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DECLARATION

I hereby declare that this thesis represents my work and effort, and all sources and aids used for this thesis have been appropriately cited. I also say that this thesis has not been submitted for this or any other degree.

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PODĚKOVÁNÍ

Tímto bych ráda poděkovala doc. JUDr. Václavu Šmejkalovi, Ph.D., vedoucímu mé diplomové práce, za jeho trpělivost pří vedení této práce a za cenné rady a komentáře, které mi pomáhaly v průběhu celého psaní.

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1 Introduction

According to Statista statistics for 2023, almost 40.000 mergers and acquisitions were concluded last year globally, the fewest since 2013, so ordinarily, worldwide M&A activity is much higher.[1] It is no wonder these numbers are attracting the attention of competition authorities around the world. Mergers and acquisitions no doubt have, in many cases, a serious impact on the global economy,[2] but they are mainly transforming the markets in individual countries or voluntary associations of countries.

That is no different in the case of the EU and the USA. In the EU, the European Commission (EC) supervises mergers and acquisitions and protects competition from unlawful concentrations.[3] In the case of the USA, the competition authorities are the Antitrust Division of the U.S. Department of Justice (DOJ)[4] and the Federal Trade Commission (FTC).[5]

Although mergers between different companies can bring many benefits for competition, such as product and service innovation or cost reductions, they can also have negative effects by creating a dominant player in the market, which can lead to consumer harm in the form of higher prices, reduced innovation or lower product quality.[6]

For this reason, merger control systems have been established in both the EU and the USA to detect mergers that may substantially lessen competition or lead to the creation of a monopoly in the relevant market before the transaction takes place.[7]

The competition authorities in the EU and the USA have two options while challenging mergers that gave rise to the concerns that competition could be disrupted after the transaction is consummated. Block the whole transaction or use another merger remedy to modify the

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[1] STATISTA. *Number of merger and acquisition (M&A) transactions worldwide from 1985 to April 2024.* In: Statista [online]. 2024 [last accessed 2024-05-30]. Available at: https://www.statista.com/statistics/267368/number-of-mergers-and-acquisitions-worldwide-since-2005/.

[2] JONES, Alison and Brenda SUFRIN. *EU Competition Law.*Fourth Edition. New York, United States of America: Oxford University Press, 2011. ISBN 9780199572731, p. 855.

[3] EUROPEAN COMMISSION. *Mergers Overview.* In: European Commission [online]. 2024 [last accessed 2024-05-30]. Available at: https://competition-policy.ec.europa.eu/mergers/overview_en.

[4] DEPARTMENT OF JUSTICE. *The Antitrust Laws.* In: Depatment of Justice [online]. 2024 [last accessed 2024-05-30]. Available at: https://www.justice.gov/atr/antitrust-laws-and-you.

[5] FEDERAL TRADE COMMISSION. *Mergers.* In: Federal Trade Commission [online]. 2024 [last accessed 2024-05-30]. Available at: https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers.

[6] EUROPEAN COMMISSION. *Mergers Overview.* In: European Commission [online]. 2024 [last accessed 2024-05-30]. Available at: https://competition-policy.ec.europa.eu/mergers/overview_en.; DEPARTMENT OF JUSTICE. *The Antitrust Laws.* In: Depatment of Justice [online]. 2024 [last accessed 2024-05-30]. Available at: https://www.justice.gov/atr/antitrust-laws-and-you; FEDERAL TRADE COMMISSION. *Mergers.* In: Federal Trade Commission [online]. 2024 [last accessed 2024-05-30]. Available at: https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers.

[7] Ibid.

acquisition. Merger remedies enable competition authorities to alter the proposed acquisition to prevent the competition from harm caused by the transaction while not losing all benefits that the concentration can bring to the competition.[8] Prohibitions of mergers are rare either in the EU or in the USA. On the contrary, merger remedies are commonly used tools[9] in merger control to preserve the pre-merger level of the competition.

During the merger control process, competition authorities around the world are used to cooperate tightly because very often large mergers are subject to control by competition authorities in several countries. This is similar to the case of competition authorities in the EU and the USA. In 2011, Best Practices on Cooperation in Merger Investigations was issued, and the document stresses the importance of coordination in cases where merger remedies need to be considered in both jurisdictions. It encourages the exchange of information and discussions on remedies between reviewing agencies and merging parties, intending to ensure consistent and compatible outcomes.[10] For instance, the EC and competition agencies in the USA recently cooperated while reviewing Microsoft's acquisition of Activision Blizzard. Although the outcome of the review process was different this time in the EU than in the USA[11], the EC praised the cooperation of the competition authorities.[12]

1.1 Objective of the thesis and research question

Therefore, this thesis aims to analyse remedies used in merger control in the EU and the USA in different sectors of the economy.[13] More precisely, the aim of the thesis is to identify

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[8] GUNNAR, Niels, Helen JENKINS and KAVANAGH, James. *Economics for Competition Lawyers.* Second edition. New York, United States of America: Oxford University Press, 2016. ISBN 9780198717652, p. 360.

[9] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 3–5 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.

[10] US-EU MERGER WORKING GROUP. *Best Practices on Cooperation in Merger Investigations.* In: European Commission [online]. 2011 [last accessed 2023-08-12]. Available at: https://ec.europa.eu/competition/mergers/legislation/eu_us.pdf.

[11] The Microsoft's acquisition of Activision Blizzard was cleared subject to remedies by EC in May 2023. See Commission Decision COMP/M.10646 – *Microsoft/Activision Blizzard* [2023]; In the USA, the FTC tried to block the merger but was unsuccessful and the transaction was completed in October 2023. The FTC is now continuing its investigation into the consummated transaction. See FEDERAL TRADE COMMISSION. *Microsoft/Activision Blizzard, In the Matter of.* In: Fedetal Trade Commission [online]. 2024 [last accessed 2024-05-12]. Available at: https://www.ftc.gov/legal-library/browse/cases-proceedings/2210077-microsoftactivision-blizzard-matter.

[12] VESTAGER, Margrethe. *Keynote Speech: Recent Development in EU Merger Control* In: International Forun of the Studienvereinigung Kartellrecht [online]. 2020 [last accessed 2023-08-12]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/speech_23_2923.

[13] Thesis will focus on remedies used in merger control on an EU level, not in a particular Member State, which also has its own legal merger control system. Furthermore, the thesis will focus on merger remedies common on a federal level in the USA. Individual states in the USA might have particular antitrust rules. Although these laws and regulations do not require merger control filings, specific industries like healthcare might require notifications for certain transaction types. Additionally, state and district attorneys general can sometimes participate in federal antitrust

similarities and differences in the application of merger remedies in the EU and the USA and to determine, at least theoretically, whether, despite the significant differences in the legal systems of the EU and the USA, the approaches and the pursued objectives of the competition authorities in the EU and the USA in the area of merger remedies are rather similar or, on the contrary, fundamentally different. In particular, the author attempts to address the difference between the remedies used in the EU and the U.S. merger control in terms of the degree of complexity of their design to ensure a level of competition before the merger and in terms of the difficulty and cost to administer them. Furthermore, the author attempts to answer whether some types of merger remedies in the EU and the USA are so different that their imposition may expose merging companies to burdensome uncertainties or costs.

As mentioned above, large mergers are often examined simultaneously by both the EC and the U.S. competition authorities, which usually cooperate with each other in this process. Thus, the approach of the two jurisdictions to merger remedies should not be that different so that the requirements imposed on merging companies under merger remedies, i.e. requirements to change their structure or conduct, are not confusing and do not lead to conflicting outcomes. For this reason, investigating the similarities and differences between merger remedies in the EU and the USA is essential and is the subject of this thesis.

The author of the thesis is aware that the topic of merger remedies in the EU and the USA is complex and still evolving. The scope of this thesis does not allow the author to thoroughly discuss all aspects associated with the topic of merger remedies in the EU and the USA.

To introduce the research issue, the thesis will present and compare general facets of merger remedies in the EU and the USA in Chapter 2. An overview of the legal framework, key documents, principles, and procedures for accepting remedies in merger control will be provided in this chapter.

Further, Chapter 3 compares the EU and the U.S. approaches toward different types of merger remedies and how they are divided compared to the conventional classification of the

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enforcement actions or investigations that impact their states. Other entities, such as the Federal Energy Regulatory Commission, can sometimes examine proposed mergers on the grounds of non-competition law. In addition, a private person can bring a civil suit to prevent the transaction from substantially lessen competition and seek damages caused by a consummated merger. The involvement of entities other than the FTC and DOJ in the U.S. merger control process will not be explored in depth in this thesis. See MERGERFILERS GLOBAL LEGAL GUIDES. *Merger Filing Guide*. In Mergerfilers Global Legal Guides [online]. 20 [last accessed 2024-05-05]. Available at: https://www.mergerfilers.com/guide.aspx?expertjuris=UnitedStates#guidebook; FEDERAL TRADE COMMISSION. *The Enforcers: The Federal Government.* In: Federal Trade Commission [online]. 2024 [last accessed 2024-05-06] Available at: https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers.

remedies provided by academics. This comparison will be accompanied by both EU and U.S. case law regarding different types of merger remedies applied in merger cases in the various sectors of the economy.

The subchapter of this thesis dealing with structural remedies, mainly divestiture, is not, contrary to the rest of the thesis, divided into separate parts, which first present the topic of structural remedies in the EU and then in the USA. This type of remedy is presented together for both the EU and the USA because there are the most similarities between the EU and the U.S. approaches in this area, and separate treatments could lead to the repetition of the same information.

Chapter 4 of the thesis deals with the enforcement of the merger remedies in the EU and the USA.

To summarise the findings and to answer, at least in principle, the above-formulated research questions, the thesis will be terminated with a conclusion in Chapter 5.

1.2 Methodology and bibliography

The author mainly uses descriptive, analytical, and comparative methods to achieve the thesis objective. The core sources for the analysis and comparison are EC decisions on merger cases cleared with remedies in the EU and consent orders, consent decrees, and final judgments that approve acquisitions subject to remedies in the USA. Furthermore, the competitive impact statements accompanying the final judgements in the USA are used as one of the primary sources. The EU and U.S. legislation and non-legislative key documents serve as essential sources, and the author also uses books, articles, and papers dealing with mergers, merger control, and merger remedies. A recent paper published by Simon Vande Valle on the topic of merger remedies[14] in the EU is a very inspiring source for the author of this thesis, as it deals with the subject in a comprehensive way. John Kwoka's works on the effectiveness of merger remedies in the USA[15], which, as will be shown below, has been widely disputed by other experts on the subject, is also a valuable source of inspiration for the topic of this thesis.

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[14] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.

[15] KWOKA, John E. *Merger Control and Remedies: A Retrospective Analysis of U.S. Policy.* Cambridge, United Kingdom: MIT Press, 2015. ISBN: 9780262327763; KWOKA, John E. Mergers, *Merger Control, and Remedies: A Response to the FTC Critique* In: SSRN [online]. Working Paper, 2017 [last accessed 2023-02-08]. Available at: https://www.zbw.eu/econis-archiv/bitstream/11159/324162/1/EBP075462370_0.pdf.

Similarly, research studies, reports, press releases, and other materials published by competition agencies in the EU and the USA are used. Reports and analyses from different organisations, such as the OECD, complement the research.

In this thesis, the author uses decisions issued by the DOJ rather than FTC decisions to introduce the topic of merger remedies in the USA because FTC merger investigations are often non-public, and therefore, it is difficult to find information about some cases investigated by FTC.

While writing this thesis, the author proofread the text using the online translators DeepL and Grammarly.

2 Remedies in merger control in the EU and the USA

2.1 Introduction to the merger remedies in the EU and the USA

Speaking of merger remedies in a broader meaning, the first and straightforward possible remedy would be prohibiting the entire concentration. As mentioned earlier, there are alternatives to outright blocking a merger when it raises significant concerns about potential harm to competition. In such cases, merger parties may propose commitments to competition authorities aimed at modifying the transaction and providing assurance to antitrust authorities that the pre-merger level of the competition would be preserved even after the merger is completed.[16] This option is often referred to as a merger remedy in a narrower sense. This thesis aims to address merger remedies in a narrower sense. A merger remedy is an instrument that can balance the potential negative consequences of the merger with the prospective benefits of the intended acquisition. The EC, for example, estimated that the customers' savings due to the mergers approved with remedies equalled € 5,600 million in 2009.[17]

The ultimate goal of merger remedies in both the EU and the USA is to preserve a pre-merger level of competition.[18]

The magnitude of merger remedies can be observed by the considerable effort that competition authorities and merger parties, with their professional advisers, must expend on designing, implementing, and enforcing the merger remedies. In addition, some remedies require long-term monitoring.[19]

Various studies were conducted to review the effectiveness of merger remedies and often sparked a wider debate. Some examples of these studies will follow.

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[16] GUNNAR, Niels, Helen JENKINS and KAVANAGH, James. *Economics for Competition Lawyers.* Second edition. New York, United States of America: Oxford University Press, 2016. ISBN 9780198717652, p. 360.

[17] The EC calculation was done for corrective decisions, including prohibiting decisions and decisions approving mergers with remedies. In 2009 no merger was forbidden, and therefore it can be concluded that the customer's savings are a result of 16 decisions clearing mergers with remedies. See EUROPEAN COMMISSION. *DG Competition Management Plan 2010* In: European Commission [online]. 2010, p. 18 [last accessed 2023-02-08]. Available at: https://ec.europa.eu/competition/publications/annual_management_plan/amp_2010_en.pdf; EUROPEAN COMMISSION. *Statistics on Mergers Cases*. In European Commission [online]. 2024 [last accessed 2024-05-10]. Available at: https://competition-policy.ec.europa.eu/document/download/4b083559-e36c-44c2-a604-f581abd6b42c_en?filename=Merger_cases_statistics.pdf.

[18] See e.g. EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, para.4; DEPARTMENT OF JUSTICE. *Merger Remedies Manual In: Department of Justice* [online]. 2020, p. 3 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

[19] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 5 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.

EC published in 2005 a study on remedies in merger control in the EU evaluating 40 decisions, including 96 merger remedies settled between EC and merger participants from 1996 to 2000[20] , which stands 57 % of merger remedies have undeniably fulfilled their competitive goals, 24 % have fulfilled it partially, 7 % have not achieved their competition goals, and in 12 % of cases, it was impossible to assess any conclusion due to lack of information.[21] The study's outcome led to the formation of a Remedies Notice.[22]

Later, John Kwoka, in his study from 2015, investigated 12 past mergers cleared with remedies in the USA and concluded that these acquisitions led to significant price increases after being consummated.[23] FTC officials Michaela Vita and F. David Osinski reacted to Kwoka's study in their Critical Review. They stated that Kwoka provided a valuable review of merger policy and academic literature.[24] However, it is impossible to deduce that the merger remedies were effective since only 12 acquisitions approved subject to remedies were evaluated. After critique from FTC, Kwoka recalculated the study outcome and found that unconditionally approved mergers caused 6.08 % price growth,[25] whilst using structural remedies generated a 5.6 % increase in prices and using behavioural remedies produced 13.4 % price growth.[26] With these findings, Kwoka still pointed out that merger remedies seem not to be so effective.

Subsequently, the EC also conducted an analysis based on 25 decisions, including eight decisions subject to merger remedies collected from European competition authorities, one of which was adopted by the EC. The study found that mergers approved without remedies caused a

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[20] EUROPEAN COMMISSION DG COMP. *Merger Remedies Study*. In: European Commission [online]. 2005, p. 11, 169-170 [last accessed 2023-03-08]. Available at: https://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf.

[21] The effectiveness of merger remedies was measured by issues that arise from designing and implementing the remedies and the time necessary to resolve the problems. Partially successful remedies were those remedies where issues were not resolved three to five years after divestiture, and in case of access remedies the foreclosure concerns were not fully solved. In some cases, the issues were not fixed, so the remedies did not fulfil their competition goals. See EUROPEAN COMMISSION DG COMP. *Merger Remedies Study*. In: European Commission [online]. 2005, p. 139-140, 169-170 [last accessed 2023-03-08]. Available at: https://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf.

[22] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 11 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.

[23] KWOKA, John E. *Merger Control and Remedies: A Retrospective Analysis of U.S. Policy.* Cambridge, United Kingdom: MIT Press, 2015. ISBN: 9780262327763, p. 116, 156.

[24] VITA Michael and F. David OSINSKI. *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review.* Antitrust Law Jurnal [online]. Vol. 82, NO. 1, p. 386 [last accessed 2023-08-02]. Available at: https://www.jstor.org/stable/27006821.

[25] KWOKA, John E. *Merger Control and Remedies: A Retrospective Analysis of U.S. Policy.* Cambridge, United Kingdom: MIT Press, 2015. ISBN: 9780262327763, p. 120.

[26] KWOKA, John E. *Mergers, Merger Control, and Remedies: A Response to the FTC Critique* In: SSRN [online]. Working Paper, 2017 p. 15, 20 [last accessed 2023-02-08]. Available at: https://www.zbw.eu/econis-archiv/bitstream/11159/324162/1/EBP075462370_0.pdf.

5 % price growth. On the contrary, conditionally cleared mergers resulted in only around a 1 % price increase.[27] The EC study was more optimistic about evaluating the effectiveness of merger remedies in the EU compared to Kwoka's analysis of merger remedies practice in the USA.
Since the 2016 EC study operates only with a few merger cases where remedies were designed to preserve competition, a broader analysis of merger remedies, such as the Merger Remedies Study published by EC in 2005, would probably be necessary to assess the effectiveness[28] of mergers cleared subject to remedies in past years.

In 2017, a study examining the effectiveness of consent orders adopted by the FTC was published, and it was concluded that the FTC's practices in designing and implementing merger remedies are generally adequate. FTC investigated by interviews 50 of the 89 consent orders issued from 2006 to 2012 and determined whether the competition remained at the same level after implementing the remedies and whether the interviewees reported concerns about FTC's merger practices. The conclusion was that 69 % of the studied consent orders were successful, 14 % were a qualified success, and 17 % failed to achieve their competition target.[29] Furthermore, supermarkets, drug stores, funeral houses, other healthcare facilities, and pharmaceutical orders were examined separately[30] and were mainly concluded as successful.

2.2 Terminology

In merger control in the EU, merger remedies are commonly referred to as commitments. On the one hand, the EU Merger Merger Regulation uses the term commitments, [31] and on the other hand, the European Commission's guidance on how competition authorities should apply remedies in merger cases, the so-called Remedies Notice[32], relies on a term remedy. Both designations are, therefore, used in the EU legal framework of merger control as synonyms. Likewise, term conditions and obligations can be observed in the EU Merger Regulation.

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[27] ORMOSI, Peter, MARIUZZO Franco and Richard HAVELL. *A review of merger decisions in the EU: What can we learn from ex-post evaluations?* In: European Commission [online]. 2016, p. 6,7, Executive Summary [last accessed 2023-03-08]. Available at https://ec.europa.eu/competition/publications/reports/kd0115715enn.pdf.
[28] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 11-12 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.
[29] FEDERAL TRADE COMMISSION. *The FTC's Merger Remedies 2006–2012. A Report of the Bureau of Competition and Economics.* In: Federal Trade Commission [online]. 2017, p. 14-15, 18 [last accessed 2023-08-04]. Available at: https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.
[30] Ibid., p. 29-31.
[31] COUNCIL OF THE EUROPEAN UNION. *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).* OJ L 24. 2004.
[32] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice*). OJ C 267 2008.

Condition is defined as a ‘‘requirement for the achievement of the structural change of the market’’[33], and obligation refers to “the implementing steps which are necessary to achieve this.’’[34] The commitments offered by the parties are binding by the EC through conditions and obligations[35] attached to the decision adopted by the EC.[36] The conditions and obligations aim to guarantee that merger parties fulfil the commitments negotiated with the EC.

Generally, the term remedy is used in merger control in the USA. U.S. competition agencies may clear the merger through a so-called consent agreement.[37] More preciously, the FTC may allow the proposed acquisition to proceed with remedies via a consent order, and the DOJ may request a court to enter a consent decree.[38]

2.3 Legal framework, key documents and principles, overview of the procedure to accept remedies in merger control in the EU

2.3.1 Legal framework, key documents and principles in the EU

The EU Merger Regulation authorises the EC[39] to declare whether the notified merger, acquisition or joint venture tends to impede effective competition significantly, in particular as a result of the creation or strengthening of a dominant position in the common market or a substantial part of the market or not, and therefore, whether the concentration is compatible with the common market. The notification before consummation of the merger is mandatory, while the concentration has a Community dimension, which means it reaches thresholds set by the EU Merger Regulation.[40] The legal framework for approving a merger that raised concerns of such

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[33] Ibid., para. 19.
[34] Ibid., para. 19.
[35] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 13 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.
[36] COUNCIL OF THE EUROPEAN UNION. *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).* OJ L 24. 2004, recital 30, art. 6(2), second sentence, and 8(2), second sentence.
[37] KWOKA, John E. *Merger Control and Remedies: A Retrospective Analysis of U.S. Policy.* Cambridge, United Kingdom: MIT Press, 2015. ISBN: 9780262327763, p. 10.
[38] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 5 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.
[39] The EC has exclusive power to take decisions under the EU Merger Regulation, including decisions to authorise mergers through remedies, subject to judicial review by the Court of Justice of the EU. See COUNCIL OF THE EUROPEAN UNION. *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).* OJ L 24. 2004, recital 17, art. 21 (2).
[40] COUNCIL OF THE EUROPEAN UNION. *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).* OJ L 24. 2004, recital 2-3, arts.1, 2(3) and 2(4).

impediment to effective competition but modified by commitments offered by parties is set in the EU Merger Regulation, accurately in Article 6(2) for the Phase I investigations and in Article 8(2) for the Phase II investigations. In both phases of the investigations, the parties must offer commitments because the EC is not empowered to initiate them.

Subsequently, the above-mentioned Remedies Notice issued by the EC in 2008 offers guidance to competition authority on applying remedies in merger cases.[41] If merger parties wish to modify the concentration to avoid competition concerns, they must submit Form RM to EC with suggested commitments. The form of the form RM is provided by Regulation 1033/2008,[42] which is an amendment to the Implementing Regulation.[43] Another relevant document on merger remedies is Best Practice Guidelines: the Commission's model texts for divestiture commitments and the trustee mandate under the EU Merger Regulation.[44]

Recital 30 of the EU Merger Regulation states that commitments modifying the merger to avoid competition concerns should be proportionate to the competition problem and entirely eliminate it. Subsequently, the recital seeks transparency and adequate consultation of Member States and interested third parties. Also, the above-mentioned attachment of conditions and obligations to the EC decision to guarantee companies compliance with their commitments in a timely and effective manner is mentioned.[45] Remedies Notice provides in Section II a list of general principles and basic conditions for acceptable commitments, which are discussed below for Phase I and Phase II investigations separately.[46]

2.3.2 Overview of the procedure to accept remedies in merger control in the EU

EC can accept the commitments in Phase I before initiating an in-depth examination. At this stage, the commitments are adequate, while the competition problem is easily identifiable and

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[41] WHISH, Richard and David BAILEY. *Competition law*. Eighth edition. Oxford, United Kingdom: Oxford University Press, 2015. ISBN 9780199660377, p. 931-932.

[42] EUROPEAN COMMISSION. *Commission Regulation (EC) No 1033/2008 of 20 October 2008 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings* OJ L 279 2008.

[43] The amended Implementing Regulation provides Annex IV, an overview of the information necessary to be submitted in the RM form.

[44] This document is relevant for structuring any type of merger commitment, not only divestiture. See EUROPEAN COMMISSION. *Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation* In: European Commission [online]. 2013, paras. 29, 31 [last accessed 2023-08-06]. Available at: https://competition-policy.ec.europa.eu/document/download/720d75b8-2f68-4b0c-bf4a-5beaf6103d6f_en?filename=best_practice_commitments_trustee_en.pdf.

[45] COUNCIL OF THE EUROPEAN UNION. *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)*. OJ L 24. 2004, recital 30.

[46] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice)*. OJ C 267 2008, paras. 4-14.

can be easily remedied. For example, in the case of *Lufthansa/Eurowings,* anticompetitive concerns were identified without problems. Therefore, concentration modified by commitments was declared compatible with the common market in Phase I.[47] Concentration can be cleared subject to remedies in this phase, while there is no doubt that serious competition concerns arising from the proposed merger will be addressed through the commitments. Considering the limited timeframe, it is crucial for the parties to promptly provide the EC with the necessary information to evaluate the substance and feasibility of the commitments accurately.[48]

EC informs merger parties about competition concerns during the Phase II investigations so that the merger parties can suggest adequate commitments.[49] The parties must propose commitments and provide the information necessary to examine them in a limited period.[50]

As mentioned above, parties must submit relevant information in both phases to the EC because only merger parties have such information at their disposal. However, the EC has to assess whether the commitments are able to mitigate anticompetitive concerns in both phases of the investigation. Acceptable commitments must be able to be effectively implemented and monitored. If parties tend to propose too extensive and complex commitments, there is little chance those will be accepted,[51] as happened in the case of *Volvo/Scania*.[52] This is similar to the approach of the DOJ in the USA because the imprecise remedies are considered problematic to enforce.[53]

The short period during which commitments can be proposed is why parties often consider preparing remedies in advance, frequently yet before the notification. In the majority of cases cleared subject to remedies, the EC accepts the commitments in Phase I.[54]

Once the EC accepts the commitments that have the potential to maintain the pre-merger level of competition, it can proceed to adopt a decision with commitments formally incorporated

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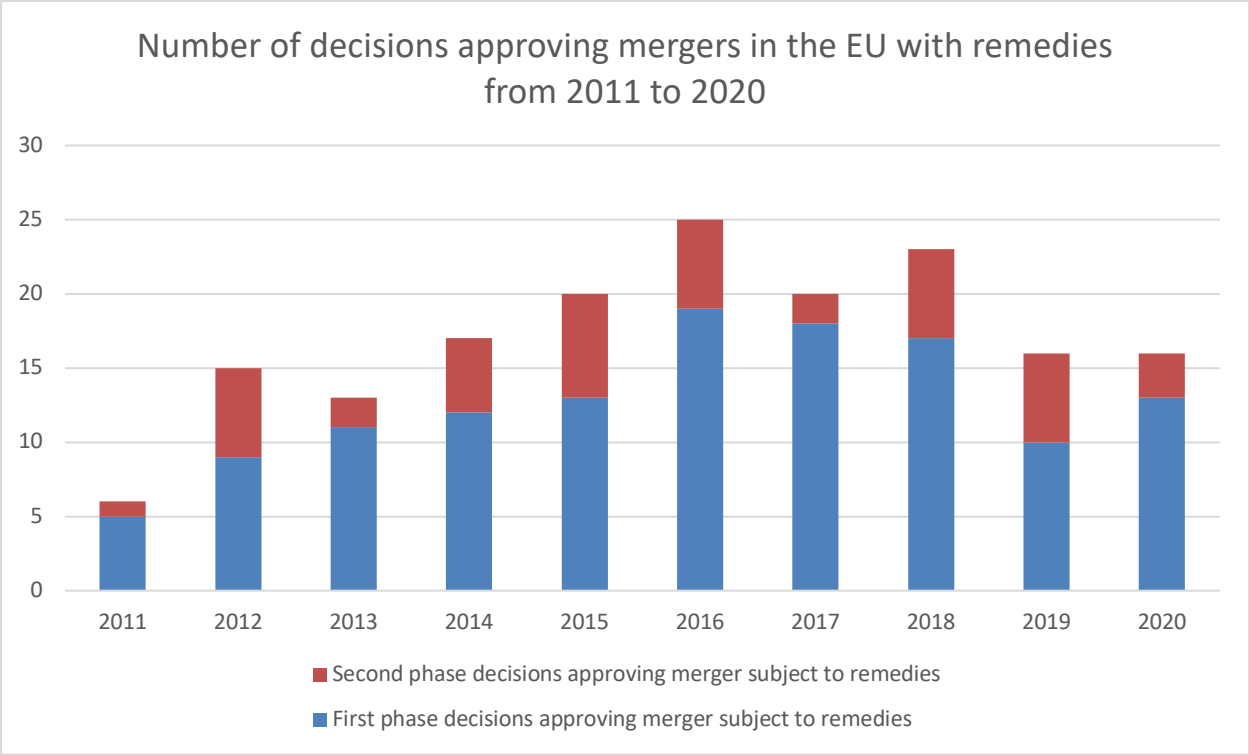
[47] Commission Decision COMP/M.3940 – *Lufthansa/Eurowings* [2005].
[48] EUROPEAN COMMISSION. Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice). OJ C 267 2008, para. 82.
[49] See, e.g. Commission Decision COMP/M.7932 – *Dow / DuPont* [2017], where the EC accepted commitment in the Phase II investigations.
[50] JONES, Alison and Brenda SUFRIN. *EU Competition Law. Fourth* Edition. New York, United States of America: Oxford University Press, 2011. ISBN 9780199572731, p. 971.
[51] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, paras. 7,13,14.
[52] Commission Decision COMP/M.1672 – *Volvo/Scania* [2000].
[53] See DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 5 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.
[54] JONES, Alison and Brenda SUFRIN. *EU Competition Law. Fourth* Edition. New York, United States of America: Oxford University Press, 2011. ISBN 9780199572731, p. 971.

into the decision as conditions which do not require court review to take effect.[55] Nevertheless, they can play a part in a potential appeal against the entire decision.[56]

The following figure displays EU data concerning conditionally approved mergers from 2011 to 2020. It encompasses mergers that were declared compatible with the common market but subject to remedies in both Phase I and Phase II. The figure highlights that most conditionally approved mergers over the past decade were cleared during Phase I investigations.

Figure 1 – Number of decisions approving mergers in the EU with remedies from 2011 to 2020, both in the first phase and the second phase



Source: EUROPEAN COMMISSION. *Statistics on Mergers Cases*. In: European Commission [online] 2024 [last accessed 2024-05-10]. Available at: https://competition-policy.ec.europa.eu/document/download/4b083559-e36c-44c2-a604-f581abd6b42c_en?filename=Merger_cases_statistics.pdf. Own data processing.

[55] COUNCIL OF THE EUROPEAN UNION. *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)*. OJ L 24. 2004, arts. 6(2), second sentence, and 8(2), second sentence.

[56] EUROPEAN COMMISSION. *Merger control procedures* In: European Commission [online]. 2013, p. 3 [last accessed 2023-23-08]. Available at: https://competition-policy.ec.europa.eu/system/files/2021-02/merger_control_procedures_en.pdf.

2.4 Legal framework, key documents and principles, overview of the procedure to accept remedies in merger control in the USA

2.4.1 Legal framework, key documents and principles in the USA

Competition agencies in the USA are authorised to protect competition and consumers from anticompetitive mergers, more preciously from mergers that may substantially lessen competition or tend to create a monopoly, and therefore violate Section 7 of the Clayton Act.[57] Furthermore, the agencies can challenge mergers also under Sections 1 and 2 of the Sherman Act.[58] Section 5 of Federal Trade Commission Act is a fundamental provision that empowers the FTC to regulate and investigate anticompetitive practices, including those related to mergers and acquisitions.[59]

Hart-Scott-Rodino Improvement Act (HSR Act)[60] established mandatory pre-merger notification of transactions that reach certain thresholds set in the HSR Act to the FTC and DOJ. These thresholds are updated yearly based on the gross national product change.[61] FTC is responsible for running the pre-merger notification programme.[62]

Other documents relevant to remedies used in U.S. merger control are Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies[63], Frequently Asked Questions about Merger Consent Order Provisions. [64] and Merger Remedies Manuals issued by DOJ[65], which provide guidance on how to tailor and negotiate remedies in merger cases.

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[57] Section 7 of the Clayton Act, 15 U.S.C. § 18 (1914).
[58] Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2 (1890).
[59] Section 5 of Federal Trade Commission Act, 15 U.S.C. § 45 (1914).
[60] Hart–Scott–Rodino Improvement Act, 15 U.S.C. § 18a (1976).
[61] In the EU, the thresholds for notification of a proposed merger are static, i.e. the EU Merger Regulation sets specific numerical thresholds. These thresholds remain unchanged until such time as they would potentially be amended as part of an amendment to the Regulation.
[62] FEDERAL TRADE COMMISSION. *New HSR thresholds and filing fees for 2024.* In: Federal Trade Commission [online]. 2024 [last accessed 2024-05-10]. Available at: https://www.ftc.gov/enforcement/competition-matters/2024/02/new-hsr-thresholds-filing-fees-2024.
[63] FEDERAL TRADE COMMISSION. *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies* In: Federal Trade Commission [online]. 2012 [last accessed 2024-05-10]. Available at: https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.
[64] FEDERAL TRADE COMMISSION. *Frequently Asked Questions about Merger Consent Order Provisions*. In: Federal Trade Commission [online]. 2024 [last accessed 2024-05-10]. Available at: https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/frequently-asked-questions-about-merger-consent-order-provisions#Divestiture%20Period.
[65] DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

The DOJ published the last updated Merger Remedies Manual in 2020[66] , and it contains the following principles applicable when choosing appropriate merger remedies in both vertical and horizontal mergers.[67]

- remedies must preserve competition
- remedies should not create ongoing government regulation of the market
- temporary relief should not be used to remedy persistent competitive harm
- the remedy should preserve competition, not protect competitors
- the risk of a failed remedy should fall on the parties, not on the consumers
- the remedy must be enforceable

2.4.2 Overview of the procedure to accept remedies in merger control in the USA

The merger review process in the USA differs from the EU merger control in many ways. Two competition agencies exist in the USA, while only the EC can enforce merger control over concentrations with a Community dimension in the EU.[68] Whilst the merger parties in the USA are subject to mandatory pre-merger notification, they have an obligation to notify the FTC as well as the DOJ of the intended merger. The preliminary review of whether the transaction raises anticompetitive issues follows the notification. The competition authorities then decide which agency is more experienced in investigating the markets possibly affected by the merger, and that one is subsequently chosen to conduct a merger review.[69] However, the DOJ is exclusively empowered to oversee mergers in specific industries such as telecommunications, banks, railways and airlines.[70]

After the preliminary review, the majority of mergers can proceed to their consummation. Whilst the competition concerns are discovered during the preliminary review, the investigating

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[66] The manual was withdrawn in 2022, and no announcement about the applicability of the previous merger guidance was made, so it seems no guidance issued by the DOJ is currently active. Therefore, this thesis uses the Merger Remedies Manual 2020 as the latest insight into the DOJ's approach towards merger remedies. See DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

[67] Ibid., p. 3-6.

[68] The EC Merger Regulations authorised the EC to enforce merger control with a Community dimension exclusively. However, in some cases, the referral mechanism between the EC and the Member States can be used. See TOTH, A. G. *European Community Law*. Volume III. New York, United States of America: Oxford University Press, 2008. ISBN 9780198257042, p. 515.

[69] FEDERAL TRADE COMMISSION. *How Mergers are Reviewed.* In: Federal Trade Commission [online]. 2024 [last accessed 2024-05-11]. Available at: https://www.ftc.gov/news-events/topics/competition-enforcement/merger-review.

[70] FEDERAL TRADE COMMISSION. *The Enforcers: The Federal Government.* In: Federal Trade Commission [online]. 2024 [last accessed 2024-05-06] Available at: https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers.

agency issues the so-called second request, and an in-depth examination of the proposed transaction is initiated.[71] In contrast to the EU, the remedies generally can not be accepted in the first stadium of the review.[72]

The procedure by which merger remedies are accepted by the agencies in the USA depends on which competition agency scrutinises the transaction. Time framework and deadlines for the particular steps of the merger reviews are given.[73]

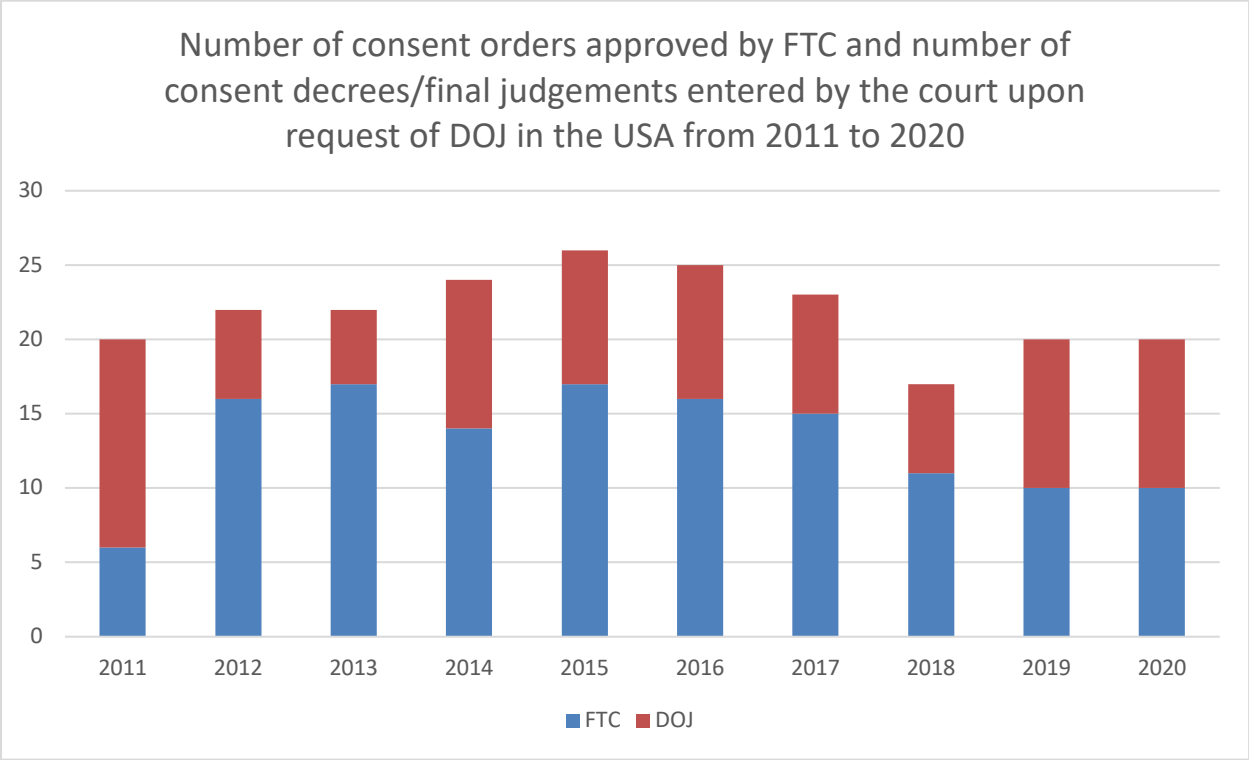
The subsequent figure demonstrates the number of merger cases resolved with remedies by the FTC and the DOJ in the USA. The collected data show that, on average, the FTC was more active in clearing mergers with remedies than the DOJ from 2011 to 2020.

[71] FEDERAL TRADE COMMISSION. *How Mergers are Reviewed.* In: Federal Trade Commission [online]. 2024 [last accessed 2024-05-11]. Available at: https://www.ftc.gov/news-events/topics/competition-enforcement/merger-review.

[72] Exceptionally, when appropriate, the DOJ allows companies to use so-called fix-it-first remedies, which are structural remedies, and avoid issuing the second request, followed by often long and challenging negotiating to agree on a consent decree. See DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 17-18 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

[73] FEDERAL TRADE COMMISSION. *How Mergers are Reviewed.* In: Federal Trade Commission [online]. 2024 [last accessed 2024-05-11]. Available at: https://www.ftc.gov/news-events/topics/competition-enforcement/merger-review.

Figure 2 – Number of consent orders approved by FTC and number of consent decrees/final judgements entered by the court upon request of DOJ in the US merger control from 2011 to 2020



Source: FEDERAL TRADE COMMISSION and DEPARTMENT OF JUSTICE. Hart-Scott-Rodino Annual Reports from 2011 to 2020. In: Federal Trade Commission [online]. 2011 – 2020 [last accessed 2023-08-05]. Available at: https://www.ftc.gov/policy/reports/annual-competition-reports. Own data processing.

Investigating the notified transaction by the FTC has the following steps. As soon as the second request is issued, the parties must comply with the request and must provide the FTC with relevant nonpublic information necessary to evaluate the transaction.[74] The FTC must communicate with the companies that the anticompetitive effects were discovered and which remedies would be appropriate to cure these issues. FTC file the administrative complaint and may enter into a negotiated consent order with the merger parties, which includes remedies adequate to preserve competition after the deal is consummated. Although the companies may negotiate remedies with the FTC, the FTC has the final word on whether the proposed remedies are sufficient and acceptable. After the consent order is accepted by FTC and published for 30 days for public

[74] Ibid.

comment, the merger can be consummated. However, the consent order does not become final until the period for public comment expires.[75]

The procedure of clearance of proposed acquisitions with remedies by the DOJ is similar in many ways but differs from the merger review by the FTC in a few aspects. Firstly, the consent agreement between companies and the DOJ is called a consent decree, not a consent order. Secondly, the DOJ also file the complaint and consent order but has to file it in the federal district court and can not enter the consent decree unilaterally. Under the Tunney Act, the accepted consent decree about the appropriate remedies must be together with the competitive impact statement released in the Federal Register, and the period for public comment also applies here, in this case, for 60 days. To become final, the consent decree must be filed in federal court by the DOJ, and only the federal court can declare that the consent decree is in the public interest and enter it in the form of a final judgment, which is legally binding.[76] The decrees are then often part of Final Judgments.

Effective remedies must simultaneously maintain the level of competition and potential benefits of the merger. DOJ examines the proposed remedies before accepting them and must ensure a logical nexus between anticompetitive concerns and the proposed remedy. More preciously, the DOJ must ensure these remedies eliminate those anticompetitive concerns.[77]

Ex-post examination of the mergers is possible in the USA. Such an opportunity for the U.S. competition agencies is given by the fact that substantive merger law regulated in Section 7 of the Clayton Act is detached from the pre-merger notification program that Title II of the HSR Act provides. This means mergers that were notified subject to a pre-merger notification program but not further examined can be challenged even after consummated. Moreover, not reportable mergers, as well as unreported transactions that reached thresholds set in the HSR Act, can be investigated ex-post[78], as confirmed in *United States v. E. I. du Pont de Nemours & Co*., where the acquisition of the stocks was challenged 30 years after the consummation.[79] This also applies to

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[75] FEDERAL TRADE COMMISSION. *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies* In: Federal Trade Commission [online]. 2012, p. 4, 23 [last accessed 2024-05-10]. Available at: https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.
[76] Antitrust Procedures and Penalties Act (Tunney Act), 15 U.S.C. § 16 (1974).
[77] DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 1-3 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.
[78] ABA ANTITRUST LAW SECTION. *Analyzing the Scope of Enforcement Actions Against Consummated Mergers in a Time of Heightened Scrutiny.* In: ABA Antitrust Law Section [online]. 2020, p. 2 [last accessed 2023-08-10]. Available at: https://ourcuriousamalgam.com/wp-content/uploads/Consummated-Mergers-Policy-Task-Force-Apr-2020-FINAL.pdf.
[79] *United States v. E. I. du Pont de Nemours & Co.,* 351 U.S. 377 (1956).

the merger remedies negotiated between companies and competition agencies[80] to restore competition in the case of ex-post examination. The legal analysis of consummated transactions is very much like the legal analysis of proposed mergers; however, mitigating the competition problems caused by consummated mergers is often more difficult than tailoring the remedies to preserve competition in pre-merger investigations of the deals. It is frequently described as a problem with ‘‘unscrambling of the eggs’’. Still, negotiated remedies by the merger parties and the agencies are preferred to unwind the consummated transaction.[81]

2.5 Conclusion of Chapter 2

As demonstrated in Chapter 2, competition authorities in the EU and the USA pursue similar objectives in merger control, namely to protect the level of competition that existed prior to the merger and to prevent the merged firm from acquiring a dominant market position as a result of the merger. In the EU and the USA, a pre-merger notification programme is established under which merging companies that reach certain thresholds must report the proposed merger to the relevant competition authority. However, the principle by which the thresholds are set differs in the EU and the USA. In the EU, the specific thresholds are set directly by the EU Merger Regulation and in the USA, the thresholds are determined each year by the FTC based on the change in gross national product in the previous year.

On the other hand, the essential difference between merger control and merger clearance subject to remedies in the EU and the USA is the existence of two competition authorities in the USA instead of one in the EU. The fact that merger clearance subject to remedies in the USA is overseen by two competition authorities where the system of accepting merger remedies from the merging parties is also quite distinctive makes the whole process in the USA much more complex and costly. Especially as both authorities in the USA have to employ a large number of competition experts, and the DOJ's adoption of merger remedies requires federal court approval. In the EU, no other institution is required to intervene in the negotiation of merger remedies to clear a merger.

Furthermore, the author considers that the existence of two competition authorities in the USA with different processes for negotiating merger remedies may expose merging companies to uncertainty, as they, in many cases, do not know in advance which competition authority will

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[80] See *Magnesium Elektron North America, Inc., and Revere Graphics Worldwide, Inc.,* Docket No. C-4381 (2012).
[81] FEDERAL TRADE COMMISSION. *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies* In: Federal Trade Commission [online]. 2012, p. 4 [last accessed 2024-05-10]. Available at: https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf; DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 19 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

review their merger and cannot sufficiently prepare in advance for how the merger clearance process will proceed. Given the above, the author considers the EU merger clearance system with remedies more transparent. Another reason the author considers the merger control system in the EU as more party-friendly and less costly is the existence of a two-phase merger control system. Parties that prepare well in advance the commitments they want to offer to the EC in order for the EC to clear their merger have a chance that their merger will be cleared subject to remedies in Phase I and can thus avoid broader investigation by the EC in Phase II altogether.

3 Types of merger remedies

3.1. Structural and behavioural merger remedies

Two categories of merger remedies are commonly distinguished – structural and behavioural remedies.

Structural remedies are called structural because they directly change the market structure by transferring the assets to the party, distinct from the merged entity. The merging parties are demanded to sell assets or a business unit to the independent party in order to restore competition, which may lessen as a consequence of the merger. The transfer of the assets may strengthen the ability of existing competitors to compete in the market or allow entry of a new rival.[82] The theory emphasises the benefit of structural remedies, as they eliminate the requirement for ongoing monitoring once the divestiture is completed, allowing the third party to manage the acquired assets autonomously.[83]

On the other hand, behavioural remedies, often also called non-structural or conduct remedies, require the merger parties to behave in a certain way or restrain particular behaviour. This required behaviour is subject to long-term monitoring, making the behavioural remedies less favourable for competition authorities in general.[84]

3.2. Structural versus behavioural remedies in the EU and the USA

The EC, as well as the DOJ and the FTC, express in their guidance on the creation of merger remedies a strong preference for structural remedies.

The Remedies Notice states that structural commitments, such as the obligation to divest a business unit, effectively address the competition concerns arising from the horizontal overlaps, and they might also serve as the most effective method for resolving issues stemming from vertical or conglomerate concerns.[85] FTC and DOJ also favour structural remedies in the form of divestitures to address the negative impact of horizontal mergers. Moreover, in its Merger

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[82] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 202, p. 26 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.

[83] GUNNAR, Niels, Helen JENKINS and James KAVANAGH. *Economics for Competition Lawyers.* Second edition. New York, United States of America: Oxford University Press, 2016. ISBN 9780198717652, p. 361.

[84] Ibid., p. 26.

[85] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, paras. 15, 17.

Remedies Manual from 2020, the DOJ also considers the structural remedy preferable in vertical merger cases.[86]

In addition, structural remedies do not necessitate long-term monitoring and ongoing government involvement in market regulation.[87]

Although competition authorities commonly prefer divestiture remedies, they may also cause problems. For instance, the choice of the purchaser may be incorrect, the assets may depreciate during the process of divestiture, and most importantly, the merger parties have an antagonistic interest to the competition authority. Strengthening an existing competitor of the merging parties or creating a new competitor is certainly not the intention of the merging companies.[88]

Simultaneously, the strong preference for structural remedies does not entirely eliminate the option to use behavioural ones. However, all the EU and USA competition authorities consider their use appropriate only in very specific circumstances. FTC and DOJ also state that conduct remedies may be effective as a complement of structural remedies in the form of divestiture[89], and behavioural commitments often accompany divestiture in the EU, too.[90]

The challenges associated with behavioural remedies revolve around complex, long-term monitoring and enforcement requirements to ensure compliance with remedies. Crafting such remedies to adapt effectively to evolving market conditions is also a difficult task, given that behavioural remedies often remain in effect for extended durations.[91] Moreover, these remedies

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[86] FEDERAL TRADE COMMISSION. *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies* In: Federal Trade Commission [online]. 2012, p. 5 [last accessed 2024-05-10]. Available at: https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf; DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 13 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

[87] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, para. 15; DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 4 [last accessed 202-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

[88] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 202, p. 36 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.

[89] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, paras. 15, 17.; FEDERAL TRADE COMMISSION. *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies* In: Federal Trade Commission [online]. 2012, p. 5 [last accessed 2024-05-10]. Available at: https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf; DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 14-17 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

[90] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 29 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.

[91] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, para. 69;

do not provide long-lasting solutions and depend on the merging parties behaving in a manner that contradicts their incentive to maximise profits.[92]

Also, the ex-post assessments of the accepted merger remedies, mentioned at the beginning of Chapter 2, often concluded that the structural remedies were effective in most cases and, therefore, are preferred.[93]

Distinguishing between different types of merger remedies is often not as simple in practice as it is in theory. The Remedies Notice categorises remedies as divestiture, removal of link with competitors and other remedies. The latter includes access remedies, change of long-term contracts and other non-divestiture remedies[94], so the remedies are instead classified in the guidance as divestiture and non-divestiture remedies rather than structural and behavioural remedies. For the purposes of this thesis, divestiture and the removal of links between competitors are described later in the subchapter on structural remedies and access remedies, change of long-term contracts and other non-divestiture remedies are discussed in the subchapter on behavioural remedies due to their more behavioural nature.

In the USA, merger remedies are divided into structural (i.e. divestiture) and conduct remedies.[95]

3.3. Structural remedies in the EU and the USA

3.3.1. Divestiture

As previously mentioned, divestiture involves the sale of tangible or intangible assets or the entire business units to a party independent of the merged entity. The largest divestiture in EU and U.S. history occurred with the acquisition of Monsanto, a U.S. agricultural company, by Bayer,

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DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 4 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

[92] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 28 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.

[93] EUROPEAN COMMISSION DG COMP. *Merger Remedies Study*. In: European Commission [online]. 2005, p. 134 [last accessed 2023-03-08]. Available at: https://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf.

[94] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice*). OJ C 267 2008.

[95] FEDERAL TRADE COMMISSION. *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies* In: Federal Trade Commission [online]. 2012 [last accessed 2024-05-10]. Available at: https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf;
DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

a German pharmaceutical and agricultural company, in 2018.[96] The EU and the U.S. competition authorities collaborated throughout the merger control process. Both the EC and the DOJ granted clearance for the acquisition, subject to divestiture, with a value of 7.6 billion euros. This underscores the ability of divestitures to give rise to significant transactions.[97] Other significant divestitures have arisen in merger cases within the EU, such as in the *AB InBev/SABMiller*[98] and *GE/Alstom*[99] cases, as well as in the USA in various cases.[100]

The Remedies Notice states that divestiture must comprise viable and competitive business. Viable business ‘‘if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and that is divested as a going concern.’’[101] The business must encompass all assets that actively contribute to its ongoing operations and all currently employed personnel or those required to maintain its viability and competitiveness. The parties must ensure that all the businesses, assets mentioned above, and personnel are included in the transaction[102] so that the proposed divestiture package can attract suitable purchasers.

When crafting the remedy, the EC can not work with the resources of the future purchaser. Therefore, ‘‘the business to be divested has to be viable as such.’’[103] Business viability signifies whether the entity to be divested is profitable or potentially profitable shortly.[104]

Moreover, Remedies Notice avers a viable business is one that can function independently, without relying on the merging parties for input materials or other forms of collaboration. From

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[96] Commission Decision COMP/M.8084 *Bayer/Monsanto* [2018]; *United States v. Bayer AG,* No. 1:18-cv-01241-JEB (D.D.C. 2019).

[97] DEPARTMENT OF JUSTICE. *Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto* In: Department of Justice [online]. 2018 [last accessed 2023-08-23]. Available at: https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened; BASF. *BASF closes acquisition of businesses and assets from Bayer* In: BASF [online]. 2018 [last accessed 2023-08-23]. Available at: https://www.basf.com/global/en/media/news-releases/2018/08/p-18-285.html.

[98] Commission Decission COMP/M.7881 – *AB InBev/SABMiller* [2016].

[99] Commission Decison COMP/M.1404 – *General Electric/Alstom* [1999].

[100] E.g. *United States and Plaintiff States v. CVS Health Corp., and Aetna, Inc.*, No. 1:18-cv-02340-RJL (D.D.C. 2018).

[101] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, para. 23.

[102] Ibid., para. 27. Nevertheless, some of the assets may be excluded from the divestiture upon request of the parties after the decision of the EC approving the transaction subject to divestiture and identification of the purchaser if the purchaser does not need particular assets. See EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, para. 31.

[103] However, there is an exception in the case of a fix-it-firs remedy, where the purchaser is already known when assessing the remedy. See EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, para. 30.

[104] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 38 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.

this, it is clear that the divestiture of an existing stand-alone business is preferred.[105] A share deal is considered the best option to accomplish the divestiture of the stand-alone business because, in most legal systems, this type of deal will automatically transfer all rights and obligations.[106]

The merging parties had to amend their initial commitments in the *Novelis/Aleris* case involving two aluminium rolling producers. This ensured the divested Aleris plant operated as a stand-alone business. They achieved this by selling the plant along with a dedicated fund exclusively earmarked to make the plant independent.[107]

Antitrust agencies in the USA also consider the divestitures of existing stand-alone businesses as appropriate to ensure the restoration of competition following the completion of mergers. Such companies have a track record of success competing within relevant markets and typically possess all the tangible and intangible assets necessary for such competition.[108]

Like in the EU, the merging parties in the USA must demonstrate that the business includes all the assets required to function as an independent entity and can be sold to a purchaser with incentive and ability to preserve the pre-merger level of competition. All the assets must be specified in the consent decree. [109]

The competition authorities may occasionally require selling more than viable, stand-alone businesses.

‘‘For the business to be viable, it may also be necessary to include activities which are related to markets where the EC did not identify competition concerns if this is required to create an effective competitor in the affected markets.‘‘[110] As happened in the EU merger case of *Unilever / Sara Lee body care,* where the entire Sara Lee's Sanex brand, which produced deodorants, bath and shower products, soaps, and shaving creams[111], had to be divested, even

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[105] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice)*. OJ C 267 2008, para. 32.
[106] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 39 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.
[107] Commission Decision COMP/M.9076 – *Novelis/Aleris* [2019], paras. 1062, 1091.
[108] FEDERAL TRADE COMMISSION. *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies* In: Federal Trade Commission [online]. 2012, p. 6 [last accessed 2024-05-10]. Available at: https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf; DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 8-9 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.
[109] DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 10-11 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.
[110] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice)*. OJ C 267 2008, para. 23.
[111] DE VALOIS TURK, Maurice. *Merger Remedies beyond the Competition Concern: When Could You End up Giving More?* In: Journal of European Competition Law & Practice [online], Volume III, Issue 5, 2012, p. 497 [last accessed 2023-08-15]. Available at: https://academic.oup.com/jeclap/article-abstract/3/5/495/1845336.

though anticompetitive concerns were considered just in some national markets for deodorants. Split of the Sanex brand would require re-branding, confusing the consumers.[112]

However, anticompetitive concerns were found in the markets for pneumatic ice protection systems for aircraft and for trimmable horizontal stabiliser actuators for large aircraft (tools responsible for maintaining the correct in-flight positions of an aircraft), the merging parties had, in addition to the ice protection systems for the aircraft, sell other products like fueling systems, hovercraft skirts, pilot control systems etc. in the merger case of *United Technologies Corp./Rockwell Collins, Inc.*[113] It was necessary because, in some circumstances, the antitrust agencies in the USA may discover that divestiture of a stand-alone business, even when the sale encompasses all the production and marketing assets responsible for manufacturing and selling the relevant product, may not equip the buyer with both the ability and incentive to restore competition threatened by the merger.[114]

While the competition authorities consider the divestiture of viable stand-alone business to be a standard, competition authorities in the EU and the USA may, in some cases, also approve the sale of less than an independent business, particularly as the divestiture of mere assets.[115] In the case of the *Novartis/GlaxoSmithKline Oncology Business,* the EC required divesting two of Novartis' cancer treatments.[116]

The divestiture of assets alone, mainly when these assets are a combination of those held by the acquiring and target companies, commonly referred to as "mix and match" asset packages, are disfavoured both in the EU and the USA. This is because it is considered risky to assume that the combination of assets that did not constitute a unified and viable business entity in the past would be capable of forming one that can effectively preserve pre-merger competition. Nevertheless, in rare instances where the merging parties can demonstrate that "mix and match" assets have the potential to restore competition, competition authorities may consider accepting

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[112] Commission Decision COMP/M.5658 – *Unileveresogi technologies/Sara Lee body care* [2010], paras. 78, 1418.
[113] Competitive Impact Statement. *United States v. United Technologies Corp*., No. 1:18-cv-02279-RC (D.D.C. 2018), p. 11-12.
[114] DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 9-10 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.
[115]EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice)*. OJ C 267 2008, para. 37; FEDERAL TRADE COMMISSION. *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies* In: Federal Trade Commission [online]. 2012, p. 7-8 [last accessed 2024-05-10]. Available at: https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf; DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 10-11 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.
[116] Commission Decision COMP/M.7275 – *Novartis / GlaxoSmithKline Oncology Business* [2015], para. 285.

such a remedy.[117] In the USA, the DOJ examined the *Unilever N.V./Unilever PLC/Conopco, Inc./ Alberto-Culver Co.* merger, during which it was determined that Alberto-Culver Co. was required to divest hair styling products brand Alberto VO5 and Unilever had to sell hair styling product brand Rave. However, there was no requirement to divest the manufacturing plants or real property due to the ample capacity provided by the contract manufacturers.[118]

With the standard of divesting a viable stand-alone business in mind, the EC can approve, on occasion, more intricate divestiture arrangements. These divestitures involve the transfer of businesses that have preexisting significant connections or partial integration with the businesses retained by the merging parties. Consequently, these connected parts of businesses must be "carved out", which is often problematic because, e.g. support systems have to be split, lines of supply have to be renegotiated etc. The merging parties can propose commitments to sell the business without these carved-out parts (e.g. some assets or employees).[119] For instance, in the *Bayer/Monsanto* case, as part of the divestiture package for the purchaser BASF, Bayer included its entire global broad-acre crop seeds and traits business, with specific carve-outs such as hybrid rice in Asia and hybrid cotton etc.[120]

3.3.2. Implementation of the divestiture

Typically, the identity of the purchaser/buyer of the divested assets or businesses remains unknown at the stage when remedies are being tailored, and the merger is cleared subject to divestiture. Once the competition authority grants approval for the transaction to proceed, the merging parties are subject to a deadline by which they must find a suitable purchaser or purchasers for the divestiture package[121] and request the competition authority's approval of the agreement with the purchaser, as well as the purchaser's acceptance.

The competition authorities appoint an independent divestiture/selling trustee to complete the sale of the divested assets if the merging parties fail to secure a suitable/acceptable purchaser

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[117] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice)*. OJ C 267 2008, para. 37; DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 10-11 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

[118] Competitive Impact Statement. *United States v. Unilever N.V.,* No. 1:11-cv-00858-ABJ (D.D.C. 2011), p. 3, 10, 12.

[119] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, para. 35.

[120] Commission Decision under remedy review clause COMP/M.8084 *Bayer/Monsanto* [2018], para. 2(a).

[121] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, para. 52; DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p .27 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

before the deadline to do so expires.[122] This ensures that the remedies are implemented in a timely manner.

The authority will deem purchasers suitable/acceptable if they are competitively viable.[123] The criteria for acceptable buyers can be found in paragraphs 48-49 of the Remedies Notice, page 9 of the Statement issued by the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies, and page 23 of the Merger Remedies Manual.

The preceding text makes it evident that the approaches of the EC and the U.S. competition agencies toward divestiture remedies share many similarities. Differences, however, can be identified in the context of up-front buyer and fix-it-first remedies.

In the EU, the up-front buyer clause stipulates that the merging parties cannot finalise the main transaction after the conditional decision is issued until they have entered into a binding agreement with the purchaser and the EC has granted its approval to both the agreement and the purchaser. Conversely, the requirement for an up-front buyer in the USA pertains to a scenario where the purchaser of divested assets or a business is already identified in the negotiated remedies between the merging parties and the competition agency. In the USA, the concept of the up-front buyer corresponds to the fix-it-first remedy employed in the EU.[124] Fix-it-first solution was used in the EU, for example, in *Liberty Global/BASE*[125] and *Hutchinson 3G Italy /Wind/JV cases*.[126]

As previously mentioned, the term ‘‘fix-it-first remedy’’ in the USA refers to a situation in which the merging parties have already entered into an agreement to sell a portion of the merged entity in order to preempt the issuance of a second request and avoid an in-depth investigation of the merger and complicated negotiating to agree on consent agreement. This agreement between

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[122] EUROPEAN COMMISSION. *Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation* In: European Commission [online]. 2013, paras. 29, 31 [last accessed 2023-08-06]. Available at: https://competition-policy.ec.europa.eu/document/download/720d75b8-2f68-4b0c-bf4a-5beaf6103d6f_en?filename=best_practice_commitments_trustee_en.pdf; DEPARTMENT OF JUSTICE. *Merger Remedies Manual In: Department of Justice* [online]. 2020, p. 29-30 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

[123] FEDERAL TRADE COMMISSION. *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies* In: Federal Trade Commission [online]. 2012, p. 9 [last accessed 2024-05-10]. Available at: https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf; EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice)*. OJ C 267 2008, para. 47.

[124] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 51 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.

[125] Commission Decision COMP/M.7637 – *Liberty Global/BASE Belgium* [2016].

[126] Commission Decision COMP/M.7758 – *Hutchinson 3G Italy /Wind/JV* [2016].

the merging parties must be approved by the DOJ to ensure that purchasers have the ability and incentive to restore competition.[127]

The necessity of pre-identification of the buyer in the EU depends on the scope of the business to be divested, the risks associated with the potential deterioration of the business during the interim period[128], and any risks associated with recognising a suitable purchaser.[129]

U.S. competition agencies frequently require the divestiture of a particular set of assets, and therefore, the buyer's identity must be ascertained before entering into the consent agreement. This applies especially in cases where less than a stand-alone business is to be divested.[130] For example, the up-front buyer was demanded in the merger concerning point-of-sale terminals in retail stores, as seen in the *VeriFone/Hypercom* case.[131]

Suppose an acceptable/suitable purchaser cannot be secured. In that case, competition authorities may sometimes require a ‘‘crown jewel’’ provision, wherein the merging parties are obligated to offer an alternative to the initial divestiture, which must be equivalent in nature.[132]

Generally, merging parties must hold the businesses or assets earmarked for divestiture separate from the retained assets during the pendency of the divestiture to ensure their independence and saleability and secure that the assets will not depreciate or lose their competitive potential.[133]

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[127] DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 17-18 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

[128] Interim period is the timeframe spanning from the EC decision's approval of the transaction to the divestiture process's finalisation.

[129] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, para. 51.

[130] FEDERAL TRADE COMMISSION. *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies* In: Federal Trade Commission [online]. 2012, p. 6-7 [last accessed 2024-05-10]. Available at: https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf; DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p .22 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

[131] *United States v. VeriFone Systems Inc.,* No. 1:11-cv- 00877-GK (D.D.C. 2011).

[132] FEDERAL TRADE COMMISSION. *Frequently Asked Questions about Merger Consent Order Provisions*. In: Federal Trade Commission [online]. 2024, Q. 24 [last accessed 2024-05-10]. Available at: https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/frequently-asked-questions-about-merger-consent-order-provisions#Divestiture%20Period; EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, paras. 44-45.

[133] FEDERAL TRADE COMMISSION. *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies* In: Federal Trade Commission [online]. 2012, p. 16-18 [last accessed 2024-05-10]. Available at: https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf; DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 28-29 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download; EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, paras. 108-111.

Since the competition authorities cannot provide daily oversight of the divestiture's implementation, appointing a monitoring trustee to supervise the parties' compliance with remedies throughout the divestiture process is necessary.[134] Although monitoring trustees are responsible to the competition authorities for the proper performance of their duties, in both the EU and the USA, merging parties are responsible for paying for the services of trustees.[135]

There are additional obligations that merging parties may be obligated to fulfil in relation to the divestiture, both in the EU and the USA. For instance, in the USA, competition agencies may include in the consent agreement a requirement to notify any otherwise unreportable transactions that the merged entity may seek to conclude in the future.[136]

The duration of the divestiture remedy, more precisely, the period during which the divested assets cannot be re-acquired by the merger entity, is typically set at ten years in both the EU and the USA.[137]

3.3.3. Removal of links with competitors

In some cases, there may be links between the merging entities and their competitors (e.g. minority shareholding in a competitor or competing joint venture, consortium, or long-term supply agreements), which may raise competition concerns. Consequently, eliminating these links can be employed as a remedy in the context of mergers. Although such a remedy is recognized in the EU Remedies Notice[138], this category is not considered in the U.S. merger remedies guidance.

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[134] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, para. 117; DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 30 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

[135] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 63 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333 ; FEDERAL TRADE COMMISSION. *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies* In: Federal Trade Commission [online]. 2012, p. 16 [last accessed 2024-05-10]. Available at: https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.

[136] This provision may also be included in the consent agreement requiring a conduct relief. See DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 31 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

[137] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice)*. OJ C 267 2008, para. 43; DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 30-31 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

[138] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, paras. 58-60.

Removing links with competitors is a structural remedy that involves either divesting minority shares held in a competitor or exiting a joint venture that competes with the merging parties by divesting a minority stake in that joint venture.[139]

Removing links with competitors may lead to several other scenarios that do not include divestiture of stakes.

First, in exceptional cases, where it can be reasonably determined that the financial benefits arising from keeping a non-controlling share in a competitor do not inherently generate competition-related concerns, the merging parties may retain their minority stake. But they are obligated to thoroughly and permanently waive all the rights associated with such shareholding that are relevant for competitive behaviour (i.e. representations on the board, veto rights, information rights).[140]

Second, when competition concerns arise from distribution agreements or agreements leading to coordinating specific commercial activities with competitors supplying identical products or offering similar services, an appropriate remedy could involve terminating the relevant contract.[141]

3.4. Behavioural remedies in the EU and USA

Remedies Notice states that commitments concerning the future behaviour of the merged entity may only be considered acceptable in exceptional cases under specific conditions. As stated earlier, divestiture commitments represent, from an EU perspective, the optimal approach to address competition problems arising from horizontal overlap and may also serve as the most effective method to address issues arising from vertical or conglomerate problems.[142] Therefore, other types of commitments may only be acceptable if the other proposed remedy is at least equivalent to divestiture in terms of effectiveness and efficiency.[143]

Regarding behavioural remedies, the US view is very similar to that of the EU. In the view of the US competition authorities, behavioural remedies can serve as an effective solution to alleviate concerns arising from a proposed merger in exceptional cases or as a complement to divestiture.[144]

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[139] Ibid., para. 58.
[140] Ibid., para. 59.
[141] Ibid., para. 60.
[142] Ibid., para. 17.
[143] Ibid., para. 61.
[144] FEDERAL TRADE COMMISSION. *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies* In: Federal Trade Commission [online]. 2012, p. 5 [last accessed 2024-05-10]. Available at: https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf;

Although the official guidelines of the competition authorities in both the EU and the USA express a clear preference for the use of structural remedies, clearance of mergers subject to behavioural remedies has not been that rare, as will be shown later in this chapter. According to statistics published regularly by the EC since 1990, in 2023, five notified mergers were cleared subject to remedies during the Phase II investigation[145], three of which involved the application of behavioural remedies.[146]

3.4.1 Behavioural remedies in the EU

As mentioned above, remedies that can be referred to as behavioural in the EU are, according to the Remedies Notice, divided into access remedies, change of long-term contracts and other non-divestiture remedies.[147]

Behavioural remedies can be used in the EU as a stand-alone remedy to protect competition from a proposed merger or as a complement to divestiture. In the case of *Assa Abloy/Agta Records,* the divestiture was accompanied by Assa Abloy's commitment to provide spare parts and related technical information and service tools on fair and reasonable terms and conditions for a period of at least ten years in a number of EEA countries, including through an online marketplace.*[148]*

3.4.1.1 Acess remedies

Access commitments are defined in the Remedies Notice as remedies through which merging parties provide third parties with transparent and non-discriminatory access to crucial infrastructure, networks, technologies, essential input or IP rights.[149] In several cases, the remedy required that a third party is provided with access to key infrastructure, networks etc. on FRAND (fair, reasonable and non-discriminatory) terms. For example, in the case of the *Telia/Bonnier Broadcasting* merger, access FRAND terms had to be granted to a licence to the merged entity's free-to-air and basic pay-TV channels, as well as to premium pay-sports channels, rights to

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DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 13 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

[145] EUROPEAN COMMISSION. *Statistics on Mergers Cases*. In European Commission [online]. 2024 [last accessed 2024-05-10]. Available at: https://competition-policy.ec.europa.eu/document/download/4b083559-e36c-44c2-a604-f581abd6b42c_en?filename=Merger_cases_statistics.pdf.

[146] *See* Commission Decision COMP/M.10806 – *Broadcom/WMware* [2023]; Commission Decision COMP/M.10646 – *Microsoft/Activision Blizzard* [2023]; Commission Decision COMP/M.10663 – *Orange /VOO/Brutélé* [2023].

[147] EUROPEAN COMMISSION. Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice). OJ C 267 2008, paras. 62-69.

[148] Commission Decision COMP/M. 9408 – *Assa Abloy/Agta Records* [2020], para. 678.

[149] EUROPEAN COMMISSION. Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice). OJ C 267 2008, para. 62.

personal video recorders and distribution of television services over the open internet in relation to premium pay-sports channels.[150]

Commitments proposed by merging parties to provide other competitors with access to crucial infrastructure or networks may be accepted by the EC, provided that the EC is ensured that such a solution will guarantee that a sufficient number of competitors enter the market and eliminate competition concerns. Where such a commitment completely eliminates the EC's foreclosure concerns, it is considered to be as effective as divestiture[151] and is accepted by the EC.

In addition, control of the merged entity's key technology or IP rights may raise concerns that competitors that depend on the technology or IP rights as a key input for downstream activities will be foreclosed. For example, where merging parties may make information relevant to the interoperability of different devices inaccessible. A further problem may arise in industries where parties license patents to each other in a collaborative manner, as the merged entity may no longer have the incentive to license to the same extent and on the same terms as before. Access remedies can address these competition problems, e.g. providing access to crucial information and licenses on the same basis as before, in circumstances where these proposed remedies will be as effective as divestiture.[152]

Access remedies are frequently used in media[153], telecommunications, digital and air transport sectors[154], as will be shown in the merger cases discussed later in this subchapter. However, they were also used in the past to grant access to energy through gas release programmes,[155] for instance, in the merger case *E.ON/MOL*.[156] As part of the deal, E.ON, a prominent German energy operator, wanted to acquire MOL WMT and MOL Storage to take over the long-term gas supply contracts with Gazprom and thus expand its retail gas and electricity supply in Hungary, where MOL was the dominant operator in gas production, transportation, storage and wholesale. During the investigation, the EC found that, following the merger, E.ON could use its control over gas resources in Hungary to strengthen its ability to determine prices and

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[150] Commission Decision COMP/M.9064 –*Telia/Bonnier Broadcasting* [2019].
[151] EUROPEAN COMMISSION. Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice). OJ C 267 2008, paras. 63-64.
[152] Ibid., para. 65.
[153] *See e.g.* Commission Decision COMP/M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media* [2015]; Commission Decision COMP/M.8665 – *Discovery/Scripps* [2018].
[154] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 56 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.
[155] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice)*. OJ C 267 2008, para. 63.
[156] Commission Decision COMP/M.3696 — *E.ON/MOL* [2005], paras. 741-742.

other business conditions in several downstream markets (e.g. market for gas supply to industrial, commercial and residential customers).[157] For the transaction to be cleared by the EC, E.ON has committed to release significant volumes of gas to the market on competitive terms. E.ON introduced an 8-year gas release programme in Hungary (1 billion cubic metres per year) and divested half of its 10-year gas supply contract with MOL E&P through a so-called contract release. This measure was intended to allow market participants to conclude gas supply contracts on equal terms.[158]

A typical competition concern in the digital sector, which access remedies can address, is that the merged entity could impair the interoperability of its own products with the products of competitors.[159] In the case of *Microsoft/LinkedIn,* merging parties have committed to enabling rival professional social networking service providers to maintain their existing level of interoperability with the Microsoft Office suite via Office add-ins and APIs.[160] In the case of *Google/Fitbit,* the EC was concerned that the completion of the merger would give Google an incentive to restrict third parties' access to Fitbit's web API, which many competitors in the market used to provide services to Fitbit users and, in return, extract data from those users. Restricting this access to Fitbit's web API could prevent new competitors from entering the digital healthcare market. The solution was, therefore, a commitment by the merging parties to continue to provide access to Fitbit's web API to rivals in the digital healthcare market.[161] In this case, another concern of the EC was that Google could harm other producers of wrist-worn devices by disrupting the interoperability of these competitors' devices with Android smartphones, which was addressed by the merging parties' commitment to maintain the interoperability of competing wristband devices with Android smartphones.[162]

Also, a significant number of merger cases in the telecommunications sector were approved by the EC subject to access commitments. The principle of access remedies in this sector is that the merged entity, as the mobile network owner, is bound to provide third parties with access to such mobile network. These so-called mobile virtual network operators are then able to offer

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[157] EUROPEAN COMMISSION. *Press release. Mergers: Commission approves acquisition by E.ON of MOL's gas business, subject to conditions*. In: European Commission [online]. 2005 [cit. 2024-05-10]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_05_1658.
[158] Commission Decision COMP/M.3696 — *E.ON/MOL* [2005], paras. 741-742.
[159] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 55-56 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.
[160] Commission Decision COMP/M.8124 –*Microsoft/LinkedIn* [2016], paras. 426-430, 437.
[161] Commission Decision COMP/M.9660 – *Google/Fitbit* [2020], para. 953.
[162] Ibid., para. 953.

services to customers as mobile operators even though they do not possess their own mobile network.[163] Although access remedies used in the telecommunications sector have not been considered to be very successful in the past, particularly as the entry of these new mobile virtual network operators into the market sometimes occurred several years after the merger[164], the EC has again recently conditioned mergers in the telecommunications industry on this type of commitment.

In a recent merger case, Orange, Belgium's second-largest mobile service provider, proposed to acquire VOO and Brutélé. Together, companies formed the second biggest fixed telecommunications services providers in the regions covered by their fixed networks. The EC investigation revealed concerns that the merger would reduce competition in certain markets, which could eliminate Orange as a significant competitor and increase the likelihood of market coordination between the remaining operators.[165] To mitigate these concerns, Orange has committed to providing Telenet (a leading telecom operator in northern Belgium with a strong reputation in fixed and mobile telecommunications markets) with at least ten years of access to the acquired fixed network infrastructure and Orange's future fibre network, which Orange planned to deploy in the coming years, in the Walloon region and certain parts of Brussels.[166] The access commitment is intended to ensure Telenet's early entry into the Walloon region and parts of Brussels.[167]

In several airline merger cases that raised concerns that the transaction's outcome would lead to horizontal anticompetitive effects in the specific air routes, EC accepted so-called slot remedies. The essence of slot remedies is that merged entities at busy airports where there is a shortage of take-off and landing slots, which is one of the significant barriers to entry into the air transport market, will release these slots for use by other competitors, allowing them to fly on routes where competition could be harmed by the proposed merger.[168] Examples of merger cases

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[163] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 55-56 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.

[164] *See e.g.* Commission Decision COMP/M.6497 – *Hutchison 3G Austria/Orange Austria* [2012]; Commission Decision COMP/M.7018 – *Telefónica Deutschland / E-Plus* [2014].

[165] EUROPEAN COMMISSION. *Press release. Mergers: Commission clears the acquisition of VOO and Brutélé by Orange, subject to conditions* [online]. European Commission, 2023 [cit. 2024-05-10]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_23_1722.

[166] Commission Decision COMP/M.10663 – *Orange /VOO/Brutélé* [2023], para. 1240.

[167] EUROPEAN COMMISSION. *Press release. Mergers: Commission clears the acquisition of VOO and Brutélé by Orange, subject to conditions* [online]. European Commission, 2023 [cit. 2024-05-10]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_23_1722.

[168] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 57-58 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.

where slot remedies were used are *Connect Airways / Flybe*,[169] *Alitalia / Etihad*[170]*, US Airways / American Airlines*[171] and *Iberia / Vueling / Clickair.*[172]

However, there have been many occasions in the past when slot commitments have not proved to be very effective and have ultimately failed to attract sufficient new competitors to enter the market. Therefore, over time, the EC has begun to require the addition of some new elements to the commitments to make released slots more attractive for new competitors.[173] This was also the case with *IAG/Aer Lingus*, where the merging parties had to add to the release of five daily slot pairs at London Gatwick Airport a rule that the future entrant must use the released slot to operate on the route where the merger could harm competition continuously for six seasons. In return, the potential entrant would be entitled to use the slots acquired to operate a service on any route connecting London with any other part of Europe after the six-season period mentioned above expires.[174]

3.4.1.2 Change of long-term exclusive contracts

Mergers and acquisitions, without a doubt, result in a change in the market structure, which may cause existing contractual arrangements, particularly exclusive long-term supply agreements, to become anticompetitive. Should the EC investigation find that the merged entity would have the incentive and opportunity to restrict the entry of competitors through these contractual arrangements, the appropriate remedy would be to terminate or modify the existing exclusive agreements to remove competition concerns.[175]

The evidence available to the EC during the investigation must reassure the EC that the factual exclusivity will not be maintained even after the termination of these agreements. Moreover, such modification of long-standing contracts will generally be sufficient only as part of a package of remedies to remove the identified competition concerns.[176]

In the merger case of *Universal Music Group/EMI Music,* Universal's commitment was not to include a most favoured nation clause in future or existing contracts with digital customers in

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[169] Commission Decision COMP/M.9287 – *Connect Airways / Flybe* [2019].
[170] Commission Decision COMP/M.7333 – *Alitalia / Etihad* [2013].
[171] Commission Decision COMP/M.6607 – *US Airways / American Airlines* [2013].
[172] Commission Decision COMP/M.5364 – *Iberia / Vueling / Clickair* [2009].
[173] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 58 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.
[174] Commission Decision COMP/M.7541 – *IAG / Aer Lingus* [2015], paras. 565.
[175] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice)*. OJ C 267 2008, para. 67.
[176] Ibid., para. 68.

the EEA.[177] A most favoured nation clause is a commitment by digital customers to provide Universal with any favourable terms provided to Universal's competitors.

3.4.1.3 Other non-divestiture remedies

Other non-divestiture remedies, or in other words, other behavioural remedies, consist of a promise by the merging parties to abstain from some commercial conduct, for example, bundling products.[178] For instance, in the case related to the merger of companies Chiquita and Fyffes, importers of bananas and other fruit, Fyffes committed to release the shipping company Maersk from an exclusivity clause. Both Chiquita and Fyffes also undertook to refrain from negotiating similar exclusivity clauses with shipping companies in the future or from encouraging shipping companies to refuse to provide services to other banana-selling companies.[179]

In the Remedies Notice provision dealing with other non-divestiture remedies, it is pointed out that this remedy is generally insufficient to eliminate competition concerns arising from horizontal overlaps. Further, the Remedies Notice is very sceptical about the effectiveness of such remedies, as it is tough for EC to monitor such promises by merged entities to refrain from certain conduct.

Despite the above-mentioned, the use of remedies of this type is not expressly prohibited in the Remedies Notice.[180] However, this was not respected by the EC in the case of Tetra Laval, where the EC refused to deal with Tetra Laval's proposed behavioural commitments in the case of the planned merger with Sidel because they were inappropriate in principle to eliminate the harmful effects of the proposed merger on competition.[181] Consequently, the Court of Justice of the EU ruled that EC had erred in rejecting straight out the behavioural commitments offered by Tetra Laval and should have taken these proposed conduct remedies into account in order to assess whether the merged entity was likely to behave in a way that would facilitate the creation of a dominant position in one or more of the relevant markets.[182]

Other examples where other non-divestiture remedies were used are *ASL/Arianespace*[183] and *PRSfM/GEMA/STIM/JV*.[184]

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[177] Commission Decision COMP/M.6458 – *Universal Music Group/EMI Music* [2012], para. 882.
[178] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice)*. OJ C 267 2008, para. 69.
[179] Commisison Decision COMP/M.7220 – *Chiguita Brands International/*Fyffes [2014], para. 387.
[180] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice)*. OJ C 267 2008, para. 69.
[181] Commission Decision COMP/M.2416 – *Tetra Laval/Sidel* [2003].
[182] Judgement of 15 Februray 2005, *Commission v Tetra Laval,* C-12/03, ECLI:EU:C:2005:87, paras. 85, 89.
[183] Commission Decision COMP/M. 7724 – *ASL/Arianel* [2011].
[184] Commission Decision COMP/M. 6800 – *PRSfM/GEMA/STIM/JV* [2015].

3.4.1.4 Implementation of behavioural remedies in the EU

As regards the duration of behavioural remedies, it is not easy to correctly determine the length of these remedies. In some cases, for example, the duration of behavioural remedies was determined according to when the particular technology that was the main subject of the proposed merger was expected to be no longer relevant to competition.[185]

Behavioural remedies are often in force for several years, usually, for example, [186]5 or 10[187] years, or for a shorter period with the possibility of extension.[188]

Given past practice, the exceptionally long duration of commitments was set at 20 years in the recent *Google/Fitbit*[189] case.

Some of the principles applicable to the implementation of divestiture discussed above may also apply to behavioural remedies. However, because of the wide variety of these non-divestiture remedies, the Remedies Notice does not explicitly state the principles for their implementation.[190]

As non-divestiture remedies are often in force for a very long period of time, close attention needs to be paid to whether they are being complied with. In past cases, the EC often required the monitoring trustee to monitor implementation[191] and subsequent compliance with commitments. Furthermore, the EC has often required the introduction of a mechanism for resolving disputes to ensure that commitments are enforceable by market participants, i.e. the mechanism of an expedited arbitration procedure, which will be discussed in more detail in Chapter 4 of this thesis.[192]

3.4.2 Behavioural remedies in the USA

As in the case of the EU, the official documents of the competition authorities in the USA dealing with merger remedies contain provisions allowing the use of behavioural remedies (in other words conduct remedies) as a supplement to divestiture (mainly in the case of horizontal mergers), but also the possibility of using conduct remedies as a stand-alone remedy (mainly in the case of vertical mergers). With this statement, the Statement of the Federal Trade Commission's

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[185] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 72 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.
[186] Commission Decision COMP/M.8124 –*Microsoft/LinkedIn* [2016].
[187] Commission Decision COMP/M.7220 – *Chiguita Brands International*/Fyffes [2014].
[188] Commission Decision COMP/M.8744 – *Daimler/BMW/Car Sharing JV* [2018].
[189] Commission Decision COMP/M.9660 – *Google/Fitbit*. [2020].
[190] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice)*. OJ C 267 2008, para. 129.
[191] Under similar conditions to divestiture, which was introduced in more detail earlier in this chapter.
[192] Ibid., para. 130.

Bureau of Competition on Negotiating Merger Remedies closes the field of conduct remedies and does not address them further.[193] Some more detailed treatment of behavioural remedies is thus found only in the Merger Remedies Manual issued by the DOJ.[194]

3.4.2.1 Behavioural remedies complementing structural remedies

Well-adjusted behavioural remedies can serve as an effective complement to structural remedies. Examples of such frequently used supplemental conduct remedies include temporary supply agreements, employee obligations, confidentiality protections etc.[195]

Temporary supply agreements can complement the divestiture and assist the purchaser during the period when the plant is being restructured, and new supply agreements are being negotiated so that it does not incur excessive losses as a competitor during this period. The DOJ determines the duration of this type of supplemental remedy in a product-by-product context. Still, interim supply agreements must not be too short because they would then not provide sufficient time to establish a viable operation. At the same time, too long agreements may diminish the buyer's motivation to compete effectively as an independent player.[196]

In the case of the *United Technologies Corp./Rockwell Collins, Inc.* merger, the divestiture was accompanied by the option of the purchaser to enter into a supply agreement with merging parties on the provision of services related to the manufacture of the components for a period up to 12 months following the divestiture.[197]

Another additional remedy that has behavioural essence and complements the divestiture may be a commitment by the merging parties not to rehire employees who were transferred to the buyer with the divested part of the merged entity under the divestiture, as was the case of *Thales S.A./Gemalto N.V* merger.[198]

Another option is to oblige merging parties to set up firewalls to prevent the dissemination of information that could cause coordination between competitors. This remedy is not often used

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[193]FEDERAL TRADE COMMISSION. *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies* In: Federal Trade Commission [online]. 2012, p. 5 [last accessed 2024-05-10]. Available at: https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.
[194] DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 14-17 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.
[195] FEDERAL TRADE COMMISSION. *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies* In: Federal Trade Commission [online]. 2012, p. 5 [last accessed 2024-05-10].
[196] DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 14 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.
[197] Competitive Impact Statement. *United States v. United Technologies Corp.*, No. 1:18-cv-02279-RC (D.D.C. 2018), p. 14.
[198] Competitive Impact Statement. *United States v. Thales S.A.*, No. 1:19-cv-00569 (D.D.C. 2019), p. 9.

in practice because although it is carefully designed in advance, it may not prevent coordination between rival parties and requires consistent monitoring and a well-established enforcement system. In the past, this remedy has been used as a complement to structural remedy, for example, in the merger case of *Northrop Grumman Corporation/TRW, Inc.*[199]

Another example where behavioural commitments accompanied divestitures is the *Sprint/T-mobile* merger, where the merged entity committed to build its own network and DISH (the buyer of the divested Sprint's prepaid mobile brands) was required to roll out a nationwide 5G network covering 70 per cent of the U.S. population by June 2023.[200]

3.4.2.2 Stand-alone behavioural remedies

Pure behavioural remedies are also not that common in the USA, having been used in only 6 % of merger cases approved subject to remedies between 2017 and 2021.[201]

A separate conduct remedy is acceptable by the competition authority only if the merging parties demonstrate that the transaction produces significant efficiencies that cannot be achieved without the merger, a structural remedy is not feasible, the conduct remedy completely eliminates the anticompetitive harm, and the remedy can be effectively enforced.[202]

Thus, separate remedies consisting of behavioural modification of the proposed merger will be used where a structural remedy would lead to a significant efficiency loss, provided that the behavioural remedy does not demonstrably constitute such an efficiency loss and also eliminates the potential for the merger to harm consumers in the relevant market.[203]

When deciding whether behavioural remedies are appropriate, the DOJ also considers the cost of monitoring and enforcement. Using these remedies may be easier in industries where regulatory supervision of companies is already conducted independently of competitive oversight. Thus, DOJ and court monitoring costs may no longer be significant.[204]

For example, a purely behavioural remedy package was used to clear mergers in the following three cases.

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[199] Competitive Impact Statement, *United States v. Northrop Grumman Corp*., No. 1:02-cv-02432 (D.D.C. 2002), p. 18-19.
[200] Competitive Impact Statement, *United States v. Deutsche Telekom AG, et al.,* No. 1:19-cv-2232 (D.D.C. 2019), p. 11-12.
[201] SAMUELSON, Martha, Ishita RAJANI and Alex ROBINSON. *Economic Analysis of Merger Remedies*. In: Global Competiton Review [online]. 2023 [cit. 2024-05-26]. Available at: https://globalcompetitionreview.com/guide/the-guide-merger-remedies/fifth-edition/article/economic-analysis-of-merger-remedies#footnote-096-backlink.
[202] DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 16 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.
[203] Ibid., p. 16.
[204] Ibid., p. 17.

In the case of *Comcast Corp./NBC Universal Inc./JV,* a series of remedies were applied to ensure non-discriminatory conduct by Comcast as the most prominent video programming distributor in the USA. These remedies were intended to ensure that Comcast's online competitors would have guaranteed access to NBC Universal programming, including the NBC broadcast network. The joint venture was required to make available to online video distributors the same bundle of broadcast and cable channels that it sells to conventional video distributors. In addition, the joint venture was obligated to offer online video distributors broadcast, cable and movie content comparable to or better than the content the distributors receive from joint venture partners, such as the Walt Disney Company. These remedies were supplemented by other partial reliefs designed to ensure that Comcast could not avoid provisions designed to protect competition, such as Comcast giving up its rights to manage the online video distributor Hulu.[205]

Another significant case where behavioural commitments were the core remedy to ensure the preservation of the pre-merger level of competition was the merger of *Google/ITA Software, Inc.*[206]

ITA was the leading producer of pricing and shopping systems in the USA and developed and licensed a software product called QPX. QPX was used by numerous airlines, online travel agents, and online travel search sites to provide consumers with highly complex and customised flight search functionality. QPX had remarkable capabilities and functioned as a type of mini-search engine for travel websites.[207]

Google's primary business was operating an online search engine. Google was already, at that time, the largest online search engine, with only one considerable rival, Bing. Bing offered a travel website that used QPX to provide comparative flight search services.[208]

Therefore, Google had intended to offer an online travel search product to rival existing travel search websites that enabled users to search for airfares across various airlines, including many using QPX. These websites were called Online Travel Intermediaries (OTIs). Google's acquisition represented the acquisition of a crucial input that had not been owned by a company acting as a horizontal competitor to ITA's users before. This transaction carried a substantial risk that Google might utilise the acquisition to foreclose its rivals or unfairly increase their costs.[209]

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[205] Competitive Impact Statement. *United States v. Comcast Corp*., No. 1:11-cv–00106–RJL (D.D.C. 2011), p. 30-34.
[206] *United States v. Google Inc. and ITA Software*, Inc., No. 1:11–cv–00688- RWL (D.D.C. 2011).
[207] Competitive Impact Statement. *United States v. Google Inc. and ITA Software*, Inc., No. 1:11–cv–00688- RWL (D.D.C. 2011), p. 2, 6.
[208] Ibid., p. 6.
[209] Ibid., p. 2.

The accepted commitments obligated Google to maintain licensing to OTIs both ITA's existing QPX product and the future ‘‘InstaSearch’’ product on fair, reasonable and non-discriminatory pricing and non-pricing terms[210] and prohibited Google from entering into agreements that would restrict the rights of airlines to share particular information with parties other than Google. Further, Google was required to incorporate certain airline data into the price and shopping results generated for all OTIs, and Google was not permitted to tie the sale of ITA products and services to the purchase of other Google products and services.[211] Google was also obligated to establish a website on which OTIs could file complaints regarding Google's compliance with the proposed remedies, which included a requirement that Google create a modifiable firewall to deal with the potential sharing of sensitive competitive data regarding OTIs.[212]

Requirements for certain post-merger conduct by merged entity were also imposed, for example, on the acquisition of Live Nation, Inc. by Ticketmaster Entertainment, Inc.,[213] where the main request was to license the underlying ticketing platform (Host) to Anschutz Entertainment Group, Inc. (the second leading concert promoter) in the belief that Anschutz Entertainment Group, Inc. would have a strong incentive to use Host both for its own ticket sales and to compete for new ticket business.[214]

Because the remedies in this case failed to protect competition during their decade-long tenure, the consent decree commitments were amended, and their effect extended until 2025.[215] However, this too proved not to be entirely adequate. In May 2024, the DOJ sued Live Nation-Ticketmaster for unlawful conduct and monopolization throughout the live concert industry, which harmed fans, innovation, artists, and venues.[216]

Unlike in the EU, the U.S. merger control system does not have a category of behavioural remedies in the form of slot remedies for airline mergers. In the above-mentioned *US Airways / American Airlines* merger case, the EC cleared the merger after the merging parties offered a slot

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[210] Ibid., p. 10-12.
[211] Ibid., p. 13.
[212] Ibid., p. 13-15.
[213] *United States v. Ticketmaster Entertainment, Inc.,* No. 1:10–cv–00139-RMC (D.D.C. 2010).
[214] Competitive Impact Statement. *United States v. Ticketmaster Entertainment, Inc.,* No. 1:10–cv–00139-RMC (D.D.C. 2010), p. 12-15.
[215] Amedned Final Judgement. *United States v. Ticketmaster Entertainment, Inc.,* No. 1:10–cv–00139-RMC (D.D.C. 2010).
[216] DEPARTMENT OF JUSTICE. *Live Nation-Ticketmaster's Exclusionary Conduct and Dominance Across the Live Concert Ecosystem Harms Fans, Innovation, Artists, and Venues* In: Department of Justice [online]. 2024 [last accessed 2024-05-27]. Available at: https://www.justice.gov/opa/pr/justice-department-sues-live-nation-ticketmaster-monopolizing-markets-across-live-concert.

remedy commitment, i.e. to release one slot pair per day at London Heathrow and Philadelphia Airport, and also provided other incentives such as the possibility for the new entrant to gain access to the merging parties' frequent flyer programmes. [217] In the same merger case, the DOJ required, as part of the U.S. merger investigation, the outright divestiture of slots, gates and ground facilities at crucial U.S. airports to allow entry by other airlines that may compete in many markets with the merged entity.[218] Although the DOJ has in the past expressed the view that divestiture is more likely to be preferred as a means of conditional approval of airline mergers in the USA[219], in the case of the airline merger of Alaska Air Group, Inc. and Virgin America, Inc., later conduct remedies were required by the DOJ to approve the transaction.[220] These consisted primarily of a requirement that Alaska Air Group, Inc. significantly reduce codesharing[221] with American Airline Group, Inc. on routes where Alaska Air Group, Inc.'s incentive to compete with American Airline Group, Inc. is likely to be reduced after the merger.[222]

3.4.2.3 Implementation of behavioural remedies in the USA

Although the official documents of the U.S. competition authorities dealing with merger remedies do not contain specific provisions on implementing behavioural commitments, merger clearance subject to behavioural remedies is accompanied by monitoring provisions allowing U.S. competition institutions to supervise compliance with the remedies. For example, the merging parties must provide records and documents relating to the content of the final judgment upon request, make staff available for interview by the competition authority, or produce written reports relating to the matters contained in the final judgment.[223]

The length of time for which behavioural remedies are in force after the merger is typically in the range of 5 to 10 years.[224]

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[217] Commission Decision COMP/M.6607 – *US Airways / American Airlines* [2013], para. 154.
[218] *United States v. US Airway Grp., Inc.,* No. 1:13-cv-01236-CKK (D.C.C. 2014), p. 5-15.
[219] DEPARTMENT OF JUSTICE. *Statement of John M. Nannes Deputy Assistant Attorney General Antitrust Division Before The Committee On Transportation & Infrastructure U.S. House of Representatives Concerning Antitrust Analysis Of Airline Mergers*. In: Department of Justice [online]. 2000, p. 8-9 [last accessed 2024-06-29]. Available at: https://www.justice.gov/sites/default/files/atr/legacy/2015/05/06/4955.pdf.
[220] *U.S. v. Alaska Air Group, Inc., and Virgin America Inc.*, 1:16-cv-02377-RBW (D.D.C. 2017).
[221] Codesharing is the joint operation of an aircraft by two or more airlines where customers are informed at the time of booking which airline will operate a particular flight.
[222] Proposed Final Judgement. *U.S. v. Alaska Air Group, Inc., and Virgin America Inc.*, 1:16-cv-02377-RBW (D.D.C. 2017), p. 5-6.
[223] See e.g. Competitive Impact Statement. *United States v. Google Inc. and ITA Software*, Inc., No. 1:11–cv–00688-RWL (D.D.C. 2011), p. 14.
[224] In the *Comcast Corp./NBC Universal Inc./JV* case, the remedies were set to expire seven years after the completion of the merger. See *United States v. Comcast Corp*., No. 1:11-cv–00106–RJL (D.D.C. 2011); In the *Ticketmaster Entertainment, Inc./Live Nation, Inc.* case, the remedies were even set to expire ten years after the merger was

3.5. Conclusion of Chapter 3

This chapter shows the clear preference of competition authorities in both the EU and the USA for the use of structural remedies in the form of divestiture to eliminate any competition concerns. Although remedies that consist of the obligation of merging parties to behave in a certain way, referred to as behavioural remedies in the EU and conduct remedies in the USA, are considered adequate to preserve the pre-merger level of competition in both the EU and the USA only if they are as effective as divestiture, and divestiture is not possible in a given case, their use is not at all uncommon in either the EU or the USA.

The basic principles guiding competition authorities in the EU and the USA in clearing mergers under structural remedy, the divestiture, are very similar, with the fundamental rule being that a viable stand-alone business must be divested for the divestiture to be effective. There are identical exceptions to this rule in both the EU and the USA jurisdictions, where it is possible to divest more or less than a viable stand-alone business.

Thus, the approach to structural remedies in the EU and the USA is very similar from the author's point of view. However, differences can be observed in that the concepts of fix-it-first remedy and up-front buyer in the divestiture implementation process. In the EU, unlike in the USA, there is another category of structural remedies in addition to divestiture, called removal of links with competitors, which, in the author's view, allows the EC to apply more targeted remedies to certain mergers than divestiture, which could be less costly to the merging parties than divestiture. Such a category of merger remedy is not known in U.S. merger control.

Although at first glance, it may appear from the names that the categories of behavioural/conduct remedies in the EU and the USA are pretty distinct, the behavioural merger remedies in the individual cases examined in this thesis for both the EU and the USA had much in common. Although in the USA, behavioural/conduct remedies are divided only into those standing alone and those accompanying divestiture, and in the EU into access remedies, change of long-term contracts and other non-divestiture remedies, even in the EU, it would be possible to divide behavioural merger remedies into those standing alone and accompanying divestiture. At the same time, as has been shown in this chapter of the thesis, for example, in the *Comcast Corp./NBC Universal Inc./JV*[225] and *Google/ITA Software, Inc.*[226] cases, the remedies used in those cases were

completed and were ultimately extended for an additional five and a half years. See *United States v. Ticketmaster Entertainment, Inc.,* No. 1:10–cv–00139-RMC (D.D.C. 2010).

[225] *United States v. Comcast Corp*., No. 1:11-cv–00106–RJL (D.D.C. 2011).

[226] *United States v. Google Inc. and ITA Software*, Inc., No. 1:11–cv–00688- RWL (D.D.C. 2011).

in the nature of access remedies, which exist as a separate category in the EU. In contrast, U.S. merger control has proven to be unfamiliar with the behavioural slot remedies in airline mergers widely used to clear airline mergers in the EU. On the contrary, in the USA, divestiture or other forms of behavioural remedies are the preferred option in the airline sector.

In the USA, we often also encounter the remedy of setting up a firewall for possible sharing of sensitive competitive data, which is not known to Remedies Notice and is not used in the EU.

As mentioned above, behavioural/conduct remedies are less popular in both the EU and the USA, also because they are often in force for an extended period – between 5 and 10 years in both the EU and the USA, sometimes longer – and their effective implementation require costly and ongoing monitoring by competition authorities throughout the period.

4 Enforcement of merger remedies

4.1 Enforcement of the merger remedies in the EU and USA

For remedies to be effective, competition authorities must also ensure that they are enforceable in all circumstances.

4.1.1 Enforcement of merger remedies in the EU

The EC may investigate the compliance of merged entities with their commitments by requesting information under Article 11 of the EU Merger Regulation and by conducting inspections under Article 13 of the EU Merger Regulation.[227] EC may identify the non-compliance ex officio through the monitoring trustee[228] or on the basis of complaints from third parties.[229]

The EC is entitled if the decision authorising the merger subject to remedies is based on incorrect information for which one of the merging parties is responsible, or if the information was obtained fraudulently, or if the merged entity breaches an obligation contained in the commitments, to revoke the decision and replace it with a new decision.[230]

If the merged entity breaches the condition, the EC's decision to clear the merger is treated as if the decision had never been taken, and the merger is deemed to have taken place without clearance. The EC may adopt interim measures to preserve conditions of effective competition, which will ensure that the merging parties dissolve the concentration or take other remedial measures.[231] This approach was applied, for example, in the case of the *Novelis/Aleris* merger.[232]

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[227] COUNCIL OF THE EUROPEAN UNION. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). OJ L 24. 2004, arts. 11, 13.
[228] The role of the monitoring trustee was further described in Chapter 3 of this thesis.
[229] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 75 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.
[230] COUNCIL OF THE EUROPEAN UNION. *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).* OJ L 24. 2004, arts. 6(3), 8(6); EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, para. 20.
[231] COUNCIL OF THE EUROPEAN UNION. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). OJ L 24. 2004, recital 30; EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, para. 20.
[232] EUROPEAN COMMISSION. *Press release. Mergers: Commission adopts final measures to preserve the divestment of former Aleris plant in Belgium following Novelis' acquisition of Aleris.* In: European Commission [online]. 2021 [cit. 2024-05-11]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_687.

The EC can also impose a fine of up to 10 % of an undertaking's worldwide turnover for breach of an obligation or condition.[233] In addition, the EC may impose a penalty payment of up to 5 % of the average daily worldwide turnover of the undertaking for a breach of the obligation.[234]

Another tool to ensure enforcement of the merged entity's commitments is requiring the merging parties to include an arbitration clause in their remedies. The idea is to ensure that third parties can themselves enforce the merging parties' commitments through the arbitration mechanism without the major intervention of the EC[235], in addition to the EC's enforcement of remedies.[236]

An arbitration clause is often part of behavioural remedies[237], such as a commitment of the merged entity to provide access to the key infrastructure or assets, or a remedy whereby the merging parties agree to license intellectual property or provide interoperability-related information. On the other hand, arbitration clauses are sporadically used in divestiture commitments.[238]

Although arbitration clauses are often incorporated into commitments as a dispute-resolution mechanism, arbitration is rarely used in practice. However, arbitration has taken place, for example, in connection with commitments in the case of *Newscorp/Telepiù*[239] or *Telefónica Deutschland/E-Plus* merger.[240]

4.1.2 Enforcement of merger remedies in the USA

The Office of Enforcement and Compliance is responsible for overseeing compliance with consent decrees issued by the DOJ. With the assistance of lawyers and economists who are experts in various sectors of the economy, they anticipate potential violations of consent decrees and thus make recommendations to the Assistant Attorney General while laying the groundwork for effective merger remedy best practices in the future.[241]

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[233] COUNCIL OF THE EUROPEAN UNION. *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).* OJ L 24. 2004, art. 14 (2) (d).
[234] Ibid., art. 15 (1) (c).
[235] EUROPEAN COMMISSION. *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice).* OJ C 267 2008, para. 130.
[236] Commission Decision COMP/M.8084 *Bayer/Monsanto* [2018], para. 3180.
[237] Behavioural remedies and structural remedies (e.g. divestiture) will be discussed in more detail in Chapter 3 of this thesis.
[238] VANDE WALLE, Simon. *Remedies in EU Merger Control – An Essential Guide.* In: SSRN [online]. Working Paper, 2021, p. 80-81 [last accessed 2024-05-10]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782333.
[239] Commission Decision COMP/M.2876 – *Newscorp/Telepiù* [2003].
[240] Commission Decision COMP/M.7018 – *Telefónica Deutschland/E-Plus* [2014].
[241] DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 33-34 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.

The specific procedures necessary to ensure compliance with the consent decree will vary depending on the predominant nature of the remedies imposed by the decree. In the case of a divestiture decree, members of The Office of Enforcement and Compliance will carefully observe the sale process, the viability of the purchaser, all documents related to the sale and all relationships between the purchaser and the merging parties to ensure that no such relationship will impede the purchaser's ability or incentive to compete vigorously.

In the case of behavioural remedies, the DOJ has, in turn, often required that the consent decree contain an arbitration provision, i.e., that a particular dispute resolution mechanism between the merging parties and third parties is established.[242] This was the case, for example, in *Google/ITA Software, Inc.*, where the DOJ required the merging parties to develop an arbitration mechanism to resolve disputes with online travel intermediaries regarding the charge of fees for any type of service.[243] In addition, to ensure enforceability, the DOJ obligated Google to establish a website where the final judgment was to be published, and third parties could file complaints regarding the merged entity's compliance with the remedies.[244]

In addition, merged entities may be required to report periodically on whether they are taking the actions to which they have committed themselves in the consent decree or, conversely, in the case of prohibitions imposed by the consent decree, competition authority staff may periodically investigate compliance with those prohibitions.[245]

If a consent decree is violated, there are two types of proceedings, civil and criminal, in which the DOJ can enforce the consent decree. Only one of these proceedings may occur, or both may coincide.[246]

Civil proceedings are designed to ensure that the consent decree is complied with and that no further violations occur and to recover damages for the harm caused by the violation. Criminal proceedings no longer have a remedial effect but are designed to punish breaches of the consent decree. The penalty to be imposed may be a fine, imprisonment, or both.[247]

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[242] Ibid., p. 34.
[243] Competitive Impact Statement. *United States v. Google Inc. and ITA Software*, Inc., No. 1:11–cv–00688- RWL (D.D.C. 2011), p. 13.
[244] Ibid., p. 14.
[245] DEPARTMENT OF JUSTICE. *Merger Remedies Manual* In: Department of Justice [online]. 2020, p. 34 [last accessed 2024-05-10]. Available at: https://www.justice.gov/atr/page/file/1312416/download.
[246]Ibid., p. 34.
[247] Ibid., p. 35.

If there is a violation of a consent order issued by the FTC, the FTC is authorized to seek civil penalties, injunctive relief[248], or consumer redress.[249] The FTC also may refer evidence of criminal antitrust violations to the DOJ.[250]

4.2 Conclusion of Chapter 4

Competition authorities in both the EU and the USA are allowed by their jurisdictions to enforce merger remedies through a variety of means. Very often, competition agencies in both the EU and the USA require merger remedies to contain dispute-resolution mechanisms through which the obligations of merging parties can be enforced directly by other competitors. However, the most common means of enforcing merger remedies in the EU and the USA will be the imposition of fines for individual breaches of commitments. In the USA, penalties for violations of remedies may be, in some cases, harsher than in the EU, as such breaches can be prosecuted and even punished by imprisonment.

[248] The FTC may seek a preliminary injunction to halt the proposed merger until the proposed transaction is fully reviewed in an administrative proceeding. See FEDERAL TRADE COMMISSION. *The Enforcers: The Federal Government.* In: Federal Trade Commission [online]. 2024 [last accessed 2024-05-06] Available at: https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers.

[249] FEDERAL TRADE COMMISSION. *The Enforcers: The Federal Government.* In: Federal Trade Commission [online]. 2024 [last accessed 2024-05-06] Available at: https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers.

[250] Only the DOJ is able to obtain criminal sanctions. See FEDERAL TRADE COMMISSION. *The Enforcers: The Federal Government.* In: Federal Trade Commission [online]. 2024 [last accessed 2024-05-06] Available at: https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers.

5 Conclusion

As mentioned in the introduction to this thesis, it is essential to examine the similarities and differences in the EU and U.S. approaches to merger remedies, mainly because the world is interconnected and most large mergers have an impact on markets around the world, and therefore in many cases, large mergers will be subject to review by competition authorities in many countries worldwide.

This thesis aimed to identify similarities and differences in the system of applying merger remedies to approve proposed mergers in the EU and the USA and to try to answer how complex the different types of merger remedies used in the EU and the USA are to design, how complex and costly they are to administer, and whether merger remedies imposed on a particular merger investigated both in the EU and the USA may expose the merged entity to any uncertainty or unexpected costs.

As regards the complexity of designing an appropriate merger remedy that is well tailored in advance to be effective and to fulfil its purpose of protecting the pre-merger level of competition, in the author's view, it is the easiest to require the merging parties to divest themselves of part of their business. Divestiture of a viable and stand-alone business is considered both in the EU and the USA as a safe option to preserve competition after a merger, and the effects of divestiture can be more easily predicted.

On the other hand, predicting in advance, what commitment by the merging parties governing how the parties will behave after the merger is consummated, will be the correct remedy to protect competition, might be quite complicated.

The above conclusions are confirmed by studies carried out by competition authorities and competition law experts in the EU and the USA, discussed at the beginning of Chapter 2 of this thesis, which summarise that, in general, structural remedies have been shown to be more likely to achieve their stated objectives than behavioural remedies. Therefore, it is easier to design a divestiture than a commitment to regulate the parties' behaviour after a merger so as to be effective.

In terms of the administrability of merger remedies, i.e. how difficult specific merger remedies are to implement and subsequently enforce, divestiture is again more popular with competition authorities in both the EU and the USA compared to behavioural remedies because divestiture does not require such long-term intervention by competition authorities in the form of monitoring. In the case of divestiture, it is in quotes sufficient to monitor that the divestiture of the business unit has occurred and that the merged entity is not trying to acquire this unit back for the time that the reacquisition is prohibited. Monitoring compliance with specific behavioural

commitments by merging parties is not so simple, as it may not be apparent at first sight that the connected undertakings are breaching their commitments. It requires the competition authorities to pay close attention if the commitments are not being breached.

An analysis of the different types of merger remedies used to clear mergers that pose a risk of harm to competition in the EU and the USA shows that there is indeed a strong need for competition authorities investigating the same mergers in multiple countries to work closely together to avoid, in the extreme case, the imposition of conflicting obligations or obligations that would expose the merging parties to unanticipated risks or costs.[251]

This is, of course, also the case of the EU and the USA. Although the systems of imposing merger remedies in the EU and the USA share many common features, as has been shown in the conclusion subchapters to each chapter of this thesis, there are also differences that could put merging parties in an uneasy position.

In the first place, there is a need for merging parties to negotiate merger remedies, based on which the proposed merger will be cleared, very often before multiple competition authorities where the process of negotiating merger remedies is different, has various requirements for the parties, also imposes increased costs on the merging companies to implement the merger and uncertainty as to whether the merger will be cleared by all of the competition authorities. In the USA, in particular, the uncertainty level is compounded because when the merging parties report their proposed merger, they often do not know whether their merger will be reviewed by the DOJ or the FTC, whose procedures for negotiating merger remedies also differ to some extent.

As can be seen from the guiding principles for the imposition of merger remedies shared by the competition authorities in the EU and the USA, structural remedies are the preferred option and behavioural remedies are only used if divestiture is not possible and obligations governing the behaviour of merger parties are as effective as divestiture. The competition authorities in both the EU and the USA will opt for divestiture in every case where divestiture is possible, and it will not happen that merging parties are forced to divest part of their business by DOJ or FTC and in the EU, they will be in turn bound by an obligation to behave in a certain way in the future. Conversely, commitments governing the parties' behaviour are likely to be chosen in the EU and the USA

[251] As mentioned earlier, despite the fact the cooperation of competition agencies in the EU and USA is quite common the results of their investigations are not always the same. See See Commission Decision COMP/M.10646 – *Microsoft/Activision Blizzard* [2023]; FEDERAL TRADE COMMISSION. *Microsoft/Activision Blizzard, In the Matter of.* In: Fedetal Trade Commission [online]. 2024 [last accessed 2024-05-12]. Available at: https://www.ftc.gov/legal-library/browse/cases-proceedings/2210077-microsoftactivision-blizzard-matter.

whenever divestiture is not possible, but at the same time, the proposed merger is expected to bring competitive advantages that would be a shame to lose.

Thus, in the author's view, competition authorities in the EU and the USA will generally seek the same or very similar type of remedial relief when investigating the same mergers.

However, the exception to this rule will undoubtedly be the approach of competition authorities in the EU and the USA to merger remedies that are accepted for merger clearance in the air transport sector. In the EU, behavioural access remedies in the form of slot remedies are commonly imposed for airline merger clearance, whereas in the USA, structural remedies in the form of divestitures have historically been used and preferred. This was the case, for example, in the above-mentioned *US Airways / American Airlines* merger.[252] As a consequence of this approach to mergers in the airline sector, the merging parties may be placed in a difficult situation and exposed to higher costs to implement a given merger as they will have to implement several different types of remedies.

However, although the competition authorities in the EU and the USA will agree to require structural or one of the behavioural merger remedies in order to clear a merger, the differences in the competition authorities' approach to the different categories of merger remedies may cause some difficulties for the merging parties.

Although the EU and U.S. competition authorities' approaches to divestiture (the primary structural remedy) share common guiding principles, merging parties could face increased costs if one of the EU or U.S. competition authorities require the merged entity to comply with other post-merger obligations in addition to divestiture. Such a a very restrictive obligation may be, for example, a requirement by the competition agencies in the USA that the merged entity notify all its proposed mergers in the future.

In the author's view, EU and U.S. competition authorities should cooperate even more closely if behavioural remedies are intended to imposed in investigations of the same merger, especially given that this category of remedies can be very diverse and the remedies imposed should not lead to incompatible post-merger obligations on the merging parties that puts the merging parties in an uncomfortable position.

In the author's view, this thesis has shown that the approach to behavioural remedies is quite similar in the EU and the USA, especially concerning remedies that guarantee other competitors' access to key infrastructure or rights (with the exception of airline mergers).

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[252] See Commission Decision COMP/M.6607 – *US Airways / American Airlines* [2013]; *United States v. US Airway Grp., Inc.,* No. 1:13-cv-01236-CKK (D.C.C. 2014).

The merging parties may face increased costs even though similar behavioural remedies will be imposed in merger investigations in both the EU and the USA if they are supplemented by ancillary provisions, which, as noted above, may differ significantly in the EU and the USA. In the USA, for example, it is popular to impose firewall provisions as an accompanying conduct remedy to ensure the confidentiality of information relevant to the merger, which the Remedies Notice does not know as a category of behavioural merger remedy in the EU.

List of Abbreviations

API	Application programming interface
Art./arts.	Article/Articles
Para. /paras.	paragraph/paragraphs
Google	Google LLC
Microsoft	Microsoft Corporation
M&A	Mergers and acquisitions
EU	European Union
USA	United States of America
EC	European Commission
DOJ	Antitrust Division of U.S. Department of Justice
FTC	Federal Trade Commission (Bureau of Competiton)
EU Merger Regulation	Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings
Remedies Notice	EUROPEAN COMMISSION. Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Remedies Notice). OJ C 267 2008
HRS Act	Hart–Scott–Rodino Improvement Act, 15 U.S.C. § 18a (1976)

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Remedies in EU and U.S. merger control

Abstract

Every year, there are a large number of mergers and acquisitions of companies around the world, many of which are investigated by competition authorities in both the EU and the USA before they take place. Although some of these proposed mergers may raise concerns that they will distort competition in the EU and U.S. markets, the competition authorities in both the EU and the USA also consider the potential benefits of such mergers and acquisitions to competition or consumers in the markets concerned when examining these mergers. Suppose the EU and U.S. competition authorities conclude that the benefits that the merger under investigation may bring to competition or consumers outweigh the risks that the merger may pose to competition in the relevant EU and U.S. markets. In that case, they do not prohibit the merger or acquisition, but conditionally clear the merger using so-called remedies.

The aim of this thesis is to analyse the EU and U.S. approaches to remedies used in merger control and the merger remedies used in past decisions of the EU and U.S. competition authorities conditionally clearing mergers in order to answer the question of how remedies used in clearing mergers in the EU and the USA differ in terms of the degree of difficulty in their design to ensure that they are actually able to maintain the level of competition that existed before the merger or acquisition was concluded. Furthermore, the author seeks to answer how remedies in the EU and the USA differ in terms of the difficulty and cost of administering them. Finally, the author aims to define whether certain types of remedies used in merger control in the EU and the USA differ to such an extent that their imposition may expose merging companies to difficult uncertainty or costs.

To achieve the objective of this thesis, the author first introduces in Chapter 2 the basic terminology, principles, legal framework and procedure for the use of merger remedies in the EU and USA. Then, in Chapter 3, the author introduces the different categories of structural and behavioural remedies and their subcategories that are used for conditional merger clearance in the EU and the USA. In Chapter 4, the author discusses the issue of enforcement of remedies in the EU and the USA. In Chapter 5, the author concludes all the insights gained while writing this thesis and attempts to answer the above research questions.

Keywords: competition law, merger control, merger remedies, EU, USA

Nápravné prostředky v kontrole spojování podniků v EU a USA

Abstrakt

Každoročně dochází k velkému množství fúzí a akvizic společností po celém světě, které jsou v mnoha případech před svým uskutečněním vyšetřovány soutěžními autoritami jak v EU, tak i v USA. Přestože mohou některá tato zamýšlená spojení podniků vyvolávat obavy, že po jejich uskutečnění dojde k narušení hospodářské soutěže na trzích v EU a v USA, soutěžní autority v EU i v USA zvažují při zkoumání těchto spojení i potenciální přínosy takových fúzí a akvizic, která mohou být pro soutěž či spotřebitele na daných trzích přínosná. Pokud soutěžní autority v EU a USA dospějí k závěru, že benefity, které vyšetřované spojení může hospodářské soutěži či spotřebitelům přinést, převažují nad rizikem, které by pro hospodářskou soutěž na daných trzích v EU a USA mohlo znamenat, nepřistupují k zákazu dané fúze či akvizice, ale spojení společností povolují podmíněně za použití takzvaných nápravných prostředků.

Cílem této práce je analyzovat přístupy EU a USA k nápravným prostředkům užívaným v kontrole spojování podniků a nápravné prostředky použité v rozhodnutích soutěžních autorit v EU a USA podmíněně povolující daná spojení podniků v minulosti a zodpovědět tak otázku, jak se nápravné prostředky používané při povolování spojení podniků v EU a USA liší z hlediska míry obtížnosti jejich konstrukce, aby skutečně po uskutečnění daného spojení byly schopny zajistit zachování úrovně hospodářské soutěže existující před uskutečněním dané fúze či akvizice. Dále se autor snaží zodpovědět otázku, jak se nápravné prostředky v EU a USA liší z hlediska obtížnosti a nákladnosti jejich adminitrovatelnosti. V neposlední řadě se pak autor práce snaží vymezit, zda se některé typy nápravných prostředků užívaných v kontrole spojování podniků v EU a USA liší natolik, že jejich uložení může vystavit spojující se společnosti obtížné nejistotě nebo nákladům.

K dosažení cíle této práce autor v Kapitole 2 nejdříve představuje základní terminologii, principy, právní rámec a proceduru pro používání nápravných prostředků v kontrole spojování podniků v EU a USA. Dále autor v Kapitole 3 představuje jednotlivé kategorie strukturálních a behaviorálních nápravných prostředků a jejich podkategorie, které jsou užívány pro podmíněné povolování spojení podniků v EU a USA. V Kapitole 4 se autor věnuje problematice následného vymáhání dodržování uložených nápravných prostředků v EU a USA. V Kapitole 5 autor v závěru shrnuje všechny poznatky nabyté při psaní této práce a snaží se zodpovědět výše uvedené výzkumné otázky.

Klíčová slova: soutěžní právo, kontrola spojování podniků, nápravné prostředky v kontrole spojování podniků, EU, USA