. / Pharmacia Corp. (RPW 2003/2, p. 314 ff.)	Pharmaceuticals	horizontal	obligation	structural	Sale of products in development

3. Effectivenss and Implementation

In general, structural measures are preferred over behavioural measures since they do not require an ongoing monitoring. It is sometimes also mentioned that structural remedies should be chosen because merger control itself is a structural policy and does not explicitly address the competitive behaviour of firms.

Whenever possible, the Swiss Competition Commission relies on the disposal of an ongoing, stand-alone business to a single buyer ("clean sweep-approach"). The clean sweep-approach facilitates the preservation of a viable competitor in the market.

Structural remedies, however, are not always an easy solution to competition problems. First, it is sometimes necessary to limit the range of potential buyers. The merger between Bell AG and SEG-Poulets AG, for example, was allowed under the condition that one of the merging firm's subsidiary was sold to a competitor. This subsidiary was the third largest producer of poultry products in Switzerland. In order to preserve effective competition, the Swiss Competition Commission deemed it necessary that the subsidiary was not taken over by one of the two largest firms in the market. The need to limit the range of potential buyers may reduce the probability of success in preserving an effective competitor in the market.[1]

Second, the success of a structural remedy may not always depend on the behaviour of the selling or buying companies, but on third parties. For example, the merger between UBS and SBV, two large banks, was approved with the obligation that – among other things – UBS sells 25 branches in different cities to competitors. It turned out, however, that the effectiveness of this remedy depends on the number of clients that switch to the absorbing bank of these branches.

Moreover, structural remedies do not always preclude future monitoring and oversight of the remedy. For example, in the Le Temps case, the Swiss Competition Commission approved the creation of a joint venture between two newspaper publishers under certain conditions guaranteeing the independence of the new company from its parent companies. For instance, the president of the new company's supervisory board was required to be independent from the parent companies. Therefore, each time a new president is elected, the firm must seek approval from the Swiss Competition Commission. Also, every change in the capital structure and the voting rights of the new company has to be notified to the Competition Commission for approval.

Behavioural remedies can play an important role in cases where structural remedies are not available or would not be sufficient to eliminate competition problems. Behavioural remedies give the competition authority a high degree of flexibility where more standard solutions are not available. In order to avoid that the competition authority accumulates ongoing regulatory task, it is important that behavioural remedies are limited in time. Thereby, the time period should be sufficiently long to allow the market participants to adapt to the new situation. The competition authority should also have the power to review remedies in order to account for changes in the competitive situation.

Behavioural remedies may help to preserve economic efficiency while avoiding anti-competitive effects of a merger. In the UBS / SBV merger, for example, there was a concern that the merged company would decide to retreat from joint ventures of the Swiss financial system. These joint ventures, which are active in the field of payments, clearing and settlement, allow for the realization of scale economies and are particularly important for small and medium sized banks. While the merged firm would probably have been sufficiently large to produce such services by its own, small and medium sized banks would have suffered a considerable competitive disadvantage if the merged firm retired from the joint ventures.

In order to preserve effective competition and economic efficiency, the Swiss Competition Commission therefore obliged UBS to continue participating in the joint venture for at least five years. Five years have been considered sufficient for small and medium sized banks to look for alternative solutions to the existing joint ventures in case that UBS should no longer participate. In Mai 2003, the Swiss Competition Commission decided that the aim of the obligation has been achieved and the obligation was lifted.

4. International Co-operation

In international merger cases, co-operation between competition authorities is essential, particularly in cases affecting markets which are international in scope. In such cases, co-ordination of merger remedies is important to effectively avoid problems that the merger may pose.

Since Switzerland does not have a co-operation agreement with other competition authorities, the Swiss competition authority relies on waivers granted by the parties for the exchange of information. Usually, the merging firms do not oppose to granting waivers, and Switzerland has co-operated in several merger cases with foreign competition authorities, in particular with the European Union.

In two international merger cases, co-operation involved the co-ordination of merger remedies (Glaxo Wellcome PLC / SmithKline Beecham PLC and Pfizer Inc. / Pharmacia Corp.). These cases did not pose particular problems, since the remedies assured to the European Union were sufficient to eliminate the competition concerns that the mergers raised in Switzerland.

However, the co-ordination of merger remedies pay pose problems among jurisdictions with fixed time periods for merger review (such as Switzerland). The merging parties may try to play off the competition authorities by filing the notification to different competition authorities at different points in time.

NOTES

1. However, the approval of a merger with a charge may be revoked if the parties made provided false information, obtained approval fraudulently or gravely act in opposition to the charge.

2. If the parties provide false information, the approval of the merger may be revoked, see footnote 1.

3. See OECD, Merger Remedies Roundtable – Issues Paper by the Secretariat, DAFFE/COMP(2003)17.

1 This, however, was not an issue in the Bell AG / SEG-Poulets AG case.

EUROPEAN COMMISSION

1. Introduction

The European Commission **fully supports the four general principles** for designing merger remedies as set out in the OECD Issues Paper. According to these principles, remedies

- should only be applied if there is a threat to competition, and
- should be the least restrictive means to effectively eliminate the competition concerns posed by a merger.

Furthermore, competition authorities:

- should not use merger review to engage in industrial planning, and
- should be flexible and creative in devising remedies.

The first two principles are clearly enshrined in the European Union's legal framework for conducting merger control. The Merger Regulation allows – and requires – the Commission's intervention only where a concentration raises serious doubts as to its compatibility with the common market (Art. 6 (1) c MR), and stipulates that a concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market (Art. 2 (2) MR). Provided that a competition problem is "readily identifiable and can easily be remedied",[1] the Commission may decide to declare the concentration compatible with the common market at the end of the first investigation phase, subject to full compliance with the commitments submitted (Art. 6 (1) b in conjunction with Art. 6 (2) MR). If the serious doubts cannot be overcome at the end of the first phase, the Commission shall open a four month second phase investigation. Here, commitments that are "proportional to and would entirely eliminate the competition problems"[2] lead to a final decision declaring the concentration compatible with the common market, again subject to full compliance with the commitments made by the undertakings concerned. Hence, and in accordance with the proportionality principle, the remedies chosen in a particular case should be the least restrictive means to effectively eliminate the identified competition concerns.

The two further principles can be rather seen as sub-elements and complements to the proportionality principle. Engaging in industrial planning would run counter this approach. The Commission's experience furthermore shows that any remedy needs to be customised to take appropriately account of the specific nature of the markets concerned and competition issues at stake.

The OECD paper raises the important question whether the mechanics and the psychology of merger proceedings lead to an inherent risk that competition authorities and merging parties agree to **remedies that err on the overly strict side**. The European Commission acknowledges that this risk might indeed exist due to the possibly coinciding interests of both competition authorities and merging parties to agree on remedies in return for a clearance decision. However, both the European Commission's legal framework and its administrative practice in merger control proceedings appear to contain sufficient safeguards to minimise this risk:

- first, *pre-notification discussions* provide space for both notifying parties and the authority to explore without undue time pressure potential competition concerns and solutions thereto;

- second, competition concerns need to be founded in the results of a *market investigation* as well as a proper *assessment* of the concerns raised by third parties in order to distinguish between genuine competition concerns and comments driven by the vested interests of competitors, customers or suppliers which may be unrelated to issues relevant under competition law;

- third, the fact that remedies – though the results of an intensive dialogue between the Commission and the notifying parties – are eventually *proposed by the parties* and not imposed by the authority reduce this risk;

- fourth, internal and external *procedural safeguards* minimise this risk, in particular the regular involvement of the remedies unit, the consultation of other Commission services including the Legal Service, and the constant co-operation with the national competition authorities of the EU Member States;

- finally, the proposed "*stop-the-clock*" provisions in the Commission's proposal for a recast Merger Regulation[3] acknowledge the "time-squeeze" which can occur in complex cases, allow for a more flexible time-frame in particular for complex remedy negotiations while preserving the general benefits of deadlines, and thus contribute further to minimise the risk of overly strict remedies.

Experience shows that the safeguards work. The clearest evidence can be provided in cases where the parties proposed remedies in the course of proceedings, but which saw eventually an unconditional clearance decision.[4] *Examples* for this practice are the *MAN/Auwärter*[5] and the *Shell/Enterprise*[6] case. In both cases, the parties submitted commitments during the first phase, and both cases resulted in an unconditional clearance decision, the *MAN/Auwärter* case after a second phase investigation, and *Shell/Enterprise* at the end of first phase. These safeguards seem to work appropriately also in cases which, at first sight, raise competition concerns, but are referred to a national competition authority for further investigation upon a Member State's request in accordance with Article 9 MR. Both the *Cargill/Cerestar*[7] and the *Compass/Restorama/Rail Gourmet*[8] case, in which the parties submitted first phase commitments to the Commission before the case was referred to the responsible British competition authority, saw eventually an unconditional clearance decision.

The OECD issues paper suggests to explore a "wait and see" approach and the possibilities for imposing **ex post remedies** to avoid erring on the strict side, including the possibility of requiring the parties to agree to the merger being revisited and subject to normal merger remedies should standard post-merger remedies prove to be inadequate. In the light of the positive experience with existing safeguards, the European Commission sees no need to explore this theoretical – though under the EU's current legal framework non-existent – possibility. The possible advantage of finding a less strict but equally acceptable remedy at a later stage – sometimes years down the road – appears to be largely outweighed by the disproportionately reduced legal certainty for merging parties. Moreover, the widely recognised benefit of short legal deadlines under EU merger control would be undermined by considering ex post remedies as a regular option. Furthermore, establishing a causal link between an emerging dominant position and a concentration which was consummated some time ago, will at first sight face significant practical difficulties. It should also be noted that a clearance decision under the Merger Regulation does not preclude the possibility that a company's abuse of a dominant position is, at a later stage, pursued under Article 82 EC Treaty.

2. Range of Remedies

The European Commission does not have examples of **"contingent" remedies** that are imposed only if conditions of competition deteriorate.

3. Design Issues – Effectiveness

The European Commission agrees, for the reasons set out in the Remedies Notice,[9] to the statement in the OECD issues paper that **divestitures are the generally preferred solution** for merger raising competition concerns. The Commission cannot observe a decreasing trend for its preference for structural as compared to behavioural remedies in its merger decisions over the past years.

The OECD issues paper raises the question whether certain market characteristics might militate in favour of using **behavioural instead of structural remedies**. The Commission acknowledges that, despite its general preference for structural remedies, behavioural remedies might under certain circumstances provide an appropriate solution. In particular where access to networks is essential for the provision of services, the so-called "gatekeeper" effects may effectively be remedied by granting non-discriminatory access rights to third parties. The Toll Collect joint venture created by *DaimlerChrysler* and *Deutsche Telekom*[10] for the collection of road toll from heavy vehicles on German motorways is a good example for a remedy aiming to ensure non-discriminatory access to a telematics gateway. It also shows, however, that an access remedy can under certain circumstances be underpinned by structural elements – in this case by the formation of an independent telematics gateway company, not controlled by the parties and operating a central interface through which telematics services can be fed into the Toll Collect system and can be provided to all trucks equipped with a Toll Collect onboard unit.

The starting point for designing an appropriate remedy is the competition concern resulting from the structural change brought about by a concentration, which is normally best addressed by a structural remedy. In line with the Remedies Notice, a divestiture – including the divestment of intellectual property rights – is usually the clearest and most appropriate solution. It might be substituted by quasi-structural remedies, e.g., exclusive license agreements, if a clear-cut divestiture appears disproportionate and the fall-back solution is capable of restoring effective competition on the market.

More complex situations call for more sophisticated solutions. In cases where a horizontal overlap is accompanied by *vertical integration and ensuing risks of foreclosure*, the most appropriate solution may consist in a remedy package combining a divestiture with obligations to grant access rights or to provide an open interface to connect third party products to the parties' equipment.

Siemens/Dräger[11] and *GE/Instrumentarium*[12] are good examples for this approach. The first case brings together the two leading players in Europe in medical ventilators and also leads to high market shares in anaesthesia delivery systems. The Commission's market investigation not only revealed competition concerns in the two horizontally overlapping markets. It also raised fears that the *Siemens/Dräger* joint venture would give preference to Siemens' patient monitors by withholding the interface information necessary for competitors' monitors to be able to interface with the ventilators and other relevant equipment sold by the joint venture.

GE's subsequent acquisition of Instrumentarium on essentially the same markets brings together two of the four leading players in patient monitors in Europe. GE, but not Instrumentarium, is also a maker of anaesthesia delivery systems and ventilators. Again, the market investigation revealed substantiated concerns that GE could in future favour its own patient monitors by withholding the interface information necessary to connect third party monitors to GE's anaesthesia delivery systems and ventilators.

In both cases, a commitment to divest the overlapping businesses – Siemens undertook to divest its Life Support Systems unit, which includes the company's world-wide anaesthesia delivery and ventilation business, whereas GE undertook to divest Spacelab, including its worldwide patient monitoring business – was accompanied by a commitment to provide interface information to connect the parties respective equipment to third party monitors.

Specific features requiring specific solutions might also occur in **markets undergoing liberalisation**. In two recent cases in the German gas market and the Austrian electricity market, *EnBW/ENI/GVS*[13] and *Verbund/Energie Allianz,*[14] the parties undertook, as part of a wider remedy package, to grant *early termination rights* to customers that entered into long term supply agreements. This particular element of the remedy packages allows customers to switch suppliers, if they so wish, within reasonable timeframes and contributes to increased competition on the markets concerned.

In the context of **structural remedies**, the European Commission bases its **preference for divesting an ongoing business** as opposed to the sale of "mix and match" assets on its own experience and the findings of the FTC Divestiture Study.[15] Both show that the divestiture of an ongoing business is more likely to result in establishing a viable competitor on the market than a divestiture consisting of a combination of certain assets from both the purchaser and the target company. For viability considerations and in order to preserve pre-merger levels of competition, the Commission usually also prefers that the divested business is sold **to a single purchaser**.

In order to assure the viability of the divested business, the Remedies Notice states that it might be necessary to include in a divestiture activities which are related to markets where the Commission did not raise competition concerns.[16] The *Buhrmann/Samas* case[17] provides a good illustration: To remedy the competition concerns on the Dutch market for the distribution of office supplies for larger customers, Buhrmann offered to divest Corporate Express's office supplies in the Netherlands, Buhrmann's entire contract stationing business. The commitment not only covered Corporate Express' sales in the market of concern, but to its entire office supplies business. The Commission considered this necessary since, for several reasons, a partial transfer of the business would not have constituted a viable business: limited just to the overlapping activities, with only half of Corporate Express' turnover, the distribution centre and the sales organisation would not have been profitable. Furthermore, the purchaser would not have been able to obtain purchase conditions as favourable as those that Corporate Express enjoyed pre-merger.

The European Commission's decision to establish, in April 2001, the **Enforcement Unit** as special unit to help devising and implementing remedies has been an important step. The unit contributes to ensure consistency and to build up the required expertise and to develop further the tools for both the negotiation and the implementation phase of remedies. Member of the unit join case teams as soon as it appears that remedies may be required. Their usual role as full members of case team, also beyond cases involving remedies, allows all unit members to combine their specific expertise for remedies with their general experience of assessing merger cases.

4. Implementation – Administrability and Enforceability Issues

The European Commission has consistently requested the parties to appoint a trustee subject to prior approval of the Commission. The trustee usually oversees the implementation of the commitments and has an irrevocable mandate to ultimately sell the business which the parties committed to divest. Only in a limited number of smaller and seemingly straightforward cases, the Commission has not insisted in the appointment of a trustee.[18]

The trustee's appointment, tasks and powers are described in the Remedies Notice in some detail.[19] However, practical experience has shown that the provisions surrounding the trustee's appointment and its

role need to be precisely defined in the commitments. Areas of potential conflicts between the Commission and the parties or between the trustee and the parties concern the timing of the trustee's appointment, the role of the trustee and the scope of his powers in relation to the parties. In order to address these issues, the European Commission has recently published **standard terms for trustee mandates** together with model texts for divestiture commitments.[20]

The trustee shall be independent of the parties, possess the necessary qualifications to carry out the job and shall not be, or become, exposed to a conflict of interest.[21] The divestiture trustee may or may not be the same person as the "hold separate" or monitoring trustee, depending on the circumstances of the case. The Commission usually requests that the commitments specify clearly appointment procedure, selection criteria and tasks of the trustee.

In practice, the monitoring or "*hold separate" trustee* plays a key role in overseeing the ongoing management of the divestment business with a view to ensuring its continued economic viability, marketability and competitiveness. In this context, he monitors the sales process as well as the hold separate obligations of the parties until the sale of the divestment business to the purchaser approved by the Commission has been completed. In order to ensure compliance of the parties with the commitments, the trustee may propose measures to the parties, but has no power to impose such measures. Regular reporting as well as *ad-hoc* reporting of the trustee to the Commission in cases of alleged non-compliance are usually sufficient tools to ensure the parties compliance with the commitments. "Kick-off" meetings between the trustee and the Commission, even prior to the trustee's appointment by the Commission, have proven useful to establish a fruitful working relationship and to ensure that the trustee has a clear understanding of the Commission's expectations.

The Commission has limited experience with *divestiture trustees*. His power to eventually divest the business at no minimum price usually provides a sufficient incentive to the parties to comply with their obligation to sell within the first divestiture period, where the parties themselves are in charge of finding a potential purchaser, meeting the standards for approval by the Commission as set out in the commitments and the Commission decision.

As regards deadlines for implementing merger remedies, experience shows that *clear and short divestiture deadlines*, usually not exceeding six months for the first divestiture period, have proven effective tools to ensure proper fulfilment of the commitments. The main success factors of short deadlines appear to be that they require the parties to start the divestiture process shortly after the Commission's approval of the merger, and that they contribute to shorten the period of uncertainty for the divested business, helping it to maintain its continued competitiveness.

Important additional tools to ensure that remedies are implemented are **up-front buyer** or **crown jewel** provisions. As set out in the Remedies Notice,[22] these tools can play a crucial role in cases where the viability of the divestiture depends to a large extent on the viability of the purchaser, or the implementation of the parties' preferred option appears to be uncertain or difficult. However, the Commission's practice over the past three to four years shows that these tools are only applied in a limited number of cases where the Commission, usually after market-testing the commitments, had doubts as to the viability or saleability of the divested business.

As regards *crown jewel provisions*, both the *Nestlé/Ralston Purina*[23] and *Pfzer/Pharmacia*[24] case resulted in implementing the first option so that the parties did not have to revert to the second, alternative commitment. This does not necessarily mean that the crown jewel provision was, with hindsight, inappropriate, since it may result as well from the parties increased incentive to succeed with their preferred option.

Up-front buyer provisions, if deemed necessary, appear to provide similar incentives for the parties to propose an acceptable buyer, since they can close the main transaction only if and when the have obtained the Commission's purchaser approval for the divested business. The Commission's experience in this regard is so far limited, but the few cases[25] seem to suggest that up-front buyer provisions may contribute to short divestiture deadlines. However, the Commission intends to require an up-front buyer for proportionality reasons only if it has doubts as to whether the proposed remedy can be implemented.

5. International Co-operation

The European Commission shares the view that *co-operation and co-ordination* in designing remedies are crucially important in mergers that are international in geographic scope and of similar importance in cases of mergers affecting a number of separate national or regional markets. In the Commission's view, co-operation should at least *ensure compatible remedies*, which does not necessarily imply that the remedies in a particular case need to be identical. The underlying competition concerns may be different in different countries or regions and may call for different solutions. The bottom line should however be that the solutions found in different jurisdictions do not conflict with each other.

Co-operation should not only relate to the designing stage, but also to the implementing stage of remedies to ensure compatibility until full compliance with the commitments in cases where remedies are possibly modified post decision, in particular in relation to time limits or scope of the parties' obligations.

The risk that parties engage in strategic gaming because of imperfect co-ordination between agencies is not only related to remedies, but constitutes a wider risk inherent to multiple merger control proceedings in general. This risk may be best limited by way of close and regular contacts between competition authorities in accordance with prevailing legal requirements as well as continued convergence of merger control regimes towards recognised best practices.

6. The Importance of Follow-Up

Following the fruitful example of the USFTC[26], the European Commission, in 2002, started its own systematic assessment of its remedies practice in merger cases. In the 12 years from 1991 to 2002, some 159 merger cases were declared compatible with the European Common Market following commitments by the notifying parties. The main objective of the Remedies Study is to analyse the effectiveness of such remedies and to improve the Commission's remedy policy and practice.

The remedies study is designed in several stages that will each result in a better understanding of the impacts and the effectiveness of merger remedies. After an extensive cataloguing exercise, the Commission's Merger Task Force is currently collecting the views of practitioners in the field, i.e. individuals active in some 40 or so cases in the years 1996 to 2000. A team of case handlers is interviewing those directly involved at the time, i.e. buyers of assets or businesses, sellers, monitoring trustees and also, where appropriate, third parties such as competitors, customers, and suppliers.

The issues analysed are on the one hand concerned with the enforcement of the remedies and on the other hand with their impact on the relevant markets. Issues include: the market context at the time, the process of negotiations between buyers and sellers, the transfer of the business, the operation of the assets after the transfer and the role of particular elements in the text of the commitments[27]. At the end of 2003, the Remedy Study team will have examined some 40 or more cases, having conducted more than 120 interviews. The cases and remedies studied will comprise divestments of stand-alone businesses and other structural and non-structural remedies.

The Commission envisages to report results of this interview phase in the first half of 2004 and endeavours to include, where appropriate, policy conclusions and its view on items such as: what remedy

was suitable (effective) in a certain competition context, what were crucial elements of remedies, the design of successful divestiture processes and hold-separate obligations, what are suitable purchasers, and the like. These findings and comments received after publication will serve as input into the review of the Remedies Notice in 2004, and also influence the Commission's thinking regarding guidelines, such as the Best Practice guidelines for standard divestiture commitments.

The planning for further stages of the study foresees statistical evaluations of the information collected in interviews and questionnaires and an in-depth analyses of selected economic sectors. The Commission would be keen to share the experience on this systematic assessment of remedies with other OECD members and delegations.

NOTES

1. Recital 8, Council Regulation (EC) 1310/97 of 30 June 1997 amending Regulation (EEC) 4064/89 on the control of concentrations between undertakings, OJ 1997 L 180, p.1.

2. Ibid.

3. OJ 2003 C 20, p. 3.

4. For procedural aspects, see Footnote 13 of the Remedies Notice, OJ 2001 C 68, p. 3.

5. M.2201, 20 June 2001.

6. M.2745, 27 May 2002.

7. M.2502, referral decision 21 January 2002.

8. M.2639, referral decision 26 February 2002.

9. Para. 9.

10. M. 2903 DaimlerChrysler/Deutsche Telekom/JV, 30 April 2003.

11. M.2861, 30 April 2003.

12. M.3083, 2 September 2003.

13. M.2822, 17 December 2002.

14. M.2947, 11 June 2003.

15. US Federal Trade Commission, A Study of the Commission's Divestiture Process (1999). http://www.ftc.gov/os/1999/9908/divestiture.pdf

16. Para. 17.

17. M.2286, 11 April 2001.

18. E.g., M.2431 *Allianz/Dresdner Bank*, 19 July 2001, and M.3091 *Konica/Minolta*, 11 July 2003.

19. In particular points 50 to 57 of the Remedies Notice.

20. See DG Competition's homepage http://europa.eu.int/comm/competition/mergers/legislation/divestiture_commitments/ and the press release IP/03/614 of 2 May 2003.

21. Point 55 of the Remedies Notice.

22. Points 19 – 23.

23. M.2337, 27 July 2003.

24. M.2922, 27 February 2003.

25. M.2060 Bosch/Rexroth, 13 December 2000; M.1915 The Post Office/TPG/SPPL, 13 March 2001; M.2337 Nestlé/Ralston Purina, 27 July 2001, and M.2544 Masterfoods/Royal Canin, 15 February 2003.

26. See footnote 15.

27. Typical elements of commitment texts include: monitoring trustees, hold-separate clauses, the length of the periods granted, fire-sale provisions, the review clauses, up-front buyer provisions, crown-jewel provisions, provisions on the transfers of personnel, etc.

SUMMARY OF DISCUSSION

1. Introduction

The Chairman made three general opening points: (1) the issue of merger remedies has become important and most countries devote quite a lot of time trying to think about; (2) there is a general trend in support for structural remedies; (3) the regulations governing merger remedies in the different jurisdictions are likely to converge. He also pointed out that no contribution criticized structural remedies and outlined the risk that the person that buys the assets does not have as much incentive to compete as the one that buys the assets to maximise the value or profit of what he has bought.

2. General principles in designing remedies

The Chairman reminded the delegates the four principles listed in the Secretariat background paper– originally suggested by Deborah Majoras – on what remedies should be: remedies should not be applied unless there is a de facto threat to competition; remedies should be the least restrictive means to effectively eliminate the competition problems posed by a merger; reinforcing the previous point, competition authorities typically have no mandate to use merger review to engage in industrial planning; competition authorities must be flexible and creative in devising remedies.

In the absence of the Delegation from Lithuania the chairman referred to its contribution, stressing that it fully agrees with the four general principles but finds controversial the principle of relying on post-merger remedies to take care of competition problems.

The Chairman turned to Germany and quoted the following statement from its contribution: “a clearance subject to remedies may only be given if the following conditions are met 1) The remedy is suitable to fulfil the statutory goal of merger control i.e. to prevent the creation or strengthening of a dominant position 2) the remedy is necessary in order to prevent the creation or strengthening of a dominant position as a result of the merger” but “a condition or obligation aimed at opening up a market does not necessarily have to relate to the market affected by the merger”. He called on the delegation to describe the balancing test and briefly comment on the RWE/VEW case.

The German delegate explained that in general a merger which creates a dominant position or leads to a strengthening of a dominant position is to be blocked in Germany. However there is an exception, the so called balancing clause, which stipulates that a merger which results in the strengthening of a dominant position is nevertheless to be cleared if it also leads to improvements of conditions of competition, and these improvements outweigh the disadvantages resulting from the merger. These improvements can occur on the market directly affected by the merger, but also on other markets. The delegate added that the burden of proof lies in its entirety on the merging parties.

In the RWE/VEW case, the merger resulted in the strengthening of a dominant position by RWE on several electricity and gas markets in Germany. The commitments by the parties on the electricity market addressed all competition concerns while they did not fully in the gas market. Since further commitments on the gas market were not available and also not conceivable, the RWE offered other commitments on the electricity market. The parties showed then that their further commitments with respect to balancing power on the electricity market lead to improvements on the electricity market, which outweigh the

resulting disadvantages on the gas market. According to Germany, this mechanism is consistent with the principle whereby remedies imposed should only be the least restrictive means for two reasons: (1) without further commitments by RWE on the electricity market, the merger must have been blocked, so their clearance with the mentioned conditions was obviously less restrictive than the available alternatives that is the blocking of the merger; (2) the balancing clause only applies if the parties themselves invoke it, and prove that the necessary prerequisites are met.

The Chairman turned to the delegate from the United Kingdom and noted from their contribution that the authorities seem to have a rather narrow view of the possible scope of the remedy: "*…UK competition authorities would find it difficult to require the divestment of assets not directly employed in those markets where competition is threatened by the merger*". The Chairman wondered whether a balancing clause such as the one described by the German delegate could be possible in the United Kingdom, and asked for comments on the *Arriva plc/Lutonian Buses Limited* case.

The delegate from the United Kingdom explained that the OFT is the first phase investigator of mergers in the UK; it has to investigate 300 or so transactions each year, and refers to the Competition Commission about a dozen or 15 for an in-depth second look. On remedies, the OFT can accept undertakings in lieu of a reference, in which case the OFT would take commitments at the end of phase one and would not go to phase two. The OFT has also a role in implementing remedies after the Competition Commission's inquires detect a need for them.

The approach in the United Kingdom is very consistent with the four principles, mentioned above. First of all the OFT identifies what the competition problem is and then, tries to find the least restrictive way to cure it. Often a structural solution is the best way; it avoids complex monitoring of behavioural remedies. However, there are clearly circumstances where the least restrictive way of doing things is not structural but behavioural; it could be, because structural solutions might have consequences for markets and therefore be found disproportional, hence the preference for a behavioural approach.

A clean sweep approach, as the Chairman qualified the UK approach, does not mean an absolute approach, and it is very much depending on the context, whether some assets could be split into little parcels or could be sold as one lump. There is a danger when one has tiny parcels of assets or with owners who don't have much competitive concerns over the merged entity.

The bus case mentioned is not a representative case as it concerned behavioural undertakings aiming at protecting the new owner of the divested assets against predatory behaviour. At that time the United Kingdom did not have a law with a deterrent effect against predatory behaviour.

But the *Interbrew-Bass* case, an illustrative case of a structural option, the merged entity stated that Bass could not be split into component parts. After some procedural loops, Interbrew succeeded in a judicial review which had the effect that the case went back to the OFT to find out whether there was a less restrictive way to solve the competition problem. Finally the OFT recalled assets within that merger – eventually being sold to Coors – which in effect brought a new entrance, a very substantial player in the UK scene. This structural solution was less restrictive than prohibiting the merger and ended in a no less competitive situation than pre-merger.

The Chairman turned to Canada stressing that according to its contribution, remedies should be the least restrictive means to effectively eliminate the competition problems posed by a merger. As stated in a Canadian case law: "*...the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger*". Hence it is not necessary that a remedy restores the market to its pre-merger state of competition;

the point is that the lessening of competition must not be any longer, substantial. The Chairman asked for clarifications and notably about the measuring test.

A delegate from Canada stated that the Bureau's objective is indeed to ensure that the lessening of competition is not substantial. In determining whether competition is substantially lessened as opposed to just lessened the question usually asked is whether the merger will result in a significant price increase. Once a substantial prevention or lessening has been found, the Bureau may be satisfied that a partial divestiture of assets rather than a full divestiture of the acquired assets or shares will be sufficient to remedy the competition concerns.

The Bureau must be satisfied that a purchaser of assets or shares will be independent from the acquirer and will provide effective competition in the relevant market. However if the merging parties are involved in many product markets, but competition concerns have been identified in only one or just a few distinct ones, and these concerns are not interrelated, the Bureau would seek a remedy only in the relevant markets where concerns where identified even though the pre-merger state will no longer exist.

While it is not necessary that the remedy restores the pre-merger state, jurisprudence also indicates that it may be necessary to overshoot the mark to ensure that an effective remedy is achieved. For example in the *Superior Propane* case the Tribunal found that there would be a substantial lessening of competition in the national coordination of services market, and that only the divestiture of all of ICG Propane could remove the substantial lessening of competition.

Turning to Hungary the Chairman quoted its contribution: "Hungary like most European jurisdiction follows a dominance test so there is a realistic option to apply a remedy that does not restore competition at the pre-merger level, but still eliminates competition concerns associated with dominance. On the other hand according to our opinion if there were only such remedies available that actually improve the conditions of competition on the market, the authority should not hesitate to apply them." The Chairman then asked if Hungary had any direct examples where this issue came up.

The Hungarian delegate explained that maintaining competition on the pre-merger level can be difficult in practice. All mergers and acquisitions result in some concentration. If this reaches the level which would impede effective competition, then the transaction should be prohibited unless an effective remedy is proposed by the parties. Having a dominance test implies that the competition problem to be remedied is either the creation or a strengthening of a single firm or collective dominance. The goal of the remedies in Hungary is not to maintain competition at a pre-merger level, but to keep the competition at such a level that it would be without the dominance. This can include the prohibition of extending the dominance to another market. However, according to the Hungarian delegate, this is rather a theoretical question, which should not cause too many problems in practice. More generally and as a matter of principle, this is the nature of the competition concern which guides the choice of the remedy; typically, in an horizontal case, the best remedy to prescribe will be some kind of divestiture of the parties.

The Chairman went on with the remedies erring on the overly strict side. He pointed out that the European Commission does address this question by drawing a list of safeguards that exist in the EU law and that minimise or eliminate this possibility. The two cases, *MAN/Auwärter* and *Shell/Enterprise* provide examples of the fact that the Commission does not err on the overly strict side when it deals with merger remedies. He also emphasised that the EC contribution talks about reviewing the *ex post* effectiveness of these merger remedies.

A first speaker from the European Commission (EC) explained that the EC has considered if under certain circumstances there could be a common interest of merging parties and competition authorities to agree relatively quickly on remedies with the risk that they err on the strict side. In principle, he added,

the legal framework of the merger regulation would not allow this; the dominance test means a thorough market investigation to decide whether the Commission can enter into remedies discussion.

In the MAN/Auwärter and Shell/Enterprise cases, the two parties offered commitments in the course of the proceedings to address concerns, that had been identified and communicated to the parties by the Commission in the early stages of the investigation. At the end of the procedure, in both cases, the Commission concluded that they can be dealt without the remedies offered and parties were allowed to withdraw their commitments before the final decision.

Another question is whether remedies are really addressed to resolve the competition problem identified in the course of the investigation, and will they be effective? To respond to this question, the EC DG Comp has decided to look back into the period from 1996 to 2000 and a stock taking database classifying remedy cases from 1990 to 2000 has notably been established. Roughly 40 cases were selected, and now, DG Comp is interviewing Companies and individuals. It runs several interviews for each case, looking into structural and behavioural remedies as well; it has group discussions and case reports discussing the conclusions and experiences of particular cases or particular remedies. The interview includes the buyers and the sellers, those who offered the commitments in the first place, the trustees, third parties or associations which sometimes have more generic industry knowledge, in some cases competitors. In general, the companies are very forthcoming and welcome the opportunity to express themselves outside a case investigation context.

Quite often, the EC tackles on a very detailed level with the companies, for example checking the scope of the remedy. This allows for the balancing between the wish of the companies to reduce the scope and the wish of the competition authority to have a safe remedy that will create a new competition in the market. Divestiture process is also scrutinised, especially timing issues and/or pricing issues.

Another issue is to make sure that the commitment made by the parties at the time of the decision stays the same until it is really divested. Trustee arrangements are very carefully reviewed with possible recourse to monitoring trustees or sometimes divestiture trustees. Appropriate industry expertise is also needed when it comes to the monitoring of the divestiture. The purchaser approval criteria are also a relevant issue: who is the purchaser? Is he able to operate the assets in the adequate way? Is he still in the business? How much competitive strength does he really exert?

As for the effectiveness of the remedy, the EC wants to go beyond just finding out if the purchaser, for example, is still in the business. There is an ongoing study of an economic nature, to find out more about reference scenarios. What would have happened had the merger been passed through with different remedies or with no remedies at all? What if that merger had been prohibited?

Finally, interviewees are asked if they think the remedy was too big or too small. If the remedies were successful, the EC examines if the remedies were overshot. . If they were not so successful it is important to find out what assets could have been left away from that remedy. This exercise involves a large group of people who develop a thorough understanding of remedies. A mid-term review has just been prepared looking at how much resources have been spent and the way forward. The result is that continuing to commit these substantial resources to this exercise is a must, because of its significant findings.

3. Structural and Behavioural Remedies

The Chairman then moved to the question of the relative merits of structural and behavioural remedies and noted that the classification of remedies and the structural/behavioural dichotomy are standard in all the submissions. Turning to the Netherlands, he pointed out that in its contribution the delegation argues

that structural remedies are more effective and less costly for the competition authority. However, it accepts behavioural remedies where structural remedies do not provide the adequate solution to the problem; the Dutch contribution says:"*Nma does not have a special Remedies Unit and cannot afford to dedicate excessive time to the monitoring of remedies. As indicated in the Remedies Guidelines, remedies should require none or only limited supervision by Nma*". The Chairman asked if this was the reason for the preference for structural remedies.

According to the delegate from the Netherlands**,** the availability of resources partly explains the strong preference for structural remedies. If the Competition Authority had more resources, including staff with specific expertise, it would consider forming a separate remedies unit or at least designing a structure for building specialised workforce to that end. However, several factors explain this preference: 1) merger control is about market structure, and structural problems call for structural solutions in the first place; 2) the Dutch law, which requires that a remedy should prevent the creation or strengthening of a dominant position, supports structural remedy in general.; 3) 50% of the established remedies are first phase remedies and the law does not allow the application of behavioural remedies in the first phase because they are not enforceable in that phase.

By contrast, the Danish contribution refers to difficulties using structural remedies. Some divestitures have required an enormous amount of resources before they were accomplished and there were problems related both to their feasibility and effectiveness. The *FAS* and the *Zonenern* mergers were both joint ventures creating new products in new markets both with some concerns about structural remedies. The Chairman enquired about this statement and the referred cases.

The Danish delegate argued that the textbook distinction between structural and behavioural remedies is not always clear cut in real life. Even in case of mergers between large co-operatives, when the mergers enhance efficiency and there is considerable countervailing buying power, the authority has to intervene if there is a considerable increase in dominance. Specifically, it was found that a combination of structural and behavioural remedies can be applied (e.g.: requiring the parties to give freedom to their suppliers to also supply to their competitors; to give the new parties or the buyer access to the dominant firms' distribution infrastructure; and allowing a negative price in the selling), which shows that real life is more complex, and one cannot simply state that one type of remedy is good and another one is bad.

The delegate gave a short description of contingent remedies by presenting two cases concerning the new economy. In one of them a *de facto* monopoly was allowed in internet media coverage services: the major Danish newspapers and TV stations set up a new company which would allow all companies to have a service, in frame of which, if there is anything in the news about this company, customers can link to the original article in the newspaper or the TV station. The decision established a monopoly – the parties establishing this monopoly constituted a very big part of the other markets. On the other hand this new product was very experimental in its nature and could indeed be welfare enhancing if it was a success. Finally the merger was allowed but with a contingent remedy saying, if the merger proves to be a success they will have the obligation to deliver all third parties on equal terms as to the owners. The condition was turned into a simple turnover condition, saying that if the turnover of this new firm exceeded a certain threshold then these remedies will apply. To sum up, the reason was that on new rapidly developing markets things are very uncertain and the authority does not know what will happen in the future.

Referring to the Israeli contribution the Chairman pointed out that the Israeli antitrust authority (IAA) is reluctant to impose sweeping conditions when considering distinct competitive concerns. On the issue of structural and behavioural remedies, he quoted from the contribution: "*there are practical obstacles confronting divestiture undertakings in light of the unique character of the Israeli economy*". The Chairman asked the delegate from Israel to explain a case between retail chains, where the authority was unable to impose remedies even though it wanted to, and to outline the uniqueness of the Israeli situation.

The Israeli delegate noted that when the Israeli antitrust authority tries to impose a divestiture it encounters compliance problems, for three main different reasons. One is that the Israeli economy is small, thus it is difficult to find many potential buyers. The second reason is that it is very difficult to keep the remedies confidential. Potential buyers wait until the last minute in order to break a better deal for themselves. The third reason might be that the IAA is gradually getting a reputation of willingness to extend the period of divestiture.

The referred example concerning retail chains, is a very good illustration of these problems: two retail chains wanted to merge with a third one in Israel. The IAA was willing to approve the merger; however in three geographical areas it turned out that there would be only one competitor left. So in these areas, the divestiture of one of the two stores was asked for. In the first area the merged company made the divested assets less attractive, thus no bid came up. The IAA insisted that they sell the better store of the two, and they tried but the bid contained a minimum price so the bid failed again. By that time a few other chains came in, so there was enough competition and the parties asked the IAA to cancel the remedy. In two other geographical areas, there were also extensions that were asked, so by the time that they really had to sell the stores there were other competitors that came to the market so they asked for the cancellation of the remedy.

One can argue that this is the demonstration that the market works by itself and the remedy was not justified in the first place. This valid argument, however, still shows the enforcement and compliance difficulties, the IAA encounters. There are two possible solutions: (1) transferring the shares to a trustee who will sell them according to court instructions; (2) "fix it first" policy which the IAA have not tried yet. The question is whether such a condition will not kill the transaction on the whole, because people will not be able to wait enough until the "fix it" first policy is complied with.

The contribution from Switzerland states: "Whenever possible, the Swiss Competition Commission relies on the disposal of an ongoing stand-alone business to a single buyer ("clean sweep-approach"). The clean sweep approach facilitates the preservation of a viable competitor in the market". Referring to the fourth principle, the Chairman mentioned the UBS/SBC case as an example of creative thinking, where a behavioural remedy was imposed on the merging party to prevent competitors from getting into trouble. The Chairman asked the Swiss delegate to describe this case explaining the difficulties of structural remedies and possible benefits of behavioural remedies.

The delegate from Switzerland explained that success in applying structural remedies to mergers depends not only of the merging parties but of third parties as well. As an example, in the UBS/SBV case, the Competition Commission authorised the merger subject to the divestiture to one buyer of 25 branches all over Switzerland. To avoid the creation of a dominant position and to allow the entrance of a new foreign bank in the Swiss market, a foreign buyer was to be found. But the offer of 25 institutions was not attractive for domestic or foreign buyers.

UBS had to continue participating in a joint venture for at least five years (these joint ventures allow for economies of scale and are particularly important for small and medium sized banks; five years had been considered sufficient for small and medium sized banks to look for alternative solutions to the existing joint ventures in case that UBS should no longer participate). In Mai 2003, the Swiss Competition Commission established that the aim of the obligation had been achieved and the obligation was lifted. Therefore UBS fulfilled two of the three obligations. However the third obligation, the perpetuation of cumulated credits to SMEs, is still to be accomplished.

The Chairman noted Korean reservations about structural remedies, which are seen as efficiency reducing in certain circumstances. The Korean delegation was invited to present its views and give examples of cases where behavioural remedies have been preferred to structural remedies.

The Korean delegate stated, as a preamble, that the KFTC' applies behavioural remedies to vertical mergers and structural remedies to horizontal mergers. Mergers usually have both anti-competitive and efficiency-enhancing effects; therefore, the KFTC balances the anti-competitive effects against efficiencies when assessing the mergers and designing the remedies. If the efficiency-enhancing effects of the concerned merger outweigh its anti-competitive effects, the merger will not be prohibited but corrected to minimize the anti-competitive effects while preserving the efficiencies.

In vertical mergers, the anti-competitive effects are not as apparent or clear as in the case of horizontal mergers. The leverage effect of vertical mergers on market dominance is bigger than that of horizontal mergers. This is evident in the conglomerate mergers, especially if the concerned merger takes place under the market condition that makes the expectation about the anti-competitive effects very difficult; for example, in the rapidly evolving, innovative market, the expected efficiencies of the merger could be lost by structural remedies.

Although structural remedies can be designed to remove the concerned anti-competitive effects, such remedies often have negative effects on the efficiencies and can even lead to the abortion of the merger itself. Furthermore, given that structural remedies are based on an assessment about the competitive effects of the merger and can not be reversed once implemented, the competition authorities should limit the application of structural remedies to the merger cases where the assessment of the effects of a merger is feasible and accurate.

The vertical merger between the home-shopping program provider and cable operator is an example of cases where behavioural remedies have been preferred to structural ones. In this case, the KFTC concluded that each merging party could exclude its respective competitor by leveraging its newly-acquired dominant power in the market of its merger partner. If the KFTC had to impose the structural remedies on this case to prevent the possible anti-competitive effects, it would have had no choice but to order the cable operator to sell its network. Instead the KFTC imposed the behavioural remedies to the effect that each merging parties should not unfairly discriminate or exclude its competitor.

At the invitation of the Chairman the Swedish delegate presented the recommendations of the working group set up in August 2002 by the Nordic competition authorities to exchange information about merger control and merger remedies (the recommendations can be found on the website of the Swedish Competition Authority) .

He explained that in Sweden while the commitments, whether structural or behavioural, must be identified at an early stage because of the short deadlines in the process, they have come forward at a very late stage and it has not always been easy to evaluate them. Parties know more about the market and its future developments than the competition authority. Also, the design of the commitment may be problematic. It must be clear and easy to interpret by the Competition authority, the market, and all its actors. Reviewing the fulfilment of these commitments is another issue. The Swedish Competition Authority tends to rely on the information from the market itself because a follow up review of every single case is resource consuming and not always necessary.

On structural versus behavioural remedies, the Swedish Competition Authority shares Korea's position whereby behavioural remedies are sometimes the best solution. In Swedish cases, remedies are often of a structural nature, because in a small economy with concentrated markets there is a long standing tradition of supply and purchasing agreements between parties. And if that situation is affected by a merger then a behavioural remedy must be imposed to ensure that other competitors in the market are not adversely affected by the merger; but the question remains: for how long should those behavioural remedies stay in place? The Swedish Competition Authority has been blamed in some cases for engaging

long term remedies which do not grant the new entity the independence that it expected to get after the merger.

The Chairman concluded the discussion on the respective merits of the structural and behavioural remedies noting that it demonstrated that if there was a preference for structural remedies, it was not obvious that the latter are more efficient and less costly.

4. Designing remedies

The Chairman noted that for smaller jurisdictions, it is not easy to design remedies, and the cost for designing them is quite significant. He quoted the Nordic group recommendations: "*Commitments should be formulated such that difficulties concerning interpretation do not occur in connection with follow-up of the commitment. This applies not least to commitments formulated in such a way that their implementation is dependent on other events or conditions*".

The Chairman outlined that the Japanese contribution refers to a merger case in the paper industry between *Nippon Paper Industries Co., Ltd. and Daishowa Paper Manufacturing Co., Ltd.* In this case the parties undertook to divest, within three years, manufacturing facilities equivalent to 500,000 tons of annual paper product capacity which amounted to 8% of the total production of 5,900,000 tons, and related operations. The Chairman questioned the Japanese delegation about the implementation of this remedy and about a possible risk that within the three years the paper market would change its dimensions and 500.000 tons would not be 8% or significant in the market any more.

The Japanese delegate answered that in this case, such a dramatic change in the market was unlikely because Japan's paper market has been rather stable. The delegate reported that it was difficult for parties to explain that market situation has substantially changed. With regard to the mentioned divestiture, the difficulties regarding interpretation of commitments have not occurred so far between the parties and the JFTC because the parties themselves proposed such a divestiture and they also presented several possible and acceptable candidates for buyers at that time. The JFTC has kept close contacts with not only the parties but also the buyers with a view to achieving the intended purposes, namely maintaining competition in the relevant market, in an appropriate manner.

The Chairman turning to Brazil reiterated that there was a diversity of remedies mentioned in the various contributions. During the first two years of the application of the Brazilian competition law, behavioural remedies were predominant. However this was probably not the best approach, and the use of antitrust regulation mechanisms tended to be inefficient because they did not attack the origin of the competition restrictions. There is now a greater reliance on structural remedies. In the *Kolynos/Colgate* case the Kolynos trademark was suspended at least for 4 years.

The Brazilian delegation noted that under the Brazilian antitrust law (SBDC) the merging parties lack strong incentives to comply with antitrust authorities as they are not required to suspend their transaction pending approval. From the remedial perspective it is much more difficult for the Tribunal to undo a completed merger. Thus the SBDC includes precautionary measures to prevent the completion of the operation before the Tribunal's approval. The main objective of such measures is to avoid that a Tribunal's decision does not totally fulfil the objectives of the Law if any fact that could irreversibly jeopardize competition in such market might occur.

Recently amendments to the antitrust law have been discussed, including the establishment of a pre merger control and the improvement of the notification criteria to stimulate involved parties to co-operate, and to encourage alternatives to solve competition problems.

Another delegate from Brazil stressed that the Competition Act has introduced various instruments to speed up decisions, particularly the Performance Commitment Term (TCD) and the Commitment Term to Cease (TCC). These commitments aim at stopping determined behavioural practices or ensuring the sharing of the benefits of the merger with the consumers, as well as eliminating resulting negative effects. The companies prefer to sign these commitments.

During the two first years of the application of the Brazilian competition law, behavioural commitments were predominant. Over the last few years the CADE (Conselho Administrativo de Defesa Econômica) have imposed restrictions that have subsequently presented important qualitative changes. They have given a greater emphasis to the formulation of structural measures applied to mergers.

In Brazil when horizontal mergers are involved, structural measures are usually implemented to reduce existing barriers to entry and to restore the previous competition conditions (e.g. *Kolynos, White Martins, Bavaria, AMBEV cases*). Regarding transactions of a vertical nature, in some situations CADE has implemented measures to prevent anticompetitive conducts between vertically related markets; for example, the imposition of the obligation of non-discrimination between shareholder and non-shareholder customers. CADE has also had an important complementary role in the process of privatizations.

Concerning the lessons to be drawn from the implementation of remedies, the Brazilian delegate mentioned the AMBEV case where the approved merger concerned about 70% of the beer market in Brazil. The remedies seem to have worked as the percentage has dropped over the last 3 years. One year ago when the CADE finally approved the Kolynos/Colgate merger, the toothpaste market in Brazil was seen more competitive than before as a result of the remedies implemented.

The Brazilian delegate concluded that the competition legislation is to be amended with the possible introduction of a pre merger control, allowing for treatment of only those agreements which generate significant effect in the market.

The Chairman next focused on Australia's contribution and noted that the ACCC (Australian Competition and Consumer Commission) has consistently favoured structural remedies over behavioural remedies. According to the contribution "crown jewel approach" may be undesirable if it leads to divestitures which are wider than necessary to address the competition problem at hand. The chairman asked if the crown jewel approach is completely off in Australia and was interested to hear about the difficulty of designing merger remedies in high-tech industries where indicators tend to be very unstable.

On the crown jewel approach, the Australian delegate explained, that if there is a fundamental roadblock, parties should negotiate to eliminate the competition concerns in a way which will not involve the crown jewel.

The ACCC clearly does not like behavioural remedies, because of the uncertainty they bring to the markets. However, the ACCC has used them on occasions, notably to protect confidential information in the short term until the sale takes place, to allow parties to try to make alternative arrangements.

Submissions from the merging parties provide very helpful information on the various aspects of the merger including on the merging markets and the barriers to entry. The merger between a very large national bank and a regional bank in Victoria was a bit parallel to the Swiss experience with the UBS case. The ACCC was concerned about regional banking competition. The purpose of the remedy was to push on quasi-structural undertakings providing access to the EFTPOS and ATM networks on reasonable commercial terms, to encourage and facilitate possible entry in those areas. The ACCC wanted that access to be available to those facilities which would take significant amount of investment to get up and run into. They also got the merging parties to make efforts to facilitate the provision of ITNT services to others. In

another case, the Pfizer and Pharmacia merger, the ACCC got an undertaking in relation to a divestiture of intellectual property in the market which was subject to the competition in order to maintain competition on that market so there would not be a foreclosure.

In certain jurisdictions a merger remedy, noted the Chairman, is a commitment not to compete with either the buyers of the divested assets or in fact with the other firm. This was the situation in the *Léčiva/Slovakofarma* case, described in the Czech contribution, where the competition authority concluded that the merger was likely to lead to the strengthening of market power on a market with relatively high barriers to entry, and ordered a vast number of behavioural remedies. That raises an issue of the frontline between protecting competitors and protecting competition. The Chairman called on the delegate from the Czech Republic to give more details of this case.

The delegate from the Czech Republic argued that the referred case was too recent to give details on the implementation of the remedies. Time periods for the implementation were set, taking into account the complexity of the transactions, the problems resulting from negotiations with the parties potentially interested and the purchase of the transferred assets. The competition authority tried to achieve a balance between the short period of time for the implementation of the remedies which could result in the impossibility of implementation and the long period of time which could be contradictory to the general efforts of the office.

As regards practical realization of the monitoring of remedies' implementation, the office sent a letter to the parties, requiring the companies to provide detailed description of the implementation of remedies. If these commitments are met, the merger will not affect competition on the relevant market, notably through some dominant position by the entity resulting from the concentration. The parties to the merger are well aware that if the commitments they have adopted remain unfulfilled, the office may reverse its decision on the concentration.

5. Implementation and control

The Chairman then turned to Norway, which according to its contribution relies on the deterrent effect of sanctions imposed by the Competition Authority. The Chairman asked the Norwegian delegation if it has ever been confronted to non compliant merging firms and thus had to impose a sanction, and what those sanctions were.

The delegate from Norway remarked that in Norway to ensure enforceability, remedies offered by the parties are always translated into conditions in the decisions not to intervene against the concentration. The NCA (Norwegian Competition Authority) does not enter into informal arrangements with the parties. Infringement of the merger decision can be punished by criminal fines or imprisonment. The NCA has so far never filed a complaint against companies for not complying with merger decisions.

Concerning structural remedies, in two difficult cases, the parties tried to demonstrate that it was impossible to find buyers for the assets that were to be divested. As this was not accepted by the NCA, the parties were not able to divest within the time limit. In one of the cases the NCA decided not to make a formal complaint; the other case is still ongoing. To avoid the time limits being infringed, a time limit for starting the divestiture process has been introduced, in recent cases, but it has not proven to be completely satisfactory. So probably in the future other conditions such as a trustee will be applied.

With respect to non-structural commitments, the NCA in several cases has undertaken an initial investigation to establish if instances reported by market actors constitute infringements of the conditions in merger decisions. Remedies that are to be carried out immediately, like altering contracts and reporting requirements are normally implemented by the undertakings. Remedies that aimed at regulating behaviour

in a longer period may lack implementation, particularly if no interested parties are aware of their existence.

With respect to monitoring, the NCA thinks that relying on the market players is sufficient in a small economy like the Norwegian one. In almost all the cases where the NCA has undertaken investigations because of suspicion of infringements, it was at the initiative of or a tip from third parties. Decisions, including the conditions, are public and can easily be found on the NCA website. Also in several cases particularly with respect to the behavioural or non-structural remedies specific conditions with respect to information are included. The real challenge is the formulation of the conditions in the decision. Conditions that might be sensible from an economic point of view may not necessarily be easy to take to prosecution or the court for sanctioning, so the NCA found it useful to include lawyers in the corporate investigation department in remedy design, to assist in formulating conditions that are enforceable.

6. International co-operation

The Chairman noted that a large part of the United States' contribution is devoted to the issue of co-operation in trans-national merger cases. The US contribution analyses the importance of such co-operation particularly for the design of consistent remedies. He invited the delegates from the United States to talk about cases and experience notably as far as the US-EU co-operation is concerned.

Delegates from the United States first focused on two cases recently filed by the DOJ (Department of Justice). In the *General Electric/Instrumentarium* case, the EC and the U.S. independently stated that the product markets were slightly different, decided that the divestiture that would work here to cure the competition concern should be the divestiture of the Spacelabs subsidiary which is located in the U.S. The EC had reached commitments to the parties prior to the DOJ reaching a consent decree. The DOJ ultimately decided to seek its own consent decree in part because it was a U.S. asset and most of the sells of the subsidiary were in the U.S. The question of remedies involving the same assets that do not impose divergent applications on a party came up most directly in the consent decree that was filed with the court in the trustee provisions. The DOJ amended it to make clear that it would consult in good faith with the EC to come up with a common trustee. So the DOJ attempted various means in the decree to avoid any inconsistent obligations.

The Alcan/Pechiney matter also involved international co-operation but not at the same level; the DOJ discussed this investigation with both the Europeans and Canada. The DOJ and the Canadian authorities had joint interviews with various customers because the acquiring party (Alcan), some affected consumers (automakers and auto parts makers), and at least one competitor were all located in Canada and because the assets to be divested were in the U.S. The Canadians were satisfied that the divestiture ordered by the U.S. would comply with their interests as well.

A delegate from the United States noted that *Exxon and Mobil* was the first merger which triggered scrutiny from both the US FTC and the EC. This was a world-wide market and the FTC was concerned because it affected the US, as the EC also was because of the potential effects in the EC regions. The parties had hoped to convince the FTC not to take any remedy. Further to talks with the EC, the FTC made clear to the parties that they won't prevent the FTC from engaging on the issues. Ultimately part of the decrees included a divestiture in the jet turbine oil market, which remedied the U.S and the EC problems as well.

The *Bayer/Aventis* case which concerned various markets for protection of agricultural crops, involved predominantly licence of intellectual property, patterns and also some know-how. Lengthy talks between the parties and EC were needed on the question of how to structure an intellectual property licence

requirement. The issues were about creating a licence that will affect competition in the U.S. market but disadvantage competition in other markets. So the solution was to talk frequently and in great detail.

It is critical to prevent parties to deal with only one agency and then use the commitment reached as leverage to get the remaining agencies falling into line and accepting that as a solution. It should be made clear to the parties that competition authorities are going to have frequent communication with their sister agencies so that the parties have the ultimate responsibility to make sure that they do not enter into conflicting obligations.

7. General Discussion

A BIAC delegate noted that the business community has an equal interest in ensuring effective merger enforcement through the imposition of adequate remedies. Failure to impose effective remedies in merger transactions can often result in a direct harm to the business community at several levels. Remedies that increase transaction costs should be avoided. For example, if an agency were to rely on a policy that always requires a certain form of divestiture or certain forms of implementations such as an up-front buyer that would perhaps impose the highest level of transaction cost on every remedy. An up-front buyer is problematic because in any merger that requires a divestiture there are going to be two baskets of assets, those that have competitive concern connected to them and those that do not. The longer it takes for the transaction to close, the longer period of time the non-offending assets remain at bay. There are two consequences, first, the party is not able to combine those assets in a way that would produce the efficiencies, and secondly, especially with respect to the sellers' assets, those assets can sometimes be hampered or devalued in their effectiveness in the market.

However the delegate from the BIAC noted that in some situations an up-front buyer is a very important requirement. According to the BIAC paper an up-front buyer should not be required in situations (1) where the assets to be divested had previously operated as a stand alone business, (2) when the asset package, even though not previously a stand alone business, is clearly sufficient to maintain competition, (3) where there is likely to be a qualified buyer within the post-merger divestiture period.

From an ABA analysis on the possible need of an up-front buyer, it appears: (1) there should be a presumption that a stand alone business, a free standing operating unit will normally satisfy government concerns without the requirement for an up-front buyer; (2) if the agency can demonstrate that there are reasons to believe that that stand alone business will not be sufficient then the parties themselves must prove that an up-front buyer is not required; (3) if the parties can not meet that obligation or if the assets to be divested are not a stand alone entity then the agency should determine whether a viable competitor will remain and can impose one of the three possible resolutions. Any one of these three methods can be used to ensure that competition will be maintained.

Concerning international co-operation, the BIAC delegate noted that the worst situation would be where different jurisdictions would require conflicting requirements with respect to the same assets. An open dialogue is critical to that equation. The BIAC suggests that in situations with more than one jurisdiction, principles of comity or positive comity should come into play.

A Mexican delegate noted that Mexico tends to favour clear cut solutions, and remedies are not necessarily the first best solution. In some cases, however, remedies should be used because of the pressure of the involved parties in conducting the merger; Mexico, then, tends to favour structural remedies. (The Mexican competition authority has had many problems with behavioural remedies, especially monitoring and enforcing of them). But structural remedies can be sometimes problematic when there are many assets that can be divested, and selling or divesting the assets in the period agreed upon is another question. It is very difficult to prove that the party has made its best efforts to get rid of the assets. As for international

co-operation, many times the undertakings that have been accepted by different antitrust agencies are relevant as well for the Mexican market and therefore the competition authority is able to take advantage of them. In general, the possibility of consulting and exchanging views on different remedies is an important tool that can help emerging antitrust agencies to impose structural remedies more effectively.

The delegate from New Zealand interjected on a point raised by Israel on the merits of structural vs. behavioural remedies in small economies. He remarked that the law in New Zealand does not allow for behavioural remedies, because they are too resource demanding for a small authority. In a supermarkets case three players in the market and a smaller one wanted to merge. The competition authority required divestment of a number of supermarkets in areas where it felt that competition would be substantially lessened. This became politically difficult because rumours were spreading that the remaining large company was acquiring these supermarkets to shut them down.

The delegate from Ireland explained that Ireland has a 10 months old merger regime. Many parties of formerly heavily regulated industries are quick to suggest behavioural remedies, but the Irish competition authority does not wish to get back into a quasi regulatory or industrial planning kind of mode, and behavioural remedies may easily fall into that category particularly in those economies that are moving to a competition based regime. Also, in some cases, behavioural remedies could very well indeed be contrary to consumer welfare interests to the extent that they are price restrictive of pricing practices that may in fact be pro-competitive or in the interest of consumers.

The Danish delegate remarked that it is important to have an arsenal of smaller or larger instruments, because an authority with only strong methods, for example the final calling off the merger, makes its operation impossible. It is not true, he added, that on balance a number of remedies go too far and too harsh and indeed have an element of industrial planning.

According to the delegate from the United States (FTC) the remedies should not be any broader than they need to be.

For the delegate from Italy the distinction between structural and behavioural remedies is a bit too simplistic. There are many behavioural remedies that do not require any monitoring by the competition authorities. For instance in the Danish example, and in many of the Italian cases that impose access to an essential facility, monitoring is done by the market itself, and the authority does not need to monitor anything, because the market does it on its own. In Europe, he continued, there is a discussion on the change of test to be used for the evaluation of mergers. Many delegations mentioned that they make sure that a dominant position is not strengthened or created. However in the Danish case a dominant position was created and the remedies that were imposed did not eliminate the dominant position; it only made sure that effective competition was not impeded. In an EC example, the *Stream/Telepiu* case, where a dominant position was created, a monopoly was allowed and remedies were imposed where effective competition was not impeded. The delegate underscored that when mergers are allowed it is not because there is not a dominant position and remedies do not always have the objective to eliminate dominance but also to make sure that effective competition is maintained.

The Chairman agreed with the Italian delegate and concluded the roundtable in noting that everyone is still looking for the truth although in a rather convergent way. Contributions contain a lot of information on many of the points that has been or has not been taken up.

COMPTE RENDU DE LA DISCUSSION

1. Introduction

Le Président formule trois observations préliminaires de portée générale : (1) la question des mesures correctives en cas de fusion est devenue une question importante et la plupart des pays se mobilisent pour y réfléchir ; (2) la tendance générale qui se dessine consiste à s'orienter vers des mesures correctives de type structurel ; (3) on peut s'attendre à une convergence des réglementations régissant l'application des mesures correctives en vigueur dans les différents pays. Le Président souligne en outre qu'aucune contribution ne critique les mesures correctives de type structurel et fait état du risque que la personne qui acquiert les actifs cédés en application de mesures correctives ne soit pas portée à livrer une concurrence aussi âpre qu'une personne qui les acquiert dans le but d'optimiser la valeur de son acquisition ou les bénéfices produits par celle-ci.

2. Principes généraux qui doivent présider à l'élaboration des mesures correctives

Le Président rappelle aux délégués les quatre principes énoncés dans la note de référence du Secrétariat, et proposés à l'origine par Deborah Majoras, à savoir : les mesures correctives ne doivent être appliquées que si la concurrence est effectivement menacée, les mesures correctives doivent être le moyen le moins restrictif de résoudre effectivement le ou les problèmes de concurrence posés par une fusion, les autorités de la concurrence n'ont généralement pas mandat pour profiter de l'examen d'une fusion pour faire de la planification industrielle, ce qui vient conforter l'argument précédent, et enfin les autorités de la concurrence doivent faire preuve de souplesse et de créativité dans la formulation des mesures correctives.

En l'absence de la Délégation de la Lituanie, le Président fait référence à la contribution de ce pays dans laquelle ce dernier insiste sur le fait qu'il adhère pleinement aux quatre principes généraux, mais estime cependant que la méthode consistant à recourir à des mesures correctives ex post pour résoudre des problèmes de concurrence est contestable.

Le Président se tourne vers l'Allemagne et reprend un extrait de sa contribution dans laquelle elle indique qu'une autorisation subordonnée à la mise en œuvre de mesures correctives ne peut être accordée que si les conditions suivantes sont respectées : 1) les mesures correctives servent l'objectif du texte législatif sur le contrôle des fusions, à savoir prévenir la création ou le renforcement d'une position dominante, 2) les mesures correctives sont nécessaires pour prévenir la création ou le renforcement d'une position dominante résultant de la fusion, sachant qu'une condition ou une obligation visant à ouvrir un marché ne doit pas nécessairement s'appliquer au marché concerné par la fusion. Il invite la Délégation à décrire le critère de l'équilibre et à commenter brièvement la fusion RWE/VEW.

Le délégué de l'Allemagne explique qu'en règle générale, toute fusion qui crée une position dominante ou aboutit au renforcement d'une position dominante est interdite en Allemagne, mais que ce principe souffre toutefois une exception fondée sur le critère de l'équilibre général selon lequel une fusion qui aboutit au renforcement d'une position dominante peut néanmoins être autorisée si elle entraîne parallèlement une amélioration des conditions de concurrence et si cette amélioration contrebalance les inconvénients résultant de la fusion. L'amélioration des conditions de concurrence peut être observée sur le marché directement concerné par la fusion, mais aussi sur d'autres marchés. Le Délégué de l'Allemagne ajoute que la charge de la preuve incombe intégralement aux parties à la fusion.

La fusion RWE/VEW s'est traduite par un renforcement de la position dominante de RWE sur plusieurs marchés du gaz et de l'électricité en Allemagne. Les engagements pris par les parties ont résolu tous les problèmes de concurrence occasionnés par la fusion sur le marché de l'électricité, mais une partie seulement des problèmes prévisibles sur le marché du gaz. Parce qu'il n'était pas prévu d'engagements autres concernant le marché du gaz et qu'il n'était pas envisageable d'en prévoir, RWE a proposé de prendre des engagements supplémentaires sur le marché de l'électricité. Les parties ont alors réussi à démontrer que les engagements supplémentaires pris en vue d'équilibrer les positions sur le marché de l'électricité avaient conduit à des améliorations sur ce marché et que celles-ci contrebalançaient les conséquences préjudiciables de la fusion sur le marché du gaz. Pour l'Allemagne, cette solution est conforme au principe selon lequel les mesures correctives imposées doivent être le moyen le moins restrictif de résoudre les problèmes de concurrence et ce, pour deux raisons : (1) si RWE n'avait pas accepté de prendre des engagements supplémentaires sur le marché de l'électricité, la fusion aurait dû être interdite : or le fait d'avoir à se plier aux conditions susmentionnées constitue pour RWE un moyen moins restrictif que l'interdiction pure et simple de la fusion, qui était la seule autre option envisageable ; (2) le critère de l'équilibre général ne peut être appliqué que si les parties elles-mêmes l'invoquent et parviennent à prouver que les conditions requises sont satisfaites.

Le Président s'adresse au délégué du Royaume-Uni et retient de la contribution de ce pays que les autorités britanniques semblent avoir une conception plutôt étroite de la portée des mesures correctives puisqu'elles estiment qu'il est difficile d'exiger la cession d'actifs qui ne sont pas directement utilisés sur les marchés où la concurrence est menacée par la fusion. Le Président se demande si la notion d'équilibre général telle que la décrit le Délégué de l'Allemagne pourrait être retenue au Royaume-Uni et invite le Royaume-Uni à formuler des commentaires sur la fusion *Arriva plc/Lutonian Buses Limited*.

Le Délégué du Royaume-Uni explique que l'Office of Fair Trading (OFT) est l'autorité chargée en première instance d'enquêter sur les fusions au Royaume-Uni ; elle enquête sur environ 300 dossiers de fusion par an, et transmet à la Commission de la Concurrence douze à quinze dossiers pour un examen plus approfondi. S'agissant des mesures correctives, l'OFT peut accepter des engagements au lieu de transmettre le dossier à la Commission de la concurrence, auquel cas ces engagements sont pris dès la fin de la première phase et avant le passage à la seconde. L'OFT a également pour mission de faire appliquer les mesures correctives lorsque les travaux de la Commission de la Concurrence ont mis en évidence la nécessité d'en imposer.

La démarche suivie au Royaume-Uni cadre tout à fait avec les quatre principes mentionnés précédemment. L'OFT cherche avant toute chose à cerner le problème de concurrence posé par la fusion, puis il s'efforce de trouver le moyen le moins restrictif d'y remédier. La meilleure solution est souvent une mesure de type structurel qui évite les difficultés inhérentes à la complexité du suivi des mesures comportementales. Cependant, il est manifestement des situations où le moyen le moins restrictif de parvenir au résultat voulu n'est pas de type structurel, mais comportemental et ce, parce que les mesures structurelles peuvent dans certains cas avoir des répercussions sur les marchés et pour cette raison, se révéler disproportionnées, ce qui conduit à leur préférer une démarche comportementale.

La démarche de la « table rase », selon l'expression du Président, suivie par le Royaume-Uni n'est pas considérée comme un principe absolu et son application dépend beaucoup du contexte et de la possibilité de fragmenter certains actifs ou de les céder en bloc. Il existe un risque lorsqu'une entité détient de petits fragments d'actifs ou lorsque les acquéreurs des actifs ne sont guère motivés pour concurrencer l'entité née de la fusion.

L'exemple des compagnies d'autobus auquel il est fait référence n'est pas représentatif dans la mesure où il a donné lieu à des mesures comportementales visant à mettre le nouveau propriétaire des actifs cédés

à l'abri de comportements de prédation. En effet, le Royaume-Uni ne dispose d'aucun texte législatif destiné à prévenir les comportements de cette nature.

S'agissant de la fusion Interbrew-Bass, qui illustre parfaitement une situation où les mesures correctives qui ont été prises sont de type structurel, l'entité issue de la fusion a déclaré que les actifs de Bass ne pouvaient être fragmentés. Après un long parcours procédural, Interbrew a réussi à obtenir le renvoi du dossier devant l'OFT pour que celui-ci détermine s'il existait un moyen moins restrictif de résoudre le problème de concurrence. L'OFT a finalement exclu de la fusion des actifs qui ont en fin de compte été cédés à Coors, ce qui a permis l'entrée sur le marché britannique d'un nouvel acteur de premier plan. Cette solution structurelle a eu des effets moins restrictifs que l'interdiction pure et simple de la fusion et a débouché sur une situation où le marché n'est pas moins ouvert à la concurrence qu'il ne l'était avant la fusion.

Le Président se tourne vers le Canada en insistant sur le fait que, d'après sa contribution, les mesures correctives doivent être le moyen le moins restrictif de résoudre les problèmes de concurrence posés par une fusion. Au vu de la jurisprudence canadienne, les mesures correctives appropriées pour éviter une réduction notable de la concurrence consistent à rétablir la concurrence au point qu'on ne puisse plus dire qu'elle est sensiblement réduite par rapport à qu'elle était avant la fusion. Il n'est donc pas nécessaire que les mesures correctives rétablissent les conditions de concurrence en vigueur sur le marché préalablement à la fusion ; le but est de faire en sorte qu'on ne puisse plus considérer que la concurrence est sensiblement réduite. Le Président demande des éclaircissements, en particulier à propos du critère utilisé pour mesurer la concurrence.

Un délégué du Canada indique que l'objectif du Bureau de la concurrence est assurément de veiller à ce que la concurrence ne soit pas sensiblement réduite. Pour déterminer si la concurrence est sensiblement réduite, et non simplement réduite, la question que l'on se pose généralement consiste à se demander si la fusion se traduira par une hausse significative des prix. Lorsqu'il a été constaté que la concurrence est sensiblement entravée ou réduite, il incombe au Bureau de la concurrence de juger si la cession d'une partie des actifs, et non de la totalité des actions ou des actifs acquis, suffira pour résoudre les problèmes de concurrence.

C'est à lui qu'il appartient de déterminer si l'entité à laquelle sont cédés les actions ou les actifs sera indépendante du vendeur et se livrera à une véritable concurrence sur le marché concerné. Cependant, si les parties qui fusionnent sont présentes sur un grand nombre de marchés de produits et que des problèmes de concurrence n'ont été décelés que sur un seul de ces marchés, ou sur un petit nombre de marchés distincts, et qu'il n'existe pas de liens entre les problèmes mis en évidence, le Bureau s'attache à trouver des mesures correctives portant uniquement sur les marchés sur lesquels des problèmes de concurrence sont apparus même si la situation qui prévalait avant la fusion a changé.

S'il n'est pas nécessaire que les mesures correctives rétablissent l'état antérieur à la fusion, il ressort de l'examen de la jurisprudence qu'il peut se révéler indispensable d'aller au-delà de cet objectif pour s'assurer que les mesures prises seront efficaces. Par exemple, dans le dossier *Superior Propane*, le tribunal a estimé que la fusion conduirait à une réduction sensible de la concurrence sur le marché national de la coordination des services et que seule la cession de la totalité des actifs d'ICG Propane pourrait remédier à cette situation.

En se tournant vers la Hongrie, le Président fait référence à la contribution remise par ce pays, dans laquelle il est indiqué que la Hongrie, comme la plupart des pays européens, applique le critère de la position dominante dans un souci de réalisme qui la conduit à appliquer des mesures correctives ayant pour objet non de rétablir les conditions de concurrence d'avant la fusion, mais d'éliminer la menace qu'une position dominante fait peser sur la concurrence. La Hongrie déclare par ailleurs dans sa contribution que

s'il existait des mesures correctives à même d'améliorer véritablement les conditions de concurrence sur le marché, les autorités de la concurrence n'hésiteraient pas à les appliquer. Le Président demande alors si la Hongrie peut citer des exemples illustrant directement cette affirmation.

Le délégué de la Hongrie explique qu'il peut se révéler difficile dans la pratique de ramener la concurrence au niveau d'avant une fusion. Toutes les fusions et acquisitions aboutissent dans une certaine mesure à une concentration accrue. Si celle-ci atteint le seuil à partir duquel elle entrave la concurrence, alors la transaction doit être interdite, à moins que les parties ne proposent des mesures correctives. L'application du critère de la position dominante suppose que le problème de concurrence à résoudre est soit la création, soit le renforcement de la position dominante d'une seule entreprise ou d'un groupe d'entreprises. En Hongrie, l'objectif des mesures correctives n'est pas de ramener la concurrence au niveau antérieur à la fusion, mais de maintenir une situation où aucune entreprise ne se trouve en position dominante, ce qui peut motiver l'interdiction faite à une entreprise d'étendre sa domination sur un autre marché. Pour le Délégué de la Hongrie, cette question est toutefois surtout théorique et ne devrait pas poser trop de problèmes dans la pratique. De façon générale, et sur le principe, c'est la nature des menaces qui pèsent sur la concurrence qui oriente le choix des mesures correctives ; le plus souvent, dans le cas d'une fusion horizontale, la meilleure solution préconisée sera, sous une forme ou une autre, une cession d'actifs.

Le Président enchaîne sur les mesures correctives péchant par excès de rigueur. Il souligne que la Commission européenne est consciente du problème puisqu'elle a dressé une liste des mesures de sauvegarde existant dans la législation européenne qui ont vocation à minimiser, voire à éliminer, les risques de cette nature. Deux dossiers, MAN/Auwärter et Shell/Enterprise, témoignent du fait que la Commission ne pèche pas par excès de rigueur lorsqu'elle applique des mesures correctives. Il souligne également que la contribution de la CE évoque la possibilité de procéder à un examen a posteriori de l'efficacité des mesures correctives.

Un premier orateur représentant la Commission européenne (CE) explique que celle-ci s'est demandée si, dans certaines conditions, les parties à une fusion et l'autorité de la concurrence pourraient avoir un intérêt commun à se mettre d'accord relativement rapidement sur des mesures correctives au risque que celles-ci pèchent pas excès de rigueur. En principe, le cadre juridique dans lequel s'inscrit le règlement sur les fusions prévient ce risque puisque l'application du critère de la position dominante exige la réalisation d'une enquête approfondie sur le marché à partir de laquelle il est décidé si la Commission peut ou non entreprendre des pourparlers à propos des mesures correctives.

Dans les fusions MAN/Auwärter et Shell/Enterprise, les deux parties ont proposé, en cours de procédure, de prendre certains engagements pour répondre aux inquiétudes qui s'étaient fait jour et dont elles avaient- été informées par la Commission dès les premiers stades de l'enquête. A la fin de la procédure, la Commission est parvenue, dans un cas comme dans l'autre, à la conclusion que les opérations pouvaient être réalisées sans qu'il soit nécessaire d'appliquer les mesures correctives proposées et les parties ont été autorisées à renoncer à leurs engagements avant la décision finale.

Se pose par ailleurs la question de savoir si les mesures correctives ont réellement pour objet de résoudre un problème de concurrence mis au jour durant l'enquête et si elles seront efficaces. Pour répondre à cette question, la DG Concurrence de la CE a décidé de se pencher sur les décisions prises pendant la période comprise entre 1996 et 2000 et une base de données répertoriant les mesures correctives prises dans des affaires de fusion entre 1990 et 2000 a été établie. Une quarantaine de dossiers ont été sélectionnés et à présent, la DG Concurrence mène des entretiens avec des entreprises et des individus. Chaque dossier donne lieu à plusieurs entretiens permettant d'étudier les mesures correctives de type structurel tout autant que les mesures comportementales ; la DG organise des entretiens collectifs et élabore des études de cas pour dégager les conclusions et les enseignements de l'expérience acquise dans le cadre de certains dossiers ayant donné lieu à des mesures correctives particulières. Participent aux

entretiens des acquéreurs et des vendeurs, les intervenants ayant pris l'initiative de proposer de prendre des engagements, des administrateurs, des tiers ou des associations qui quelquefois possèdent une connaissance plus globale du secteur d'activité, parfois même des concurrents. En général, les sociétés se montrent très ouvertes et se félicitent de la possibilité qui leur est ainsi donnée de s'exprimer en dehors du cadre d'une enquête.

Très souvent, la CE entre vraiment dans les détails avec les entreprises et ses vérifications portent par exemple sur la portée des mesures correctives, ce qui permet d'arriver à un équilibre entre le désir des sociétés de la réduire et la volonté des autorités de la concurrence de disposer d'un outil fiable pour restaurer la concurrence sur le marché. Le processus des cessions d'actifs est également passé au peigne fin, en particulier les aspects ayant trait aux délais et/ou aux prix.

Comment, par ailleurs, s'assurer que les engagements pris par les parties au moment de la décision demeurent inchangés jusqu'au moment où la cession est effectivement réalisée. Les arrangements fiduciaires sont examinés très attentivement et il peut être fait appel à des mandataires de contrôle, ou parfois à des mandataires de cession. Il est également fait appel à des spécialistes du secteur concerné au stade du suivi de la cession. Les critères d'approbation de l'acquéreur constituent également un aspect important : Qui est l'acquéreur ? Est-il en mesure d'exploiter convenablement les actifs ? Est-il encore dans les affaires ? De quels atouts dispose-t-il réellement par rapport à ses concurrents ?

S'agissant de l'efficacité des mesures correctives, la CE entend ne pas se contenter de déterminer par exemple si l'acquéreur est encore dans les affaires. Elle a entrepris une étude de longue haleine à caractère économique pour tenter d'en savoir davantage sur des scénarios de référence. Que ce serait-il passé si la fusion avait été autorisée moyennant d'autres mesures correctives ou sans mesures correctives ? Que serait-il arrivé si elle avait été interdite ?

Enfin, les personnes interrogées sont invitées à indiquer si elles pensent que les mesures correctives étaient surdimensionnées ou au contraire insuffisantes. Si elles ont été fructueuses, la CE examine si elles n'étaient pas surdimensionnées. Si elles se sont révélées inopérantes, il importe de savoir quels sont les actifs qui auraient dû être laissés hors du champ de leur application. Cet exercice mobilise une large palette d'intervenants qui acquièrent ainsi un connaissance approfondie des mesures correctives appliquées. Un bilan à mi-parcours vient d'être établi : il fait le point sur les ressources qui ont été mobilisées et sur les étapes futures, et conclut qu'il est impératif de continuer de consacrer les ressources considérables qui sont actuellement affectées à la réalisation de l'exercice en raison de l'importance des enseignements qu'il permet de dégager.

3. Mesures correctives structurelles et comportementales

Le Président passe ensuite à la question des vertus respectives des mesures structurelles et comportementales et observe que la classification des mesures correctives et la dichotomie entre les mesures structurelles et comportementales se retrouve dans toutes les contributions. Se tournant vers les Pays-Bas, il souligne que la délégation de ce pays affirme dans sa contribution que les mesures correctives structurelles sont plus efficaces et moins onéreuses pour l'autorités de la concurrence qui accepte toutefois de recourir à des mesures comportementales lorsque les mesures structurelles ne constituent pas une réponse adéquate au problème rencontré. Il apparaît dans la contribution des Pays-Bas que le Conseil néerlandais de la concurrence (Nma) ne dispose pas d'un service spécialisé dans les mesures correctives et ne peut se permettre de consacrer trop de temps à des activités de suivi de ces mesures. Comme il ressort des directives sur les mesures correctives, ces dernières ne doivent exiger qu'un effort minimum de supervision, voire aucun effort, de sa part. Le Président demande si c'est là la raison pour laquelle les Pays-Bas préfèrent les mesures de type structurel.

Selon le délégué des Pays-Bas, le manque de ressources explique en partie la préférence marquée des Pays-Bas pour les mesures structurelles. Si l'autorité de la concurrence avaient davantage de moyens, notamment en personnel qualifié, elle pourrait envisager de créer une unité distincte chargée des mesures correctives, ou au moins de mettre en place une structure ayant vocation à former un personnel spécialisé dans cette perspective. Néanmoins, plusieurs autres facteurs sont en cause : 1) le contrôle des fusions a trait à la structure des marchés et les problèmes d'ordre structurel appellent en premier lieu des solutions de type structurel ; 2) la législation néerlandaise, en vertu de laquelle une mesure corrective doit avoir pour objet de prévenir la création ou le renforcement d'une position dominante, est favorable de façon générale aux mesures structurelles ; 3) la moitié des mesures correctives qui sont prises le sont au cours de la première phase de la procédure alors que la loi n'autorise pas l'application de mesures comportementales au cours de cette phase au motif qu'elles ne peuvent être mises en œuvre dès ce stade.

A contrario, la contribution du Danemark fait référence aux difficultés rencontrées pour appliquer des mesures correctives de type structurel. Certaines cessions d'actifs ont exigé la mobilisation de ressources considérables avant même leur exécution et le Danemark fait état de problèmes de faisabilité et d'efficacité. Dans le cas des fusions ayant donné naissance à *FAS* et *Zonenern*, les parties étaient toutes deux des entreprises communes visant à lancer de nouveaux produits sur de nouveaux marchés et dans ces deux cas, les mesures correctives structurelles ont été sources de difficultés. Le Président demande des informations complémentaires sur ce point et sur les fusions mentionnées.

Le délégué du Danemark indique que la distinction entre les mesures correctives structurelles et comportementales n'est pas toujours évidente dans la pratique. Même dans le cas de fusions entre de grandes coopératives, où l'opération améliore l'efficience et où il existe un contre-pouvoir fort du côté des acheteurs, l'autorité de la concurrence doit intervenir si l'on observe un renforcement prononcé d'une position dominante. Plus précisément, il est apparu que l'on pouvait panacher mesures structurelles et comportementales (par exemple en obligeant les parties à laisser à leurs fournisseurs la liberté de s'approvisionner auprès de leurs concurrents, en donnant aux parties en présence après la fusion ou à l'acquéreur la possibilité d'avoir accès à l'infrastructure de distribution des entreprises dominantes et en autorisant la vente à des prix négatifs), ce qui montre que la réalité est plus complexe et que l'on ne peut décréter d'emblée que certaines catégories de mesures sont bonnes et d'autres mauvaises.

Le délégué décrit brièvement les mesures correctives envisageables en présentant deux exemples choisis dans le secteur de la nouvelle économie. Dans l'un de ces exemples, un monopole de fait a été autorisé dans le secteur des services de suivi de la couverture médiatique via Internet : deux grands journaux et chaînes de télévision danois ont fondé une nouvelle société par l'intermédiaire de laquelle toutes les entreprises pouvaient bénéficier d'un service consistant à donner accès à leurs clients, à chaque fois qu'une information les concernant était diffusée, à l'article original ou à l'émission ayant fait état de cette information. Cette initiative créait un monopole puisque les fondateurs de la nouvelle société détenaient une très large part des autres marchés. Par ailleurs, ce nouveau produit avait par nature un caractère tout à fait expérimental et pouvait réellement, en cas de réussite, améliorer le bien-être de tous. La fusion a finalement été autorisée à une condition, à savoir que si elle était couronnée de succès, les parties seraient tenues de fournir le service commercialisé à tous les tiers aux mêmes conditions que celles consenties aux propriétaires de la nouvelle société. Cette condition s'est muée en un simple critère de chiffre d'affaires puisqu'il a été décidé que les mesures correctrices ne seraient applicables que si le chiffre d'affaires de la nouvelle société dépassait un certain montant. En résumé, cette décision s'explique par la très grande incertitude qui caractérise les marchés en croissance rapide et par le fait que les instances compétentes ignorent comment la situation est appelée à évoluer sur ces marchés.

Se référant à la contribution d'Israël, le Président insiste sur le fait que l'instance chargée de la lutte contre les ententes en Israël (l'IAA) hésite à suivre la démarche de la table rase compte tenu de la spécificité des problèmes de concurrence qu'elle est amenée à traiter. Sur la question du choix des mesures

structurelles ou comportementales, il rappelle que la contribution d'Israël fait référence à des obstacles pratiques à la cession d'actifs qui sont inhérents aux caractéristiques particulières de l'économie israélienne. Le Président invite le délégué d'Israël à s'exprimer sur le cas d'une fusion entre des chaînes de distribution pour laquelle les instances compétentes se sont trouvées dans l'incapacité d'imposer des mesures correctives alors qu'elles souhaitaient le faire, et à insister sur la situation sans équivalent de son pays.

Le délégué d'Israël indique que lorsque l'instance chargée de la lutte contre les ententes en Israël tente d'imposer une cession d'actifs, elle se heurte à des difficultés pour faire respecter cette décision et ce, principalement pour trois raisons. La première tient à la petite taille de l'économie israélienne qui complique la recherche d'acquéreurs potentiels. La deuxième réside dans la difficulté à respecter la confidentialité des mesures correctives. La troisième raison pourrait être que l'IAA a de plus en plus la réputation d'être disposée à prolonger le délai accordé pour la cession des actifs.

L'exemple cité concernant les chaînes de distribution est une excellente illustration des difficultés rencontrées en Israël : deux chaînes de distribution souhaitaient fusionner avec une troisième. L'IAA était disposée à autoriser la fusion. Il est toutefois apparu que dans trois zones géographiques, il ne resterait plus en lice qu'un seul concurrent. Les parties ont donc été invitées à céder l'une des deux enseignes dans ces trois zones. Dans la première, la seule présence de la société issue de la fusion a fait perdre de leur intérêt aux actifs cédés au point qu'aucun acquéreur n'a fait d'offre. L'IAA a insisté auprès des parties pour qu'elles cèdent le plus performant des deux points de vente, ce qu'elles ont essayé de faire, mais en fixant un prix minimum, d'où un nouvel échec. C'est alors que d'autres chaînes ont fait leur entrée en scène, rétablissant ainsi une certaine concurrence, ce qui a conduit les parties à demander à l'IAA d'annuler les mesures correctives. Dans les deux autres zones, des prolongations de délais ont également été sollicitées, si bien qu'au moment où les parties ont effectivement dû procéder à la vente des actifs, d'autres concurrents étaient entrés sur le marché, évolution qui les amenées à demander là aussi l'annulation des mesures correctives.

On peut penser que la démonstration est ainsi faite que le marché fonctionne par ses propres moyens et que les mesures correctives ne se justifiaient pas d'emblée. Cet argument est recevable, mais il n'en demeure pas moins que l'exemple illustre les difficultés auxquelles se heurte l'IAA dans la mise en œuvre et l'application des mesures correctives. Face à ces problèmes, deux solutions peuvent être envisagées : (1) le transfert des parts à un mandataire chargé de les céder conformément aux instructions de la justice ; (2) la solution de la «mise en ordre préalable» que l'IAA n'a pas encore expérimentée. On peut alors se demander si imposer une telle condition ne reviendrait pas à condamner la transaction dans son ensemble du fait que les protagonistes ne seraient pas en mesure d'attendre jusqu'à la réalisation de la «mise en ordre préalable»

Il est précisé dans la contribution de la Suisse que chaque fois que cela est possible, la Commission suisse de la concurrence préconise la cession d'une activité indépendante en cours d'exploitation à un seul acquéreur (démarche de la table rase) en considérant que cette démarche facilite le maintien d'un concurrent crédible sur le marché. A propos du quatrième principe, le Président fait référence à la fusion USB/SBC dans laquelle une conception créative a prévalu puisqu'une mesure comportementale a été appliquée à la société issue de la fusion afin de mettre les concurrents à l'abri de difficultés éventuelles. Le Président invite le délégué de la Suisse à revenir sur ce dossier en expliquant les problèmes posés par les mesures structurelles et les avantages potentiels des mesures comportementales.

Le délégué de la Suisse explique que le succès des mesures structurelles en cas de fusion dépend non seulement des parties qui fusionnent, mais aussi des tiers. A titre d'exemple, il rappelle que dans la fusion UBS/SBV, la Commission de la concurrence a autorisé la fusion sous réserve que les 25 succursales réparties sur tout le territoire de la Suisse soient cédées à un seul et unique acquéreur. Pour éviter la

création d'une position dominante et permettre l'entrée d'une nouvelle banque étrangère sur le marché suisse, il fallait trouver un acquéreur étranger. Mais l'offre portant sur 25 établissements n'était intéressante ni pour les acquéreurs étrangers, ni pour les acquéreurs suisses.

UBS a dû rester dans le cadre d'une entreprise commune pendant au moins cinq ans (une telle structure permet de réaliser des économies d'échelle particulièrement importantes pour des banques de petite taille ou de taille moyenne ; il a été jugé que cinq ans était une période suffisamment longue pour permettre à des banques de petite taille ou de taille moyenne de rechercher d'autres solutions dans l'hypothèse où UBS déciderait de se retirer). En mai 2003, la Commission suisse de la concurrence a décidé que l'objectif visé avait été atteint et que l'obligation imposée à UBS pouvait être levée. UBS a donc rempli deux des trois obligations qui lui avaient été imposées. Il lui reste encore à se plier à la troisième, à savoir la reconduction des crédits en cours accordés à des PME.

Le Président prend note des réserves émises par la Corée à propos des mesures structurelles dont elle pense qu'elles réduisent l'efficience dans certaines conditions. La Délégation de la Corée est invitée à exposer son point de vue et à donner des exemples concrets dans lesquels on a préféré des mesures comportementales à des mesures structurelles.

Le délégué de la Corée déclare en préambule que la Korea Fair Trade Commission (KFTC) applique des mesures comportementales en cas de fusion verticale et des mesures structurelles en cas de fusion horizontale. Les fusions ont généralement des effets anti-concurrentiels en même temps que des effets bénéfiques en termes d'efficience, et c'est pour cette raison que la KFTC met en balance les effets anti-concurrentiels avec les gains d'efficience escomptés lorsqu'elle évalue les conséquences d'une fusion et met au point les mesures correctives jugées nécessaires. Si les effets, en termes de gains d'efficience, de la fusion contrebalancent ses effets anti-concurrentiels, la fusion n'est pas interdite, mais donne lieu à des mesures permettant de minimiser les effets anti-concurrentiels tout en préservant les gains d'efficience.

Dans le cas de fusions verticales, les effets anti-concurrentiels ne sont pas aussi manifestes ou évidents que dans le cas de fusions horizontales. L'effet de levier produit par une fusion verticale sur la position dominante occupée par une entreprise sur un marché est plus fort que celui produit par une fusion horizontale. C'est une évidence en ce qui concerne les fusions de conglomérats, en particulier lorsqu'elles sont effectuées sur des marchés où il est très difficile d'anticiper leurs effets anti-concurrentiels ; sur des marchés novateurs en proie à une évolution rapide par exemple, l'adoption de mesures structurelles risque de compromettre les gains d'efficience escomptés de la fusion.

Si l'on peut certes concevoir des mesures structurelles qui éliminent les effets anti-concurrentiels d'une fusion, celles-ci ont souvent un impact négatif sur les gains d'efficience et peuvent même conduire à une mort dans l'oeuf de la fusion. En outre, étant donné que les mesures structurelles sont fondées sur une évaluation des effets de la fusion sur la concurrence et qu'on ne peut revenir en arrière une fois qu'elles ont été appliquées, les autorités de la concurrence doivent en réserver l'application à des fusions dont il est possible d'évaluer précisément les effets.

La fusion verticale entre un producteur d'émissions de télé-achat et un opérateur du câble est un exemple parmi d'autres dans lequel la Corée a préféré appliquer des mesures comportementales de préférence à des mesures structurelles. Dans ce cas précis en effet, la KFTC est arrivée à la conclusion que chacune des parties à la fusion pouvait exclure ses concurrents respectifs en faisant usage de son pouvoir récemment acquis sur le marché de son partenaire dans la fusion. Si la FKTC avait appliqué des mesures structurelles dans ce cas afin de prévenir les effets anti-concurrentiels potentiels de la fusion, elle n'aurait pas eu d'autre choix que de contraindre l'opérateur du câble à céder son réseau. Au lieu de cela, elle a opté pour l'application de mesures comportementales pour faire en sorte que chacune des parties à la fusion ne puisse exercer une discrimination déloyale envers son concurrent ou l'évincer.

A l'invitation du Président, le délégué de la Suède présente les recommandations du groupe de travail mis en place en août 2002 par les autorités de la concurrence des pays nordiques pour échanger des informations sur le contrôle des fusions et les mesures correctives accompagnant les fusions (on peut prendre connaissance des recommandations de ce groupe sur le site Internet de l'autorité de la concurrence suédoise).

Il explique qu'en Suède, si les engagements, qu'ils soient d'ordre structurel ou comportemental, pris les parties à une fusion doivent être définis à un stade précoce de la procédure en raison de la brièveté des délais impartis, ils ne sont effectivement souscrits que très tard et qu'il n'est pas toujours facile de les évaluer. Les parties en savent en effet davantage sur le marché et ses évolutions futures que l'autorité de la concurrence. En outre, la définition de ces engagements peut parfois se révéler délicate. Ceux-ci doivent en effet être clairs et faciles à interpréter par l'autorité de la concurrence, le marché et toutes les autres parties prenantes. Veiller au respect de ces engagements est encore un autre aspect de la question. L'autorité de la concurrence suédoise a tendance à se fier aux informations émanant du marché, estimant qu'il est onéreux, et pas toujours nécessaire, d'exercer un suivi pour chaque cas de fusion.

Concernant l'opposition entre mesures structurelles et comportementales, l'autorité de la concurrence suédoise partage l'opinion de la Corée selon laquelle les mesures comportementales constituent parfois la meilleure solution. En Suède, les mesures prises sont souvent de nature structurelle car dans une économie de petite taille où les marchés sont concentrés, il existe depuis longtemps des accords d'approvisionnement et de vente entre les parties. Et si la situation se trouve modifiée par une fusion, il convient de recourir à des mesures comportementales pour veiller à ce que les autres concurrents présents sur le marché ne pâtissent pas de cette transaction. Demeure toutefois la question de la durée pendant laquelle les mesures correctives doivent s'appliquer. Il a été reproché dans certains cas à l'autorité de la concurrence suédoise d'avoir imposé des mesures correctives à long terme empêchant la nouvelle entité née de la fusion de jouir de l'indépendance qu'elle pouvait espérer.

Le Président conclut la discussion sur les mérites respectifs des mesures structurelles et comportementales en faisant observer qu'elle montre bien que, si l'on dénote certes une préférence pour les mesures structurelles, il n'est pas patent que celles-ci soient plus efficaces et moins coûteuses.

4. Mise au point des mesures correctives

Le Président note que pour les petits pays, la mise au point des mesures correctives n'est pas une tâche aisée et génère des coûts non négligeables. Il cite les recommandations formulées par le groupe de travail créé par les pays nordiques, dans lesquelles il est précisé que les engagements doivent être rédigés de telle manière qu'ils ne puissent donner lieu à des difficultés d'interprétation pendant la phase de suivi, et que ce principe s'applique tout autant aux engagements formulés de telle manière que les modalités selon lesquelles ils devront être honorés dépendent d'autres facteurs ou circonstances.

Le Président souligne que la contribution du Japon fait référence à un projet de fusion dans l'industrie du papier entre *Nippon Paper Industries Co., Ltd* et *Daishowa Paper Manufacturing Co., Ltd*. Dans ce dossier, les parties ont entrepris de se dessaisir, sur trois ans, d'installations dont la capacité de production annuelle était évaluée à 500 000 tonnes de papier, ce qui représentait 8 pour cent d'une production totale de 5 900 000 tonnes et du volume des activités annexes. Le Président interroge la Délégation du Japon sur la mise en œuvre de cette mesure et sur le risque éventuel qu'en trois ans, le volume du marché du papier ne change et que 500 000 tonnes ne représentent plus 8 pour cent, ni même une part significative, du marché.

Le délégué du Japon répond que, dans ce cas précis, une évolution spectaculaire du marché était improbable du fait de la relative stabilité du marché japonais du papier. Il indique que les parties auraient eu du mal à invoquer une évolution sensible de la situation sur le marché. S'agissant de la cession d'actifs

mentionnée, l'interprétation des engagements n'a jusqu'ici fait surgir aucune difficulté entre les parties et la Commission japonaise de la concurrence (JFTC), les parties l'ayant proposé d'elles-mêmes et ayant en outre présenté plusieurs candidats crédibles et acceptables prêts à acquérir les actifs mis en vente. La JFTC a conservé des contacts étroits non seulement avec les parties à la fusion, mais aussi avec les acquéreurs, afin d'atteindre par des moyens idoines les objectifs visés, à savoir en premier lieu le maintien de la concurrence sur le marché considéré.

Le Président, se tournant vers le Brésil, insiste une fois encore sur la diversité des mesures correctives mentionnées dans les différentes contributions. Au cours des deux premières années d'application de la loi brésilienne sur la concurrence, ce sont les mesures comportementales qui ont été privilégiées. Ce n'était toutefois probablement pas la meilleure solution et l'utilisation des mécanismes relevant de la réglementation de la concurrence s'est le plus souvent révélée inefficace car ceux-ci ne permettaient pas d'agir sur l'origine des atteintes portées à la concurrence. La tendance est à présent à avoir davantage recours aux mesures structurelles. Dans la fusion *Kolynos/Colgate*, l'exploitation de la marque Kolynos a été suspendue pendant au moins quatre ans.

La délégation du Brésil fait observer que la législation sur les ententes en vigueur au Brésil n'incite guère les parties à une fusion à se plier aux injonctions des autorités compétentes dans la mesure où elles ne sont pas tenues de suspendre la transaction jusqu'à ce que celle-ci soit approuvée. Vu sous l'angle des mesures correctives, il est beaucoup plus difficile pour un tribunal de défaire une fusion déjà réalisée. C'est pour cette raison que la loi prévoit des mesures conservatoires destinées à empêcher la réalisation de l'opération avant l'approbation du tribunal. Ces dispositions ont principalement pour objectif d'éviter qu'une décision du tribunal ne soit pas pleinement conforme à l'objet de la loi dans l'hypothèse où surviendrait un événement quelconque de nature à compromettre irréversiblement la concurrence sur le marché.

Des propositions d'amendements à la loi sur les ententes ont été examinées récemment, dont certaines prévoyaient notamment la mise en place d'un contrôle ex ante et l'amélioration des critères de notification afin d'encourager les parties concernées à coopérer et de favoriser le recours à d'autres solutions pour résoudre les problèmes de concurrence.

Un autre délégué du Brésil souligne que la loi sur la concurrence prévoit divers instruments permettant d'accélérer la prise de décision, en particulier « l'engagement de résultat » et « l'engagement à ne pas faire ». Ces dispositifs visent à mettre un terme à certaines pratiques comportementales ou à faire en sorte que les consommateurs retirent eux aussi des avantages de la fusion, mais aussi à éliminer les répercussions négatives pouvant résulter de cette opération. Les sociétés préfèrent souscrire les engagements qui leur sont proposés dans ce cadre.

Pendant les deux premières années d'application de la loi brésilienne sur la concurrence, les engagements de type comportemental étaient prédominants. Depuis quelques années, le CADE (Conselho Administrativo de Defesa Econômica) impose des restrictions qui font l'objet de modifications qualitatives importantes après coup et met davantage l'accent sur l'élaboration de mesures structurelles destinées à être appliquées en cas de fusion.

Au Brésil, les mesures structurelles qui sont généralement prises en cas de fusion horizontale ont vocation à lever les obstacles à l'entrée et à rétablir les conditions de concurrence qui prévalaient avant la fusion (comme ce fut le cas par exemple pour Kolynos, White Martins, Bavaria et AMBEV). S'agissant des fusions verticales, le CADE a dans certains cas appliqué des mesures visant à prévenir les comportements anti-concurrentiels sur des marchés verticalement liés, par exemple en imposant une obligation de bannir toute discrimination entre les clients actionnaires et non actionnaires. Le CADE a également joué un rôle d'accompagnement important dans le processus des privatisations.

En ce qui concerne les enseignements à tirer de la mise en œuvre des mesures correctives, le Délégué du Brésil fait référence au dossier AMBEV dans lequel la fusion approuvée portait sur environ 70 pour cent du marché de la bière brésilien. Les mesures correctives semblent avoir porté leurs fruits puisque ce pourcentage a diminué au cours des trois dernières années. Il y a un an, lorsque le CADE a finalement approuvé la fusion Kolynos/Colgate, le marché brésilien du dentifrice était jugé plus ouvert à la concurrence qu'il ne l'était auparavant et ce, grâce aux mesures correctives ayant accompagné la fusion.

Le délégué brésilien en conclut que la législation sur la concurrence doit être revue et que l'on devrait notamment prévoir un contrôle ex ante grâce auquel ne seraient traités que les accords risquant d'avoir des répercussions notables sur le marché.

Le Président attire ensuite l'attention de l'auditoire sur la contribution de l'Australie et observe que la Commission australienne de la concurrence et de la consommation (Australian Competition and Consumer Commission-ACCC) privilégie depuis toujours les mesures structurelles aux détriment des mesures comportementales. Il ressort de la contribution de l'Australie qu'il n'est peut-être pas souhaitable de suivre une démarche consistant à « vendre les joyaux de la couronne » si celle-ci conduit à des cessions d'actifs beaucoup plus importantes que nécessaire pour régler le problème de concurrence que l'on entend traiter. Le Président demande si une telle démarche est totalement exclue en Australie et désire en savoir plus sur les difficultés rencontrées au stade de la mise au point des mesures correctives en cas de fusion dans des secteurs de pointe où les indicateurs subissent généralement des variations importantes.

A propos de la démarche consistant à « vendre les joyaux de la couronne », le délégué de l'Australie explique que, si la situation est totalement bloquée, les parties doivent négocier afin de régler les problèmes de concurrence selon des modalités qui ne les obligent pas à se défaire de leurs plus précieux actifs.

L'ACCC n'est manifestement pas favorable aux mesures comportementales en raison de l'incertitude qu'elles engendrent sur les marchés. Cependant, elle les a employées dans certains cas, notamment pour protéger des informations confidentielles à court terme jusqu'à ce que la cession ait lieu et ce afin de permettre aux parties de tenter de trouver d'autres solutions.

Les demandes présentées par les parties à une fusion contiennent des informations très utiles sur divers aspects de la fusion, y compris sur les marchés concernés par cette opération et les barrières à l'entrée. La fusion entre une très grande banque nationale et une banque régionale de l'État de Victoria présentait des caractéristiques assez similaires à celles du dossier UBS en Suisse. Les mesures correctives visaient à imposer des dispositions de nature quasiment structurelles consistant à donner accès aux réseaux EFTPOS et ATM à des conditions commerciales raisonnables et à encourager et faciliter l'entrée de nouveaux arrivants dans les régions concernées. L'ACCC souhaitait ouvrir l'accès à des installations dont la mise en place nécessite des investissements considérables. Elle a également obtenu que les parties à la fusion fassent de leur mieux pour faciliter la fourniture de services ITNT à d'autres acteurs. Dans le cas de la fusion entre Pfizer et Pharmacia, l'ACCC a obtenu, pour préserver la concurrence, un engagement portant sur la cession d'actifs sous forme de droits de propriété intellectuelle exploités sur le marché concerné.

Le Président fait observer que dans certains pays, les mesures correctives en cas de fusion consistent en un engagement pris par les parties à la fusion de ne pas concurrencer les repreneurs des actifs cédés ou en fait l'autre entreprise. Tel fut le cas pour la fusion Léčiva/Slovakofarma dont il est question dans la contribution de la République tchèque : l'autorité de la concurrence a estimé que cette fusion risquait d'aboutir à un renforcement du pouvoir de marché s'accompagnant de l'instauration de barrières à l'entrée relativement élevées, et elle a en conséquence imposé toute une série de mesures comportementales. Cette affaire soulève la question de la ligne de démarcation entre la protection des concurrents et la protection de

la concurrence. Le Président invite le délégué de la République tchèque à communiquer de plus amples informations sur ce dossier.

Le délégué de la République tchèque affirme que l'affaire est trop récente pour qu'il puisse donner davantage de détails sur la mise en place des mesures correctives. Des délais ont été fixés pour la mise en œuvre de ces mesures, délais qui tiennent compte de la complexité des transactions, des problèmes posés par les négociations avec les parties potentiellement intéressées et du temps nécessaire à la réalisation de la vente des actifs transférés. L'autorité de la concurrence a tenté de trouver un équilibre entre le risque de voir la mise en œuvre des mesures correctives tout simplement compromise par la brièveté du délai imparti et le risque inverse qu'un délai trop long ne compromette ses efforts.

En ce qui concerne le suivi de la mise en œuvre des mesures correctives, les services compétents adressent une lettre aux parties les invitant à communiquer une description détaillée de la manière dont les mesures préconisées ont été mises en œuvre. Si les engagements pris sont respectés, la fusion n'altérera pas la concurrence sur le marché considéré en conférant une position dominante à l'entité née de la transaction. Les parties à la fusion sont bien conscientes que si les engagements qu'elles ont pris ne sont pas honorés, l'autorité de la concurrence risque de revenir sur sa décision concernant l'opération.

5. Mise en œuvre et contrôle

Le Président se tourne ensuite vers la Norvège qui, si l'on en croit sa contribution, s'en remet aux effets dissuasifs des sanctions imposées par l'autorité de la concurrence. Le Président demande à la délégation de la Norvège s'il est jamais arrivé à l'autorité de la concurrence d'avoir affaire à des entreprises peu coopératives et d'avoir en conséquence à prononcer des sanctions, et dans cette hypothèse, quelles ont été les sanctions infligées.

Le délégué de la Norvège fait observer que dans son pays, pour faciliter le respect des mesures correctives proposées par les parties à une fusion, celles-ci sont toujours considérées comme des conditions auxquelles est subordonnée la décision des autorités compétentes de ne pas s'opposer à l'opération. La NCA (l'autorité norvégienne de la concurrence) ne conclut pas d'accords informels avec les parties à une fusion. Toute violation de la décision relative à une fusion est passible d'amendes ou de peines d'emprisonnement. La NCA n'a jusqu'ici jamais eu à traiter de plainte à l'encontre d'entreprises n'ayant pas respecté une décision relative à une fusion.

S'agissant des mesures structurelles, les parties en cause ont tenté dans deux dossiers délicats de démontrer qu'il était impossible de trouver des acquéreurs pour les actifs qu'elles étaient invitées à céder. Leur démonstration n'a pas convaincu la NCA et elles ont laissé filer le délai qui leur était imparti pour réaliser la cession. Dans l'un de ces deux cas, la NCA a décidé de ne pas déposer plainte officiellement ; l'autre dossier est en cours d'examen. Pour éviter les dépassements de délais, une date limite pour la mise en oeuvre de la procédure de cession des actifs a été fixée, mais à en juger par les dossiers traités récemment, cette solution ne semble pas pleinement satisfaisante.

S'agissant des mesures non structurelles, la NCA a entrepris dans plusieurs cas une première enquête afin d'établir si les agissements dénoncés par certains acteurs présents sur le marché constituaient un non-respect des conditions fixées dans la décision relative à la fusion. Les mesures correctives qui doivent être exécutées immédiatement, comme les modifications à apporter aux contrats et les exigences en matière de notification, sont généralement respectées. Les mesures qui visent à réguler le comportement de l'entreprise sur une longue période ne le sont pas toujours, en particulier si aucune des parties concernées n'est informée de leur existence.

En ce qui concerne le suivi, la NCA estime que dans une économie aux dimensions modestes, comme l'économie norvégienne, on peut s'en remettre aux acteurs en présence sur le marché. Dans pratiquement tous les dossiers pour lesquels elle a entrepris des investigations à la suite de soupçons de non-respect des mesures correctives, elle l'a fait à l'initiative ou sur les indications de tierces parties. Les décisions qu'elle prend, y compris les conditions qu'elle impose, sont rendues publiques et il est possible d'en prendre connaissance sur son site Internet. Dans divers cas, notamment de fusions s'accompagnant de mesures comportementales ou non structurelles, des conditions spécifiques en matière d'information sont prévues. Le véritable enjeu réside en fait dans la définition des conditions dont la décision est assortie. Certaines conditions, qui paraissent raisonnables du point de vue économique, ne sont pas nécessairement celles qui offrent le plus de facilité dans la perspective de poursuites judiciaires ou d'une condamnation à des sanctions prononcées par un tribunal si bien que la NCA a jugé utile d'intégrer dans le service chargé des enquêtes qui met au point les mesures correctives des juristes chargés de veiller à ce que les conditions imposées aux parties soient faciles à faire respecter.

6. Coopération internationale

Le Président observe qu'une bonne partie de la contribution des États-Unis est consacrée à la question de la coopération dans des dossiers de fusions transnationales. La contribution des États-Unis analyse l'importance de la coopération en particulier pour la cohérence des mesures correctives. Le Président invite les délégués des États-Unis à évoquer des dossiers réels et à faire part des enseignements de l'expérience acquise, singulièrement dans le cadre de la coopération entre les États-Unis et l'Union européenne.

Les délégués des États-Unis mettent d'abord l'accent sur deux dossiers traités récemment par le ministère de la Justice des États-Unis. Dans l'affaire *General Electric/Instrumentarium*, la CE et les États-Unis ont déclaré séparément que les marchés de produits étaient légèrement différents et ont décidé que la cession d'actifs qui se révélerait efficace en l'espèce pour mettre un terme aux problèmes de concurrence devrait porter sur la filiale Spacelabs, implantée aux États-Unis. La CE a obtenu des engagements des parties avant même que le ministère de la Justice des États-Unis n'obtienne un règlement amiable. Le ministère de la Justice des États-Unis a finalement décidé de tenter d'obtenir de son côté un règlement amiable en partie parce qu'il s'agissait d'un actif situé sur le territoire des États-Unis et aussi parce que la filiale réalisait la plus grande partie de son chiffre d'affaires aux États-Unis. Le souci de veiller à ce que des mesures correctives portant sur les mêmes actifs n'imposent pas à une partie des obligations divergentes est évoqué très directement dans le règlement amiable déposé au tribunal dans les dispositions relatives aux mandataires. La ministère de la Justice des États-Unis a du reste modifié le règlement amiable afin qu'il soit clair qu'il s'engageait de bonne foi dans des consultations avec la CE pour désigner de concert un mandataire. Il a eu recours à divers moyens dans l'énoncé du règlement pour éviter toute incohérence dans les obligations imposées aux parties.

L'affaire Alcan/Péchiney a également donné lieu à une coopération internationale, mais pas au même niveau ; le ministère de la Justice des États-Unis a eu des discussions sur les investigations menées tant avec les Européens qu'avec les Canadiens. Le ministère américain et les autorités canadiennes ont eu des entretiens communs avec divers clients car d'une part, la partie réalisant l'acquisition (Alcan), certains consommateurs concernés (constructeurs automobiles et fabricants de pièces détachées) et au moins un concurrent se trouvaient au Canada, et d'autre part, les actifs à céder se situaient aux États-Unis. Au cours de ce processus, les Canadiens ont acquis la conviction que la cession d'actifs imposée par les États-Unis servirait également leurs intérêts.

Un délégué des États-Unis note que la fusion entre *Exxon* et *Mobil* a été la première fusion à attirer l'attention de la Commission fédérale du commerce des États-Unis (FTC) et de la CE. Elle concernait un marché mondial : la FTC s'y intéressait parce qu'elle touchait les États-Unis et la CE s'en préoccupait en raison de ses effets potentiels sur les diverses régions d'Europe. Les parties avaient espéré convaincre la

FTC de ne pas adopter de mesures correctives. A la suite des discussions qu'elle a eues avec la CE, la FTC a signifié sans ambiguïté aux parties qu'elles ne réussiraient pas à l'empêcher d'intervenir. La décision qui a finalement été prise comportait une obligation de céder des actifs sur le marché du carburant pour avions, obligation qui résolvait du même coup les problèmes soulevés aux États-Unis et en Europe.

La fusion *Bayer/Aventis* qui concernait divers segments du marché de la protection des cultures portait essentiellement sur des licences d'exploitation de droits de propriété intellectuelle, des brevets et autres formes de savoir-faire. Les pourparlers entre les parties et la CE sur la question de la manière d'imposer une obligation ayant trait au droit d'exploiter des droits de propriété intellectuelle durèrent longtemps. On s'interrogeait sur la création d'une licence d'exploitation qui agirait sur la concurrence sur le marché américain, mais aurait des effets préjudiciables sur la concurrence sur d'autres marchés. Les rencontres ont été fréquentes et les échanges approfondis.

Il est capital d'empêcher les parties à une fusion de traiter avec un seul organisme et d'utiliser ensuite l'engagement qu'elles ont pris comme moyen de pression pour pousser les autres organismes à s'aligner et à accepter la première solution retenue. Il devrait être clair pour les parties que l'autorité de la concurrence va avoir de fréquents échanges avec des organismes homologues de sorte que c'est à elles qu'il incombe en dernier ressort de veiller à ne pas contracter d'obligations contradictoires.

7. Débat général

Un délégué du BIAC note que les entreprises ont elles aussi intérêt à ce que les fusions se déroulent dans de bonnes conditions grâce à l'application de mesures correctives adéquates, faute de quoi ces opérations risquent dans bien des cas d'être directement préjudiciables à toutes les entreprises à divers niveaux. Les mesures correctives qui contribuent à accroître les coûts de transaction doivent toutefois être évitées. Il faut par exemple veiller à ce que l'organisme compétent ne suive pas une stratégie consistant à privilégier systématiquement les formes de cession d'actifs ou les conditions de mise en œuvre, notamment la solution de l'acquéreur initial, qui risquent à chaque fois de générer les coûts de transaction les plus élevés. La solution de l'acquéreur initial pose problème dans la mesure où pour toute fusion exigeant une cession d'actifs, on va se retrouver en présence de deux ensembles d'actifs dont l'un regroupe des actifs qui soulèvent des problèmes de concurrence et l'autre des actifs qui n'en posent pas. Plus le délai est long jusqu'à la clôture de la transaction, plus la période pendant laquelle l'attente perdure concernant les actifs qui ne constituent pas une menace pour la concurrence est longue elle aussi. Cette situation a deux conséquences : en premier lieu, la partie concernée n'est pas en mesure de combiner ces actifs de manière à générer des gains d'efficience, et en second lieu, ces actifs, en particulier ceux du vendeur, peuvent dans certains cas perdre de leur intérêt sur le marché.

Le délégué du BIAC note toutefois que dans certaines situations, l'exigence de l'acquéreur initial est une condition très importante. D'après un document du BIAC, elle ne doit pas être imposée dans des situations où (1) les actifs à céder ont été préalablement exploités dans le cadre d'une activité indépendante, (2) l'ensemble d'actifs à céder, même s'il ne constitue pas une activité indépendante, est à l'évidence suffisant pour préserver la concurrence, (3) on peut raisonnablement espérer qu'un acquéreur qualifié se présentera pendant le délai imparti pour la cession des actifs à partir de la réalisation de la fusion.

Si l'on fait appel à l'analyse appliquée du comportement pour déterminer s'il y a lieu de recourir à la solution de l'acquéreur initial, il apparaît que : (1) l'on doit pouvoir partir du principe que l'existence d'une entreprise indépendante, d'une unité d'exploitation autonome, suffira pour apaiser les inquiétudes des pouvoirs publics sans qu'il soit besoin d'exiger un acquéreur initial ; (2) si l'organisme peut démontrer qu'il y a des raisons de croire que l'existence d'une entreprise indépendante ne sera pas suffisante, les parties elles-mêmes devront prouver qu'il n'est pas nécessaire d'exiger un acquéreur initial ; (3) si les

parties ne parviennent pas à faire une démonstration probante, ou si les actifs à céder ne constituent pas une entité autonome, l'organisme devra déterminer si un concurrent viable va rester en lice et pourra opter pour l'une des trois décisions envisageables. On peut utiliser l'un ou l'autre des trois critères qui viennent d'être cités pour s'assurer que la concurrence sera préservée.

S'agissant de la coopération internationale, le délégué du BIAC note que la pire des situations est celle dans laquelle différents pays imposent des exigences contradictoires concernant les mêmes actifs. Il est alors capital d'ouvrir un dialogue franc pour résoudre le problème. Le BIAC est d'avis que dans les situations où les autorités de plusieurs pays sont appelées à statuer, c'est le principe de la courtoisie internationale ou de la courtoisie positive qui doit prévaloir.

Un délégué du Mexique fait observer que son pays a tendance à privilégier les solutions claires et nettes et que les mesures correctives ne sont pas nécessairement les plus satisfaisantes. Dans certains cas cependant, il y a lieu de recourir à des mesures correctives à cause des pressions exercées par les parties projetant la fusion ; le Mexique est alors généralement favorable à l'application de mesures structurelles. (L'autorité de la concurrence mexicaine a rencontré de multiples difficultés lorsqu'elle a cherché à appliquer des mesures comportementales, notamment au stade du suivi et de la mise en œuvre). Les mesures structurelles peuvent toutefois elles aussi être sources de difficultés dans des cas où un grand nombre d'actifs sont susceptibles d'être cédés. L'obligation de céder les actifs dans le délai imparti constitue un autre aspect de la question. Il est très difficile de prouver que la partie concernée a tout mis en œuvre pour se dessaisir de ses actifs. En ce qui concerne la coopération internationale, on a observé à de multiples reprises que les engagements acceptés par différents organismes de lutte contre les ententes sont également valables pour le marché mexicain et que l'autorité de la concurrence peut donc en tirer avantage. En général, la possibilité de se livrer à des consultations et à des échanges de vues sur les diverses mesures correctives utilisables est importante car elle peut aider les organismes de lutte contre les ententes de création récente à s'en remettre davantage à des mesures structurelles.

Le délégué de la Nouvelle-Zélande intervient sur un point soulevé par Israël concernant les vertus respectives des mesures structurelles et comportementales dans les économies de petite taille. Il fait observer qu'en Nouvelle-Zélande, la législation n'autorise pas les mesures comportementales car elles mobiliseraient une quantité de ressources excessive pour un organisme ne disposant que de moyens modestes. Dans une affaire concernant des supermarchés, trois acteurs présents sur le marché et un plus petit souhaitaient fusionner. L'autorité de la concurrence a exigé la cession d'un certain nombre de supermarchés dans des régions où elle estimait que la concurrence se trouverait notablement réduite du fait de la fusion. Cette solution s'est toutefois révélée politiquement difficile à mettre en œuvre lorsqu'une rumeur s'est répandue selon laquelle la grande société qui restait en place avait décidé d'acquérir ces points de vente pour les fermer.

Le délégué de l'Irlande explique que le régime d'examen des fusions de l'Irlande n'a que dix mois d'existence. Un grand nombre d'acteurs de secteurs auparavant fortement réglementés sont prompts à proposer des mesures comportementales, mais l'autorité de la concurrence irlandaise ne souhaite pas retomber dans un mode de fonctionnement qui s'apparenterait à une quasi-réglementation ou à de la planification industrielle. Or les mesures comportementales peuvent facilement basculer de ce côté, en particulier dans les économies qui opèrent une transition vers un système fondé sur la concurrence. En outre, dans certains cas, les mesures comportementales peuvent très bien entrer en conflit avec les intérêts des consommateurs dans la mesure où elles restreignent des pratiques en matière de fixation des prix qui servent parfois la concurrence ou les intérêts des consommateurs.

Le délégué du Danemark observe qu'il importe de pouvoir disposer d'un arsenal d'instruments aux effets modulables dans la mesure où, si elle ne peut avoir recours qu'à des méthodes fortes, par exemple à l'annulation de la fusion, l'autorité de la concurrence perd toute possibilité de remplir sa mission. On ne

peut pas dire, selon lui, qu'un certain nombre de mesures correctives vont trop loin et frappent trop fort et comportent de fait des éléments qui rappellent la planification industrielle.

Selon le délégué des États-Unis **(**FTC), les mesures correctives ne devraient pas couvrir un champ plus large que nécessaire.

Pour le délégué de l'Italie, la distinction entre les mesures structurelles et comportementales est par trop simpliste. On dénombre une multitude de mesures comportementales qui n'exigent pas de suivi de la part des autorités de la concurrence. Au Danemark par exemple et dans de nombreux dossiers de fusion traités en Italie où les parties à la transaction ont dû accorder l'accès à une installation essentielle, c'est le marché qui a assuré le suivi, ce qui a dispensé l'autorité de la concurrence d'intervenir à ce niveau. En Europe, un débat s'est engagé sur une éventuelle modification du critère à utiliser pour évaluer les conséquences des fusions. Un grand nombre de délégations indiquent que le critère utilisé consiste à déterminer si la fusion crée ou renforce une position dominante. Dans l'affaire citée par le Danemark cependant, la fusion aboutissait à la création d'une position dominante que les mesures correctives imposées n'éliminaient pas et l'autorité de la concurrence s'est contentée de veiller à ce que la concurrence ne soit pas entravée. Dans l'exemple cité par la CE, à savoir la fusion *Stream/Telepiu*, où l'opération créait une position dominante, un monopole a été autorisé et des mesures correctives imposées alors que la concurrence n'était pas menacée. Le Délégué insiste sur le fait que lorsqu'une fusion est autorisée, ce n'est pas parce qu'elle ne crée pas de position dominante, et rappelle que les mesures correctives n'ont pas toujours pour objectif de mettre un terme à cette position dominante et visent aussi à préserver une véritable concurrence sur le marché.

Le Président déclare partager l'avis du délégué de l'Italie et conclut la discussion en faisant observer que nul n'a encore trouvé la bonne voie même si tous la recherchent en empruntant des chemins plutôt convergents. Les contributions des différents pays sont riches d'informations sur bon nombre des points qui ont été abordés, ainsi que sur d'autres aspects.