Remedies in EU Competition Law

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Substance, Process and Policy

Edited by

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About the Global Competition Law Centre

The Global Competition Law Centre (GCLC) forms part of the College of Europe and aims at promoting cutting-edge research in competition law and economics. It disseminates ideas and promotes research and benefits from a large network of competition professionals, built through the organisation of regular activities in Europe and elsewhere. Since its inception in January 2004, the GCLC has gained credentials as a high-level discussion forum for academics, practitioners, and enforcement officers in the competition field across the world. The GCLC regularly organises conferences, lunch talk seminars and evening policy talks, publishes books and hosts a working papers series. In addition, the GCLC awards a yearly prize for the best dissertation incompetition law and policy written at the College of Europe.

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On the Consistency of the European Commission's Remedies Practice*

Benjamin Loertscher & Frank Maier-Rigaud

* This chapter is based on a presentation given at the 14th Annual Conference of the GCLC in Brussels on 31 January–1 February 2019 on Remedies in EU Competition Law: Substance, Process & Policy. It is an extended and more detailed version of the analysis presented in Frank P. Maier-Rigaud & Benjamin Loertscher, *Structural vs. behavioral remedies*, *Antitrust Chronicle*, 1(1) Competition Policy International (2020). The authors would like to thank Philipp Heller, Thomas Hoehn, Fabian Kühnhausen, Slobodan Sudaric and Nicola Tosini, as well as various conference participants for feedback and Rob Reimert for research support.

§4.01 INTRODUCTION

Both antitrust and merger investigations at the EU level regularly conclude with the European Commission ('Commission') accepting commitments or, in antitrust cases, imposing remedies.

Article 7 of Regulation 1/2003[1] ('Article 7') sets out the Commission's power to impose remedies to bring an infringement of Article 101 or 102 of the Treaty on the Functioning of the European Union[2] ('TFEU') effectively to an end, and Article 9 of Regulation 1/2003 ('Article 9') provides that it can render commitments binding that have been offered in antitrust investigations concerning such infringements.[3]

In merger control investigations, the Commission regularly accepts commitments modifying a notified concentration and enabling the Commission to declare the concentration compatible with the internal market and the EEA Agreement pursuant to Articles 6(2) and 8(2) of the Merger Regulation.[4]

For the purpose of this chapter, the term 'remedies' shall not only include modifications to notified concentrations as noted above but also measures intended to bring an infringement of Article 101 or 102 to an end, or to meet concerns regarding such an infringement and remove grounds for action by the Commission.

Generally, remedies have the objective to either reduce or eliminate the ability or incentives of the undertakings concerned to follow a conduct that would impede or even eliminate effective competition, or, in particular, also to increase the ability of third parties to compete. To achieve this, remedies packages often consist of several types of remedies that together must remove the competition concerns identified.

The theories of harm underlying antitrust and merger investigations frequently are similar if not identical; the difference being that antitrust investigations are typically concerned with actual (or at least alleged) infringements of competition law, whereas merger investigations consider potential harm to competition in the future. A cooperation agreement subject to an antitrust investigation may lead to an alignment of incentives between the parties to the agreement and a loss of competition similar to the concerns a horizontal merger may raise. Or, an alleged abuse of dominance may relate to input or customer foreclosure, i.e., the type of conduct that may be the source of concerns in a vertical merger.[5] The remedies used to address infringements of Article 101 or 102 should, however, not only cure the unlawful conduct but also prevent future

1. Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1 (4 January 2003) ('Regulation 1/2003').
2. Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C 83/47.
3. For an overview on antitrust remedies *see* Philip Lowe and Frank P. Maier-Rigaud, *Quo Vadis Antitrust Remedies*, in *International Antitrust Law & Policy: Fordham Competition Law 2007* (B. Hawk ed., Fordham University School of Law 2008).
4. Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L024, 29/1/2004) ('Merger Regulation').
5. *See* for example Frank P. Maier-Rigaud and Nicola Tosini, *Mergers Between Backward Integrated Firms: Insights from BASF/Solvay's Polyamide Business*, Journal of European Competition Law & Practice (2019), https://academic.oup.com/jeclap/article-abstract/11/1-2/82/5531433?redirectedFrom=fulltext.

infringements.[6] Forward-looking analyses are therefore necessary in both areas of competition enforcement.

Despite these similarities for at least a subset of cases in which there is a substantial if not complete overlap of theories of harm, the measures applied to remedy concerns in these two areas of competition law vary substantially. In particular, there is a predominance of behavioural remedies in antitrust cases, whereas merger investigations mostly rely on structural remedies. An inconsistent approach to remedies across areas may, however, raise questions regarding the analytical framework of the Commission's decisions and the factors driving its remedies practices.

Being aware of the differences in the Commission's remedies practice, the Director General of the Commission's Directorate General for Competition considered in a speech in 2012 that a convergence could be observed between the Commission's practices on remedies in merger control and antitrust. He noted in particular that the experience from merger remedies had inspired an increased use of structural remedies in antitrust and that the acceptance of access remedies in both areas was another sign of convergence.[7]

Evidence of such convergence has been found in the past. It was expected, however, that in merger and antitrust cases with comparable factual circumstances only gradual differences in the remedies should result, and considered that convergence has its limits as the structural nature of mergers normally require structural remedies whereas conduct related concerns can often be addressed with conduct related remedies.[8]

This chapter provides a review of the Commission's past practice of accepting and imposing remedies to assess how it has developed and discusses the consistency of the practice between antitrust and merger investigations.

The following section provides some background to the main types of remedies. The chapter subsequently presents a review of the Commission's past remedies practice in antitrust and merger cases and ends with a discussion of the observed practice and the consistency between the two practice areas.

§4.02 BACKGROUND ON REMEDIES

The legal basis for the Commission's power to impose or accept remedies in antitrust cases was set out in Regulation 17/62, the predecessor to Regulation 1/2003, stating that the Commission has the power to 'require the undertakings or associations of undertakings concerned to bring such infringement to an end'.[9]

6. *See* for example OECD, 'Remedies and Sanctions in Abuse of Dominance' (2007) *Policy Roundtables*.
7. *See* Alexander Italianer 'Legal certainty, proportionality, effectiveness: the Commission's practice on remedies' (2012) Brussels. Available at http://ec.europa.eu/competition/speeches/text/sp2012_07_en.pdf.
8. *See* Johannes Lübking, *Konvergenz und ihre Grenzen bei Zusagen in der EU-Fusionskontrolle und nach Artikel 9 VO 1/2003*, 12 Wirtschaft und Wettbewerb 1223-1235 (2011).
9. *See* Council Regulation (EEC) 17/62 First Regulation implementing Articles 85 and 86 of the Treaty, [1962] OJ P013, Article 3(1).

In the *Commercial Solvents* cases[10] the European Court of Justice (ECJ) upheld the Commission's decision of 14 December 1972 which found that Commercial Solvents had abused its dominant position by refusing to supply a former customer and ordered that supply be resumed. The ECJ established that the provisions of Article 3 of Regulation 17/62 'must be applied in relation to the infringement which has been established and may include an order to do certain acts or provide certain advantages which have been wrongfully withheld as well as prohibiting the continuation of certain action, practices or situations which are contrary to the Treaty'. The ECJ continued stating that '[f]or this purpose the Commission may, if necessary, require the undertaking concerned to submit to it proposals with a view to bringing the situation into conformity with the requirements of the Treaty'. This ruling established that the Commission could impose remedies and accept commitments.

The procedural powers to impose remedies under Article 7 and formally accept commitments under Article 9 were later detailed with the introduction of Regulation 1/2003.[11]

The Commission may, however, not just have the procedural powers to require remedies but in certain cases even the obligation to become active as Article 105(1) TFEU requires the Commission to 'ensure the application of the principles laid down in Articles 101 and 102'. Considering this requirement, Advocate General Ruiz-Jarabo stated in his Opinion in *UFEX v. Commission* that '[t]he Commission […] has an obligation to restore freedom of competition in the sector concerned'.[12]

Recital 13 of Regulation 1/2003 observes that '[c]ommitment decisions are not appropriate in cases where the Commission intends to impose a fine'. As a consequence, the Commission's notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU observes that the procedure under Article 9 does not apply to cartels.[13]

The purpose of commitments under Article 9 is to meet the concerns expressed by the Commission in a preliminary assessment thereby avoiding the need for the

10. *See* Joined cases 6 and 7-73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission*, ECLI:EU:C:1974:18.
11. For a discussion of structural versus behavioural remedies in antitrust and what changed with the introduction of Regulation 1/2003, *see* Frank P. Maier-Rigaud, *Behavioural versus Structural Remedies in EU Competition Law*, in *European Competition Law Annual 2013, Effective and Legitimate Enforcement of Competition Law* Chapter 7, 207-224 (Philip Lowe, Mel Marquis & Giorgio Monti eds, Hart Publishing 2016), or Frank P. Maier-Rigaud, *The Idea of the Subsidiarity of Structural Remedies in European Competition Law (Zur Idee Der Subsidiarität Struktureller Maßnahmen Im Europäischen Wettbewerbsrecht)*, 5 *Wirtschaft und Wettbewerb* 485-500 (2012). One of the novelties under Regulation 1/2003 was that the prior informal commitment practice was formalised. With Regulation 1/2003 the Commission has the power to make commitments offered under Article 9 binding. The intent of this formalisation of commitments procedures at the time, contrary to its effect ever since, was not to increase the use of commitments.
12. *See* C-119/97 P, *Ufex and Others v. Commission*, Opinion of Advocate General Ruiz-Jarabo Colomer, ECLI:EU:C:1998:255, paragraph 72.
13. *See* Commission Notice on Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU [2011] OJ C308/06, paragraph 116. *See also* Per Hellström, Frank P. Maier-Rigaud & Friedrich Wenzel Bulst, *Remedies in European Antitrust Law*, 76(1) The Antitrust Law Journal (2009).

Commission to adopt a decision requiring that an infringement be brought to an end. In its judgment in *Alrosa*, the ECJ noted that the mechanism under Article 9:

> is intended to ensure that the competition rules laid down in the Treaty are applied effectively, by means of the adoption of decisions making commitments, proposed by the parties and considered appropriate by the Commission, binding in order to provide a more rapid solution to the competition problems identified by the Commission, instead of proceeding by making a formal finding of an infringement. More particularly, Article 9 of the regulation is based on considerations of procedural economy, and enables undertakings to participate fully in the procedure, by putting forward the solutions which appear to them to be the most appropriate and capable of addressing the Commission's concerns.[14]

The legal basis for accepting remedies in merger cases is found in the Merger Regulation.[15] Articles 6(2) and 8(2) of the Merger Regulation provide that the Commission may decide to declare a merger compatible with the internal market subject to remedies in Phase I and Phase II cases, respectively.[16]

If a notified concentration raises serious doubts as to its compatibility with the internal market in a Phase I investigation or is found to be incompatible with the internal market as it would significantly impede effective competition in the internal market or a substantial part of it, the notifying parties may offer commitments to modify the notified concentration in order to address the Commission's concerns.

[A] Requirements for Remedies

In general, remedies must meet two key requirements: they must be effective and proportionate.

[1] Effectiveness

The first requirement for remedies is that they have to be *effective* in removing the competition concerns and restore or maintain competition without the need for a (merger) prohibition decision or an infringement decision under Article 7.

The Merger Remedies Notice provides guidance as to how commitments must be designed to be acceptable to the Commission with respect to their effectiveness:

> The commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view. Furthermore, commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.[17]

14. *See* case C-441/07 P *Commission v. Alrosa*, ECLI:EU:C:2010:377, paragraph 35.
15. Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2004] OJ L 24, 29.1.2004, p. 1-22.
16. *See also* recital 30 of the Merger Regulation.
17. *See* Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [2008] OJ C 267, pp. 1–27, ('Merger Remedies Notice'), paragraph 9.

When assessing commitments offered, the Commission will consider the 'type, scale and scope by reference to the structure and the particular characteristics of the market in which the Commission has identified' competition concerns,[18] and '[i]n order for the commitments to comply with these principles, there has to be an effective implementation and ability to monitor the commitments'.[19]

[2] Proportionality

The second requirement for remedies is that they must be *proportionate* to the competition concerns identified.

According to settled case law, the principle of proportionality requires that the measures adopted by European Union institutions must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.[20]

The Merger Regulation specifically notes the requirement that commitments accepted by the Commission 'should be proportionate to the competition problem and entirely eliminate it'.[21]

Article 7 empowers the Commission 'to impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end'. Although Article 9, unlike Article 7, 'does not expressly refer to proportionality, the principle of proportionality, as a general principle of European Union law, is none the less a criterion for the lawfulness of any act of the institutions of the Union, including decisions taken by the Commission in its capacity of competition authority'.[22]

The legal hurdles for imposing structural remedies under Article 7 continue to be considered higher than those for behavioural remedies. At least this is what a cursory look at Article 7(1)3 would suggest where it is stated that, '[s]tructural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy'. Moreover, according to recital 12 of Regulation 1/2003, the imposition of a structural remedy 'would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking'. Reformulating the relevant sections of Article 7(1)3 while preserving their meaning, that is, ensuring the logical consistency between the original and the reformulated sentence, however, reveals that the subsidiarity of structural remedies is a merely an impression based on the convoluted wording chosen. A logically equivalent, i.e., content preserving reformulation of Article 7(1)3 is as follows:

> Behavioural remedies can only be imposed either where there is no more effective structural remedy or where any equally effective structural remedy would be

18. *See* Merger Remedies Notice, paragraph 12.
19. *See* Merger Remedies Notice, paragraph 13.
20. *See* case T-65/98, *Van den Bergh Foods v. Commission*, ECLI:EU:T:2003:281, paragraph 201.
21. *See* Merger Regulation, paragraph 30.
22. *See* case C-441/07 P *Commission v. Alrosa*, ECLI:EU:C:2010:377, paragraph 36.

equally or more burdensome for the undertaking concerned than the behavioural remedy.[23]

In the context of Article 9, the application of the principle of proportionality by the Commission 'is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the Commission must, however, take into consideration the interests of third parties'.[24]

[B] Types of Remedies

As indicated by Regulation 1/2003,[25] the broadest classification for remedies distinguishes between structural and behavioural remedies.

Structural remedies seek to directly influence the competitive structure of the relevant market(s) in order to maintain or improve the conditions for competition. Behavioural remedies seek to address the identified competition concerns by requiring certain conduct from the undertakings concerned, which can of course include the requirement to refrain from certain actions.

Access remedies, which will also be introduced in more detail below, are another type of remedy often accepted in the past that has both structural and behavioural aspects.

Despite various efforts to clearly distinguish between types of remedies,[26] the distinction is not always clear cut in practice.

[1] Structural Remedies

A generally accepted definition of 'structural remedies' does not exist.[27] The divestiture of a business to a suitable purchaser is a very common structural remedy in conditional merger clearance decisions by the Commission. While stating that other types of

23. *See* Frank P. Maier-Rigaud, *The Idea of the Subsidiarity of Structural Remedies in European Competition Law (Zur Idee Der Subsidiarität Struktureller Maßnahmen Im Europäischen Wettbewerbsrecht)*, 5 Wirtschaft und Wettbewerb 485-500 (2012), and Frank P. Maier-Rigaud, *Behavioural versus Structural Remedies in EU Competition Law*, in *European Competition Law Annual 2013, Effective and Legitimate Enforcement of Competition Law* Chapter 7, 207-224 (Philip Lowe, Mel Marquis & Giorgio Monti eds, Hart Publishing 2016), which include not only a proposed test to choose remedies, but also a treatment of the likely intent of the European Commission as traced back to the initial proposals for Regulation 1/2003.
24. *See* case C-441/07 P *Commission v. Alrosa*, ECLI:EU:C:2010:377, paragraph 41.
25. *See* Regulation 1/2003, preamble recital 12 and Article 7.
26. *See* for example the Merger Remedies Notice, the Merger Remedies Guide of the International Competition Network, 'Merger Remedies Guide' (2016), or Massimo Motta, Michele Polo & Helder Vasconcelos, Merger Remedies in the European Union: An Overview', 52(3&4) The Antitrust Bulletin 603-631 (2007).
27. For an overview of the discussion of the definition of structural versus behavioural remedies *see* Frank P. Maier-Rigaud, *Behavioural versus Structural Remedies in EU Competition Law*, in *European Competition Law Annual 2013, Effective and Legitimate Enforcement of Competition Law* Chapter 7, 207-224 (Philip Lowe, Mel Marquis, and Giorgio Monti eds, Hart Publishing 2016).

commitments may also be acceptable, the Commission has declared its clear preference for structural remedies in merger cases,[28] and, as shown below, this preference is also evidenced by the Commission's practice.

The reason for this preference lies, on the one hand, in the perceived capability of structural remedies to durably prevent the competition concerns raised by the notified merger by changing the incentives of the firm(s) in the market. On the other hand, structural remedies have the advantage that they do not require ongoing monitoring over the medium or long term.

In the first instance, divestitures are implemented within a 'first divestiture period' of typically six months that can be extended following an application under the review clause of the Commitments. During this period, the notifying parties have the sole responsibility for finding a suitable purchaser for the divestment business. If, subject to approval of the potential buyer by the Commission, they fail to enter into binding agreements to sell the divestment business within the first divestiture period, a divestiture trustee will be appointed with an exclusive mandate to dispose of the divestment business at no minimum price in the 'trustee divestiture period' of typically three to six months.[29]

Divestitures remove the source of the ability or incentive of the undertaking(s) concerned by the investigation or the merged entity to increase prices, raise rivals' costs or engage in other abusive conduct. In addition, the acquisition of the divested business strengthens an existing competitor or enables the entry into the market by a new competitor. The Merger Remedies Notice explains that '[t]he divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and that is divested as a going concern'.[30] In addition to the right scope of the business, the suitability of the purchaser is therefore crucial for the effectiveness of the remedy. For this reason, divestiture commitments include criteria that the purchaser must fulfil that aim at ensuring that the divestment business under its new ownership will have the ability and incentive to actively compete on the market. The purchaser and the terms of the sale, therefore require the Commission's approval before the divestiture can be completed.[31]

The removal of links with competitors is another type of structural remedy. This can for example include commitments to exit from a joint venture or to sell a minority shareholding in a competitor.

[2] Behavioural Remedies

Behavioural remedies are designed to regulate the ongoing conduct of the undertakings concerned and can come in very different forms. In antitrust cases, behavioural

28. *See* Merger Remedies Notice, paragraphs 15 and 17.
29. *See* paragraph 15 of the Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the Merger Regulation published by the Commission on 5 December 2013.
30. *See* Merger Remedies Notice, paragraph 23.
31. *See* Merger Remedies Notice, paragraph 101.

remedies are often designed to mirror the abuse: for example, a refusal to supply would be remedied with a commitment to supply or anticompetitive tying would be addressed with a commitment to untie.[32]

Behavioural remedies can be 'positive' in the sense that they require a certain conduct or 'negative' in the sense that they prohibit certain conduct. Examples of behavioural remedies that have been accepted in the past include:

- amending corporate governance provisions;[33]
- refraining from limiting capacity of certain infrastructure available to competitors;[34]
- making investments into gas interconnection capacity;[35]
- enabling customers to switch;[36]
- introducing a new pricing system;[37]
- capping of prices;[38] and
- ring-fencing of strategic information within a consortium.[39]

Under Article 7 the Commission can also order the parties addressed by the decision to cease and desist the conduct infringing Article 101 or 102. Such an order can also be considered to be a behavioural remedy.

In the context of merger investigations, behavioural remedies are rarely favoured. The Commission states in the Merger Remedies Notice that '[c]ommitments relating to the future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances'.[40] The main reason for this is that their effectiveness is sometimes questioned because, in contrast to structural remedies, they leave the firms' incentives essentially unchanged.[41] In addition, there may be risks regarding the workability of behavioural remedies as an effective implementation and monitoring may be difficult to ensure, and risks regarding distorting effects on competition.[42]

Designing behavioural remedies that are effective and do not entail significant risks as those noted above over the typically long periods during which they are in effect is very challenging. Especially in fast-moving industries, changing circumstances that could not have been foreseen can mean that behavioural remedies become less

32. *See* Per Hellström, Frank P. Maier-Rigaud & Friedrich Wenzel Bulst, *Remedies in European Antitrust Law*, 76(1) The Antitrust Law Journal (2009).
33. For example, case M.3817 – Wegener/PCM/JV.
34. For example, case AT.39316 – GDF foreclosure.
35. For example, case M.4180 – Gaz de France/Suez.
36. For example, case AT.39654 – Reuters Instrument Codes.
37. For example, case AT.39678 & 39731 – Deutsche Bahn I & II.
38. For example, case AT.39398 – Visa MIF.
39. For example, case M.6844 – GE/Avio.
40. *See* Merger Remedies Notice, paragraph 17.
41. *See* Per Hellström, Frank P. Maier-Rigaud & Friedrich Wenzel Bulst, *Remedies in European Antitrust Law*, 76(1) *The Antitrust Law Journal* (2009), or John Kwoka, *Merger Remedies: An Incentives/Constraints Framework*, 62(2) The Antitrust Bulletin (2017).
42. *See* Merger Remedies Notice, paragraph 17.

effective or even irrelevant, or more difficult to monitor.[43] Moreover, the remedies can have the consequence of distorting the behaviour of affected parties in unintended ways such as providing a negative incentive to innovate.[44]

Behavioural remedies are often accepted to complement other remedies in a 'commitments package' to ensure their effectiveness. This is in particular the case in access remedies packages:

In *Cisco/Tandberg*,[45] for example, interoperability remedies included not only the transfer of intellectual property relating to an interoperability protocol for video conferencing systems to an independent industry body, which would grant access to the protocol based on an open source license, but also a behavioural commitment that Cisco would continue to implement the protocol in its own products. This behavioural commitment was an essential element of the commitments package. If Cisco had stopped implementing the protocol after the divestiture, the purpose of the remedies to enable interoperability between the products of Cisco and of third-party vendors could not have been fulfilled.

In *GDF*[46] and *E.ON*[47] as well, access remedies related to the release of capacity in gas infrastructure were complemented by behavioural commitments to limit or reduce future capacity bookings.

[3] Access Remedies

Access remedies seek to eliminate the competition concern identified by requiring that access is granted at appropriate terms to an asset necessary to enable third parties to compete. The asset could be key infrastructure or intellectual property, for example:

- patents;[48]
- technology;[49]
- natural gas;[50]
- capacity in gas import infrastructure;[51]
- airport slots;[52]
- mobile telecommunications network;[53]
- network for supplying traction current;[54]

43. *See*, e.g., Thomas Hoehn & Alex Lewis, *Interoperability Remedies, FRAND Licensing and Innovation: A Review of Recent Case Law*, 34(2) European Competition Law Review 101 (2013).
44. *See ibid*.
45. *See* case M. 5669 – Cisco/Tandberg.
46. For example, case AT.39316 – GDF foreclosure.
47. For example, case AT.39317 – E.ON gas foreclosure.
48. For example, case AT.38636 – Rambus.
49. For example, case M.6564 – ARM/Giesecke & Devrient/Gemalto/JV.
50. For example, case M.3696 – E.ON/MOL.
51. For example, case AT.39316 – GDF foreclosure.
52. For example, case AT.39596 – British Airways/American Airlines/Iberia or case M.5335 – Lufthansa/SN Airholding (Brussels Airlines).
53. For example, case M.6992 – Hutchison 3G UK/Telefonica Ireland.
54. For example, cases AT.39678 & 39731 – Deutsche Bahn I & II.

- technical information;[55] and
- data under copyright.[56]

The granting of access is aimed at removing or lowering a barrier to entry or expansion to enable third parties to enter the market or to compete for a larger part of the market.

Access remedies do not neatly fall into the categories of structural or behavioural remedies and are therefore presented here as a separate category.[57] The Merger Remedies Notice discusses them under the heading 'other remedies'[58] but also refers to the granting of access to key infrastructure or inputs as a structural remedy.[59] Others suggest that access remedies are behavioural,[60] non-structural[61] or 'quasi-structural'[62] remedies.

While access remedies are capable of achieving a structural effect on the market concerned, such an effect is not always guaranteed. Access remedies can be designed in different ways to ensure a structural effect, or at least make it more likely. A key aspect in this regard is whether the undertakings concerned actually commit to grant access to one or more third parties or whether they commit to offer to grant access in the event of a request from a third party.[63] The Commission can accept commitments without identifying a new entrant in advance if there has been sufficient indication of interest in entry.[64] Where entry is not sufficiently certain, the Commission may require that an agreement granting access to an entrant be entered into with an identified third party[65] or as an upfront remedy,[66] i.e. implemented prior to closing of the notified transaction, to ensure the structural effect of the commitments.

55. For example, case AT.39230 – Rio Tinto Alcan.
56. For example, case M.7337 – IMS Health/Cegedim business.
57. For example, the Merger Remedies Guidance of the Competition and Markets Authority in the UK (last updated in 2018) distinguishes between 'IP remedies', which it considers may have features of structural or behavioural remedies depending on their formulation, and access remedies, which it considers to be behavioural remedies. *See also* International Competition Network, '*Merger Remedies Guide*' (2016).
58. *See* Merger Remedies Notice, section 3.
59. *See* Merger Remedies Notice, paragraph 17.
60. *See* for example the Commission's contribution to OECD, 'Remedies and Sanctions in Abuse of Dominance' (2007) *Policy Roundtables*. Available at https://www.oecd.org/competition/abuse/38623413.pdf.
61. *See* Massimo Motta, Michele Polo & Helder Vasconcelos, *Merger Remedies in the European Union: An Overview*, 52(3&4) The Antitrust Bulletin 603-631 (2007), or International Competition Network, '*Merger Remedies Guide*' (2016).
62. *See* for example *ibid.*, OECD, 'Remedies in Merger Cases' (2011) *Policy Roundtables*, or Competition Bureau Canada, 'Information Bulletin on Merger Remedies in Canada' (2006).
63. For example, the commitments package in case M.6497 Hutchison 3G Austria/Orange Austria includes three access remedies: an upfront commitment to give a mobile virtual network operator (MVNO) access to the mobile telecom network of the merging parties, a commitment to make wholesale access available to requesting parties, and a commitment to offer to transfer the rights to use certain mobile spectrum. The latter two remedies are designed such that they are dependent on third parties requesting access.
64. *See* case T-177/04, *easyJet v. Commission*, ECLI:EU:T:2006:187.
65. For example, case M.5440 – Lufthansa/Austrian Airlines.
66. For example, case M.7018 – Telefonica Deutschland/E-Plus.

Access remedies can include the transfer of an asset.[67] More often, however, they are designed to enable access through a supply, lease, license or other type of agreement that leaves the ownership of the assets unchanged. Moreover, even where such an agreement enables access for an unlimited duration, it will not necessarily be as permanent as a transfer of ownership since the agreement may be terminated. This could be because the counterparty does not require access anymore, or because certain conditions of the agreement have not been met. For example, license agreements typically include limitations on permitted uses and confidentiality provisions,[68] and in airport slot release commitments, slots may have to be returned if they are not used or not used properly.[69] In this regard, access remedies are less contentious as property rights are less affected than in a divestiture.

In contrast to divestiture commitments, behavioural and access remedies often need to be implemented over many years[70] and can even be unlimited in duration[71] and therefore require monitoring measures over a long-term period.

In many instances, the undertakings concerned will be able to start implementing access remedies very quickly. Depending on their design, however, there can be a risk inherent to access remedies that their implementation, or at least the effects of the implementation, is substantially delayed. In *Hutchison 3G Austria/Orange Austria*, it took almost two years after the Commission had issued its decision until a mobile virtual network operator (MVNO) started offering its services on the market.[72] In the meantime, concerns were raised about price increases on the market leading the Austrian competition authority to start an investigation into the national telecommunications market.[73]

While divestitures, once implemented, are definitive,[74] there remains a possibility for the undertakings concerned to request an amendment or waiver of long-term

67. For example, in case M.6607 – US Airways/American Airlines the main commitment related to the offer to grant access to airport slots to a new entrant wishing to start serving the route between London Heathrow and Philadelphia International Airport. Subject to the Commission's approval, the new entrant could obtain 'grandfathering rights' to the slot after it had made appropriate use of it for a certain period. In this case the right to use the slot would effectively be transferred to the new entrant, which would then be freed from restrictions on the route to be served.
68. *See* for example case M.5984 – Intel/McAfee and the Non-Disclosure and Permitted Use Agreement published by Intel: https://software.intel.com/sites/default/files/c7/bb/37640.
69. For example, case M.7541 – IAG/Aer Lingus.
70. For example, five years in AT.39592 – Standard & Poor's.
71. For example, the interfacing commitment in case M.3083 – GE/Instrumentarium requiring GE to ensure interoperability between its medical devices and third-party patient monitors and clinical information systems, or the airport slot release commitments in case M.3770 – Lufthansa/Swiss.
72. *See* http://www.upc.at/ueber-upc/presse/pressearchiv/upc-mobile-ab-sofort-mit-leistungsstarken-tarif-paketen/.
73. *See* http://www.bwb.gv.at/Aktuell/Seiten/Telekombranchenuntersuchung-Zwischenstatus.aspx.
74. In merger cases, commitments accepted by the Commission will normally require the merged entity not to re-acquire material influence over the whole or part of the divestment business for a period of 10 years, unless the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the divestment business is no longer necessary to render the proposed concentration compatible with the internal market. After this

behavioural or access commitments under the review clause long after the original decision. In *Hoffmann La Roche/Boehringer Mannheim*, for example, the Commission accepted a request to waive commitments to grant access to patented technology used in DNA probes thirteen years after the original clearance decision.[75] More recently, in February 2019, the Commission agreed to waive a slot release remedy as well as other related commitments in *Air France/KLM* more than fifteen years after the conditional clearance decision.[76]

The Commission will, however, accept a modification or waiver of commitments only in very rare cases which can leave the undertakings concerned in a situation of uncertainty.[77]

§4.03 THE COMMISSION'S REMEDIES PRACTICE

In order to gain a better understanding of the Commission's remedies practice, we have reviewed the Commission's decisions to accept or impose remedies in antitrust and merger cases over the period from November 2004 to December 2018.[78] This period is split into three periods (November 2004 to January 2010, February 2010 to October 2014 and November 2014 to December 2018) which roughly corresponds with the terms of DG Competition's Commissioners.[79] This allows some insight into the evolution of the Commission's remedies practice over time.

Table 4.1 presents an overview of the number of decisions included in the review split by the three periods noted above. The antitrust decisions are further split by decisions under Articles 7 and 9 as well as decisions relating to infringements of Articles 101 and 102 and in merger cases by Phase I and II decisions. Overall, we have reviewed 309 Commission decisions, including 55 antitrust decisions and 254 merger decisions. These decisions were reviewed with a view to categorising each case according to the type(s) of remedies accepted or imposed. This work relied on the text of the decisions and commitments published by the Commission by the end of January 2018 as well as in some cases on the Commission's press releases and Q&A documents. All cases were categorised according to whether the remedies included structural, behavioural or access remedies. Since remedies packages often consist of several types

10-year period, the merged entity may (re-)acquire the divestment business. Such a transaction may not necessarily be subject to merger control. *See* Merger Remedies Notice, paragraph 43.

75. For example, case M.950 – Hoffmann La Roche/Boehringer Mannheim.
76. Case M.3280 Air France/KLM. The waiver only related to the commitments relating to the connection between New York and Amsterdam. The commitments relating to other connections were left unchanged. An important reason for the decision to waive a part of the commitments package under the remedy review clause was that similar remedies remain in effect under commitments accepted by the Commission in its Article 9 decision in case AT.39964 Air France-KLM/Alitalia/Delta Air Lines.
77. *See* Charlotte Breuvart & Étienne Chassaing, *Post-clearance Modification and Waiver of EU Merger Remedies: When the Hardest May Be Yet to Come Concurrences* No 3 (2014). For example, in 2016 the Commission rejected a request for a partial waiver of the commitments given by the merging parties in case M.3770 – Lufthansa/Swiss eleven years earlier.
78. Decisions relating to cartel investigations have not been taken into account for this purpose.
79. The last of the three periods does not fully cover the current Commissioner's term.

of remedies a decision can fall into more than one category so that the total number of remedies over all types exceeds the total number of cases.

Table 4.1 Number of Antitrust and Merger Decisions Reviewed by Period and Article/Phase

Antitrust	*Article 7*			*Article 9*			*Total*
	Article 101	*Article 102*	*Total*	*Article 101*	*Article 102*	*Total*	
November 2004–January 2010	4	2	**6**	5	8	**13**	**19**
February 2010–October 2014	3	4	**7**	7	11	**17**	**24**
November 2014–December 2018	2	5	**6**	2	4	**6**	**12**
Total	**9**	**11**	**19**	**14**	**23**	**36**	**55**
Mergers	**Phase I**		**Phase II**	**Total**			
November 2004–January 2010	82		21	**103**			
February 2010–October 2014	42		16	**58**			
November 2014–December 2018	72		21	**93**			
Total	**196**		**58**	**254**			

Source: Own research based on public Commission decisions. Note that since antitrust investigations can relate to (potential) infringements of Articles 101 and 102 at the same time, the total number of Article 7 or 9 decisions does not have to be equal to the sum of decisions relating to Articles 101 and 102. Article 9 decision of 20 December 2012 in case AT.39230 – *Rio Tinto Alcan* and Article 7 decision of 9 July 2014 in case AT.39612 – *Perindopril (Servier)* are therefore listed as both Article 101 and 102 cases but only counted once in the totals. The commitments decisions of 12 December 2012 and 25 July 2013 in case AT.39847 – Ebooks have been counted as only one decision.

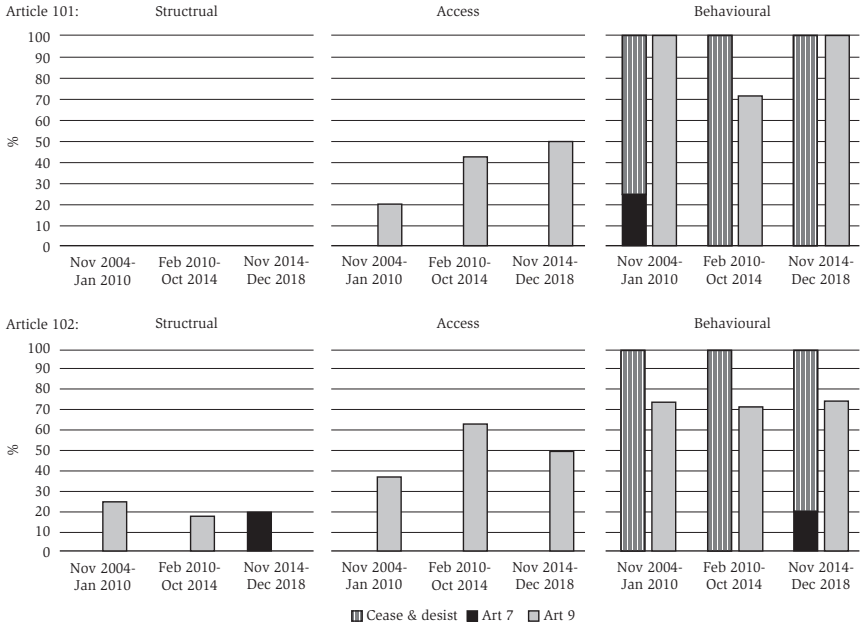
It should be noted that this categorisation is not always straightforward and there are of course instances in which a different categorisation could arguably be used. Despite these inherent difficulties, this review provides some insight into the key differences in the Commission's remedies practice in antitrust and merger cases as well as the development of this practice over a longer period of time.

[A] Remedies in Antitrust Decisions

Figure 4.1 presents the share of the Commission's (non-cartel) antitrust decisions based on Articles 7 and 9 that included structural, access or behavioural remedies. The top row presents the review of Article 101 decisions and the bottom row the review of Article 102 decisions.

An order to cease and desist the conduct that was the basis of the infringement was included in all Article 7 decisions reviewed. Only a small number of Article 7 decisions include specific additional remedies beyond a cease-and-desist-order. The other decisions of Article 7 may, however, include the requirement to propose or communicate to the Commission measures to ensure compliance. Such additional measures were not incorporated in the analysis presented here. For Article 7 the charts in Figure 4.1 therefore show the share of decisions involving behavioural remedies other than cease-and-desist-orders and the remaining decisions that included cease-and-desist-orders but do not impose specific other remedies are represented with the cross-hatched columns.

Figure 4.1 Remedies in Article 101 and 102 Cases



Source: Own research based on public Commission decisions.

Figure 4.1 reveals the importance of behavioural remedies in Article 9 decisions. This prevalence is even stronger in Article 101 cases than in Article 102 cases. Only in

the period from February 2010 to October 2014 did not all Article 9 decisions relating to infringements of Article 101 include behavioural remedies.[80]

No case has been identified in which a decision relating to an infringement of Article 101 led to structural remedies. The occurrence of structural remedies is also very rare in Article 102 cases. The only Article 7 decision identified in which a structural remedy was imposed occurred in September 2016 in *ARA foreclosure*. Altstoff Recycling Austria (ARA) was found to have abused its dominant position by blocking entry into the market for household waste collection in Austria. Regulation requiring the nationwide coverage by suppliers of waste collection services made prospective entrants into the market dependent on gaining access to nationwide collection infrastructure that was partly controlled and partly owned by ARA and could not be duplicated. Refusing to permit access to this infrastructure was considered an abuse of a dominant position. The Commission imposed a remedy on ARA to divest its household collection infrastructure.[81] This structural remedy was, however, originally proposed by ARA, which made it easier to demonstrate the proportionality of the remedy.

The final Article 9 decision within our review period that led to a structural remedy relates to *CEZ*, in which the Commission accepted a remedy proposed by the Czech electricity incumbent CEZ to divest about 800–1,000 MW of its generation capacity to address concerns that CEZ had reserved capacity in the transmission network to prevent competitors from entering the market.[82]

Figure 4.1 also indicates an increasing occurrence of access remedies in Article 9 decisions rising from four out of thirteen cases in the period from November 2004 to January 2010 to nine out of seventeen cases in the period from February 2010 to October 2014 and three out of six cases in the period from November 2014 to December 2018.

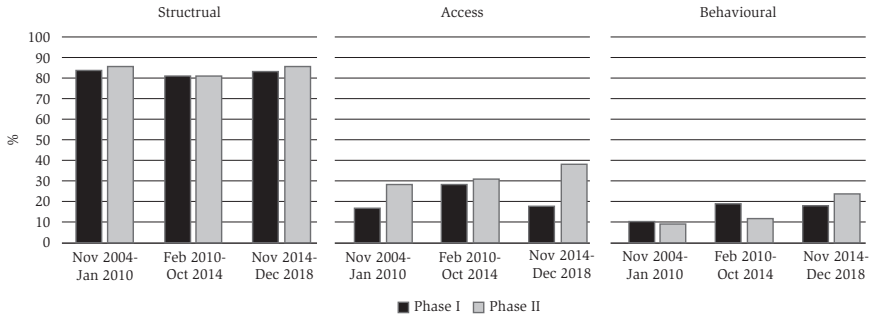
While no Article 7 decisions were categorised as imposing access remedies, this is due to the fact that cease-and-desist-orders do not specify how compliance should be ensured. In certain cases, it would, however, be expected that compliance requires providing (better) access to essential assets to competitors. This may, for example, be the case in *Telekomunikacja Polska*, in which the Commission ordered Telekomunikacja Polska to cease and desist from refusing access to its wholesale products which the Commission considered to be an infringement of Telekomunikacja Polska's dominant position on telecommunication markets in Poland.[83]

80. The exceptions are two aviation cases (AT.39596 – British Airways/American Airlines/Iberia and AT.39595 – Continental/United/Lufthansa/Air Canada) in which airport slot release and other commitments were accepted that have been categorised as access remedies.
81. *See* Commission decision in case AT.39759 – ARA foreclosure dated 20 September 2016.
82. *See* Commission decision in case AT.39727 – CEZ. In 2018, however, the Commission issued an Article 9 decision accepting a structural remedy in case AT.38700 – Greek lignite and electricity markets. This case is not included in the analysis as infringements of Article 106 TFEU are not part of this review.
83. *See* case AT.39525 – Telekomunikacja Polska. The abusive conduct included proposing unreasonable conditions in draft contracts, delaying negotiations, refusing access to its network, refusing access to subscriber lines and refusing access to general information.

[B] Remedies in Merger Decisions

Figure 4.2 presents the share of the Commission's merger decisions accepting remedies packages with structural, access or behavioural remedies. Furthermore, a distinction is made between Phase I and II decisions.

Figure 4.2 Remedies in Merger Decisions



Source: Own research based on public Commission decisions.

In line with the Commission's Merger Remedies Notice, over 80% of conditional merger clearances in either Phase I or in Phase II involve a structural remedy.[84]

Conversely, only a limited number of mergers have been cleared subject to behavioural remedies. In this regard it is worth recalling that the small share of merger decisions including behavioural remedies indicated in Figure 4.2 includes decisions in which behavioural remedies were accepted as part of a remedy package that also included other types of remedies. In fact, only 11 of the 254 merger decisions reviewed were cleared subject to behavioural remedies only. Figure 4.2 suggests, however, an increase in the acceptance of behavioural remedies in merger cases since November 2014 compared to the previous two periods analysed. Behavioural remedies were accepted not only more often as part of remedies packages but also on their own. Eight of the eleven cases cleared exclusively subject to behavioural remedies fall into the period since November 2014.

Figure 4.2 also suggests that the Commission is accepting access remedies more often than behavioural remedies. We observe an increase in the share of the decisions including access remedies from 19% (20 out of 103 decisions) in the period from November 2004 to January 2010 to 29% (17 out of 58 decisions) in the following period until October 2014 for Phase I and Phase II decisions overall. Since November 2014, however, a divergence between the acceptance of access remedies in Phase I and Phase II cases occurred. While the share of decisions accepting access remedies fell back to 18% (18 out of 72 decisions) in Phase I cases, it climbed to 38% of Phase II cases as 8

84. Overall, 212 out of 254 conditional merger decisions reviewed included structural remedies.

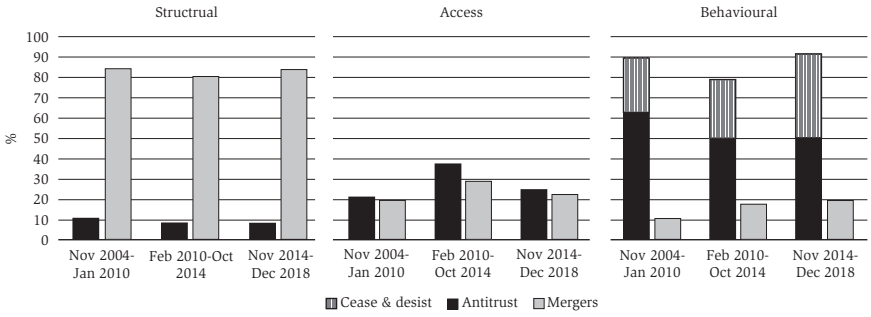
out of 21 conditional Phase II merger clearances in this period involved an access remedy.[85]

By comparison, in its merger remedies study of 2005, the Commission reviewed forty representative cases cleared between 1996 and 2000 and found that 87% of the remedies identified were structural remedies (including remedies requiring the exit from a JV), 10% were access remedies and 3% were 'other remedies'.[86] Generally, the Commission's preference for structural merger remedies therefore does not appear to have changed substantially. Access remedies, however, appear to have been accepted more often since 2004.

[C] Comparison of Remedies in Antitrust and Merger Decisions

Figure 4.3 presents the share of the different types of remedies accepted (or imposed) by the Commission in antitrust and merger cases in the three periods defined. The share of decisions that included cease-and-desist-orders but do not impose specific other remedies are again represented with cross-hatched columns.

Figure 4.3 Remedies in Antitrust and Merger Decisions



Source: Own research based on public Commission decisions.

The overwhelming preference for structural remedies in merger cases stands in stark contrast to the very low share of antitrust cases involving structural remedies. Figure 4.3 also shows that this practice has not changed over time.

By contrast, behavioural remedies are accepted or imposed much more often in antitrust cases than they are accepted in merger clearance decisions. While we observe a low but increasing share of behavioural remedies in merger decisions, Figure 4.3 suggests that the share of antitrust decisions with specific behavioural remedies has declined over the three periods reviewed. This is at least partly the result of a greater share of Article 7 decisions in the last period from November 2014 to December 2018. Table 4.1 shows that seven of the thirteen antitrust decisions reviewed falling in this

85. A Mann-Whitney-U-test indicates that this difference is statistically significant at the 10% level.
86. *See* European Commission, 'Merger Remedies Study' (2005) Chart 5.

period were Article 7 decisions, whereas in the previous two periods six out of nineteen and twenty-three decisions respectively where Article 7 decisions. As noted above, these often do not specifically set out how an infringement should be brought to an end. Figure 4.1, however, shows no decrease in behavioural remedies accepted in Article 9 decisions. The higher occurrence of Article 7 decisions may indicate a reduced willingness by the Commission to accept remedies under Article 9 or firms may find it less appealing to offer commitments under Article 9 to the Commission.

With respect to access remedies, we observe a similar share of antitrust and merger cases that include such remedies and those shares also developed similarly over time. Their share increased in the period from February 2010 to October 2014 compared to the previous period but fell again in the period thereafter.

§4.04 CONCLUDING CONSIDERATIONS

The review of the Commission's case practice in antitrust and merger cases over a period of more than fourteen years has demonstrated stark differences in the Commission's approach to remedies in these two areas of competition enforcement. The Commission mainly relies on behavioural remedies to address the competition issues underlying antitrust infringements while it displays a strong preference for structural remedies in merger investigations. The review also suggests that the Commission's remedies practice has not led to any substantial convergence between the two practice areas. Instead, the difference appears to be as stark under Commissioner Vestager as it was under her predecessors Almunia and Kroes.

These different approaches to solving competition problems seem inconsistent and difficult to reconcile. On the one hand, while the legal hurdle for imposing structural remedies under Article 7 is certainly perceived to be higher than accepting them under Article 9 or in merger cases, the overwhelming use of behavioural remedies in antitrust cases suggests that behavioural remedies are in the Commission's view an effective tool to resolve competition concerns. In order to address antitrust concerns the Commission requires structural changes affecting firms' incentive structures only in exceptional cases.

On the other hand, merger decisions are based on the idea that the risks to effective competition derive from changes to the structure of the market and therefore typically require structural remedies. The Commission's merger remedies practice therefore suggests that behavioural remedies are not 'as effective' in preventing restrictions to effective competition. If behavioural remedies are, however, an effective tool and if it is not necessary to change the structure of the undertaking in question to prevent effective competition from being restricted, then proportionality would suggest that they should be used more often in merger cases as well. This would in particular have to be the case considering the somewhat more uncertain nature of any forward-looking analysis indicating negative merger effects.

The review of the Commission's remedies practice across antitrust and merger cases raises the question whether the theory underlying the Commission's merger remedies practice or the theory underlying the Commission's antitrust remedies

practice is flawed or whether its reluctance to require structural remedies in antitrust cases and its corresponding reluctance to accept behavioural remedies in merger cases is driven by factors other than the underlying economics of the cases.

The Commission's remedies practice may rather be a result of differences in the Commission's negotiation position and pragmatism. While the Commission may baulk at the suggestion that it is involved in negotiations when deciding to impose or accept remedies, there is no denying that firms' incentives are to try and propose the least burdensome remedies that the Commission will accept and they will typically make several proposals to the Commission over the course of the proceedings to design the remedies in a manner acceptable to the Commission. This is as true in merger cases as it is in Article 9 cases. Even in Article 7 cases, commitment discussions may have taken place earlier in the proceedings. In addition, not only the Commission but also the parties are aware of the possibility of judicial review of the Commission's decisions. The presumed higher legal threshold for imposing structural rather than behavioural remedies under Article 7 also reduces the likelihood of structural remedies being proposed under Article 9 procedure. Firms may not wish to propose remedies for an Article 9 decision that are substantially tougher than the remedies the Commission could impose under Article 7. By contrast, in merger control proceedings, the merging parties are in most cases under intense pressure to complete the review process quickly. Even in the unlikely event that they could overturn a decision blocking a proposed merger by establishing that proposed behavioural remedies could have effectively addressed the competition concerns identified, such a judgment may well come too late from the merging parties' perspective.

The stark differences identified between merger and antitrust remedies are, however, in part driven by a different distribution of competition concerns within these two areas of competition law. While the theories of harm underlying antitrust and merger investigations are often ultimately the same, their distribution is different. While in merger cases the concerns are often horizontal, Article 102 cases often involve concerns that are of a vertical nature and, even though Article 101 cases often also raise vertical concerns, it may be possible to resolve these concerns without resorting to structural remedies. Nevertheless, the stark contrast found in the review suggests that there is at least a subset of cases where concerns are identical and where one therefore would have expected an identical approach to resolve the identified competition concern.