

Behavioural remedies in vertical and conglomerate merger cases

Selected topics from the European,
German and French practice

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11 February 2022

- **PhD subject: The prevention of price-based exclusionary conduct in the context of merger control** – A comparative analysis with particular regard to the European, German and French practice on merger remedies

- **Two main research topics:**
 - The identification of future price-based exclusionary conduct in the context of merger control proceedings

 - The prevention of such strategies via merger remedies

- **Soutenance de thèse (19 October 2021), members of the jury:**
 - Prof. Dr. Florian Bien (University of Würzburg, Germany - supervisor)
 - Prof. Dr. Laurence Idot (Université Paris II - supervisor)
 - Dr. Etienne Pfister (Chief Economist, Autorité de la concurrence - rapporteur)
 - Prof. Dr. Andreas Heinemann (University of Zurich and President of the Swiss Competition Commission - rapporteur)

- I. Preliminary remarks**
- II. Admissibility of behavioural remedies?**
- III. Remedies in vertical cases**
- IV. Remedies in conglomerate cases**
- V. Conclusion**

I. Preliminary remarks

1. An unequal importance of merger remedies in practice

a) EU (1990 – Mai 2021)

- 334 conditional clearances in Phase 1, 140 in phase 2
- 30 prohibition decisions

b) Germany (1999 – June 2021)

- 76 conditional clearances in Phase 2
- 63 prohibition decisions

c) France (March 2009 – June 2021)

- 90 conditional clearances in Phases 1 and 2
- 2 prohibition decisions (first prohibition in August 2020!)

2. Procedural differences/particularities

- **EU/France**: Conditional clearances in Phase 1 possible
- **Germany**: Conditional clearances only in Phase 2 (however: recently *de facto* clearance in phase 1!)
- **France**: special instruments: “*injonctions*” and “*prescriptions*”
 - Obligations that can be imposed unilaterally by the ADLC
 - But: little practical relevance: cases *Canal Plus/TPS* (2012) and *Financière Cofigeo/Agripole* (2018)

II. Admissibility of behavioural remedies?

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- Terminology: Behavioural remedies = access remedies + purely behavioural remedies
- Problems: Designing and monitoring of behavioural remedies

Different approaches vis-à-vis the applicability of behavioural remedies

(1) Germany:

- Bundeskartellamt: very reluctant to accept behavioural commitments
- Section 40 para. 3 ARC: “*These conditions and obligations must not aim at subjecting the conduct of the undertakings concerned to continued control.*”
- Guidance on Remedies in Merger Control (2017): **3 guiding principles**
 1. Clear preference for divestitures
 2. No continued control
 3. Clear preference for up-front buyer solutions in the case of divestitures

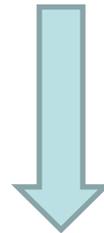
(1) Germany:

Implementation of these guiding principles in practice:



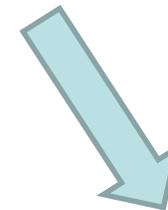
1. Rejection of certain types of commitments as such

→ firewalls, price caps, closure of facilities, organisational obligations (e.g. legal unbundling within a corporate group)



2. Strict approach towards (access) remedies

→ Remedies in case *Telefónica Deutschland/E-Plus* (2014) are not deemed sufficient



3. Minor practical relevance of behavioural remedies

→ Many behavioural remedies 2000 – 2003
→ Since 2011: only 3 cases with behavioural remedies

(2) France:

- 2009 – 2017: **55%** of conditional merger clearances containing behavioural remedies (in **36 %** of the cases exclusively behavioural remedies)
- Study “Les engagements comportementaux“ (2019): ADLC is the NCA in Europe that accepted the most behavioural commitments in its past practice
- Long-lasting behavioural commitments in some cases (up to 30 years)
- Acceptance of purely behavioural remedies (in conglomerate cases)
- Reasons for the broad acceptance of behavioural remedies:
 - The former jurisdiction of the Minister for Economic Affairs for merger control (*Canal Plus/TPS* (2006): 59 behavioural remedies → “self-binding“ effect
 - A more pragmatic and a case-by-case approach

(2) France:

- Recent developments: A stricter approach in the future practice?

- Study “Les engagements comportementaux“ (2019):

„This is why the Autorité, alongside other competition authorities, is currently considering the more stringent use of behavioural remedies, favouring quasi-structural commitments in anticompetitive practice law and structural commitments in merger law whenever they provide a better response to the competition issues.“

- However:

- Radical realignment of the practice regarding merger remedies seems unlikely (self-binding effect of former decisions)
- 2020: stand-alone behavioural commitments in 5 cases

II. Admissibility of behavioural remedies?

(3) Comments:

- Risks linked to a broad acceptance of behavioural remedies
 - Monitoring
 - Breach of commitments → costly further proceedings
 - **France:** 4 procedures concerning the non-respect of merger remedies (e.g. *Canal Plus/TPS*)
 - **EU:** *Telefónica Deutschland/E-Plus* (?)
- However:
 - Non-respect of structural remedies also possible (France: *Fnac/Darty*)
 - Advantages of behavioural remedies in certain situations (high flexibility, tailor-made solutions, advantages in dynamic/digital markets, preservation of efficiency gains)

(3) Comments:

- As regards section 40 para. 3 phrase 2 ARC (**no continued control**):
 - Difficulties in distinguishing between admissible and non-admissible behavioural commitments (what does „continued control“ mean?)
 - **Lack of legal certainty**
 - German practice has not always been coherent
 - Solutions:
 - **restrictive interpretation** of the provision
(prohibition of continued control only refers to the Bundeskartellamt itself, not to monitoring trustees/market participants)
 - **Deletion of the provision**

II. Admissibility of behavioural remedies?

(3) Comments:

– Conclusions:

- Restrictive approach towards behavioural commitments as such is not convincing
- The choice of merger remedies should always depend on the competition concerns of the case at hand
- In cases of foreclosure concerns in vertical/conglomerate cases behavioural solutions should regularly be considered
- However: the relevant parameters of e.g. an access commitment (duration, scope of the obligations, pricing) have to be sufficient detailed

III. Remedies in vertical cases

(1) Duration

- Remedies in France sometimes with excessive durations (20, 30 years)
 - Remedies **without time limit, but including a resolutive condition ?**
 - *Case Friesland Foods/Campina* (2008)
 - Provision of raw milk until the day when a specific number of cooperative members will have left the dairy cooperative (→ departure premium)
 - To this day, less than 50 % of the intended number of members have actually left the cooperative
- High risks for a behavioural commitment to entail long-term obligations if the success of the remedy **is subject to the will of third parties** (cooperative members)

(2) Pricing

- Different price formulas possible:
 - Price caps (in cooperation with the sector-specific regulator, case *KPN/Reggefiber* (2008))
 - FRAND terms
 - Cost-plus
 - Retail-minus pricing

(2) Pricing

- The obligation to publish a reference offer

a) Reference offer that is not subject to prior approval by the NCA

Aut. conc., déc. 12-DCC-100 du 23 juillet 2012 - *Canal Plus/TPS*, pt 707 (Injonction n° 6) :

« 6 (b) – Il est enjoint aux Parties de mettre à disposition les chaînes visées par l’injonction 6 (a) [...] **dans des conditions tarifaires qui seront transparentes, objectives, et non discriminatoires** et qui : [...] »

6 (c) - Il est enjoint aux Parties de **publier**, dans un délai de trois mois après la notification de la présente décision, **une offre de référence** décrivant les conditions tarifaires et techniques de cette mise à disposition. Cette offre sera proposée à tous les distributeurs qui souhaiteraient acquérir sur le marché de gros les chaînes dégroupées visées par l’injonction 6 (a). »

(2) Pricing

- The obligation to publish a reference offer

b) Reference offer that is subject to prior approval by the NCA

Aut. conc., déc. 14-DCC-160 du 30 octobre 2014 - *SFR/Numericable*, Engagements :

« La Partie notificante s'engage à proposer les Engagements d'accès n° 1 et 2 à des conditions tarifaires qui seront **transparentes, objectives et non discriminatoires** et qui:

- ne génèreront pas de ciseau tarifaire [...] »

(2) Pricing

- The obligation to publish a reference offer

b) Reference offer that is subject to prior approval by the NCA

Aut. conc., déc. 14-DCC-160 du 30 octobre 2014 - *SFR/Numericable*, Engagements :

« La Partie notificante s’engage à transmettre à l’Autorité **pour agrément préalable**, une proposition d’offre de référence décrivant les conditions tarifaires et techniques de cet Engagement d’accès. La Partie notificante s’engage **à publier**, dans un délai de trois mois à compter de la Date d’Effet et **sous réserve de l’agrément de l’Autorité, une offre de référence**. »

« Dans le cadre des Engagements d’accès n°1 et 2, la Partie notificante s’engage, dans un délai de 3 mois de la Date d’Effet, à identifier ses postes de coûts **permettant d’appliquer le test de ciseau tarifaire**. »

III. Remedies in vertical cases

b) Reference offer that is subject to prior approval by the NCA (case SFR/Numericable)

Avantages	Risques et inconvénients
<ul style="list-style-type: none"> Projet de l'offre élaboré par l'entreprise, l'autorité peut demander des modifications 	<ul style="list-style-type: none"> Procédures d'agrément d'une longue durée (<i>SFR/Numericable</i>: 9 mois, <i>Canal Plus Overseas/Mediaserv</i>: 14,5 mois)
<ul style="list-style-type: none"> Gain de temps pour préciser les conditions d'accès 	<ul style="list-style-type: none"> La faible incitation à mettre rapidement en œuvre les engagements

– Possibilities to address the shortcomings ?

Clearance under the suspensory condition of the publication of a reference offer approved by the NCA (up-front solution)?

- The transaction can't be completed before the implementation of the commitments
- Advantages:
 - **Additional incentives** for the parties to implement their commitments in a timely manner
 - **Stronger position of the NCA** in the discussions during the approval procedure
- In theory: convincing solution

IV. Remedies in conglomerate cases

IV. Remedies in conglomerate cases

- **Limited applicability/suitability of structural remedies** in order to address mixed bundling concerns (commercial bundling via rebates)

- **Different behavioural remedies conceivable:**
 - **Temporary transfer of a business activity** to a third party (*RATP Développement/Keolis*)

 - **Temporary grant of a licence** to a competitor (*Telia Company/Bonnier Broadcasting Holding*)

 - **Prohibition of bundle discounts** (and other bundle strategies)
 - Purely behavioural commitment → inadmissible from the Bundeskartellamt's perspective
 - Several examples in the French practice (e.g. telecommunications, food industry), but: heterogeneous character of ancillary measures (separation of teams - separation of companies - no ancillary measures)

– Comments:

- **Temporary transfer of a business activity** to a third party should be the **primary measure**
 - Less problematic in terms of monitoring (competitor benefits directly from this measure / no obligation to monitor if the merged entity abstains from a certain conduct)
 - Structural effect, but less severe compared to a divestiture (temporary character)

- **Temporary grant of a licence** enables a competitor to offer bundles on its own
 - However: Merged entity will still be active on the affected markets → **risk of foreclosure** strategies
 - Effectiveness of the measure depends on the conduct of the licensee

– Comments:

- **Commitment to abstain from bundle strategies** (e.g. bundle discounts)
 - Principally applicable in dynamic markets if none of the other measures are feasible
 - Can likely be monitored if sufficient ancillary measures are taken (separation of the sales units, measures against the exchange of information, separate accounting)

- Behavioural remedies should play an important role in vertical and conglomerate cases
- The position of the German Bundeskartellamt regarding behavioural commitments is not convincing
- The duration of a behavioural remedy should never be subject to the conduct/will of third parties
- For complex access remedies, the obligation to publish a reference offer that is subject to prior approval by the competition authority is a reasonable solution if the approval procedure is not too time-consuming (→ suspensory condition)
- In conglomerate cases, the temporary transfer of a business activity to a third party seems to be a viable alternative to a divestiture