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Remedy Design and Application in South Africa

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1 Introduction

This paper investigates the design and implementation of remedies in competition cases in South Africa. The paper begins with some theoretical observations in Section 2. We discuss the most important objectives and principles of remedies and suggest important considerations for the design of remedies. Section 3 considers the two main types of remedies, namely behavioural and structural remedies. Each of these categories has their own advantages and disadvantages that need to be taken into account. Section 4 looks at remedies that have been imposed in South African merger cases and provide some summaries of illustrative cases. We found that behavioural remedies have been used more frequently than structural remedies by the Competition Authorities. However, behavioural remedies have typically been used to deal with vertical concerns, while structural remedies have been preferred for horizontal concerns. We also examine the recent Sasol abuse of dominance case, where a mixture of structural and behavioural remedies was applied. Section 5 examines the evidence on remedy implementation and effectiveness in the EU and the USA. We find that while structural remedies have generally been preferred, they have often not been very successful in addressing anticompetitive effects. Recently, the use of a mixture of behavioural and structural remedies has been more popular these jurisdictions. Section 6 concludes.

2 Remedies – Some Theoretical Observations

This section deals briefly with some of the theoretical aspects of remedies. It is shown that the objectives of remedies are different in merger and abuse of dominance cases. We discuss the principles of remedies such as *proportionality*, *suitability* and *necessity*. In general the remedy must be proportional to the gravity of the anti-competitive conduct, suitable to the companies and market in question and necessary given other remedial options available. We also list some important considerations which should be taken into account in the design of a given remedy.

2.1 Remedy Objectives

Remedies can be applied either to ameliorate some of the negative effects of a merger, or to rectify some of the effects of an abuse of dominance case. Davies and Lyons (2007)¹ define remedies as interventions that are designed to avoid the anti-competitive effects of a merger, while not impeding its anticipated efficiency gains. For example, a competition authority might approve a merger only if certain remedies are adopted by the merging firms. Remedies are far more complex than prohibitions and require substantial insight by the relevant competition authorities. The effectiveness of a remedy in a merger case ultimately depends on whether it achieves the pre-merger level of competition in the market, eliminating any harm the merger might otherwise have caused consumers. Remedies are thus commonly examined in relation to mergers.

It is, however, even more complex to design an appropriate and effective remedy in abuse of dominance cases, compared to those that apply in merger cases. The fundamental problem is that there is no agreement on the appropriate objective(s) in these cases. Different jurisdictions tend to prioritise different objectives and even within countries clear choices have not always been made. It is often hard to design remedies that can achieve more than one objective. Moreover, there has not been a great deal of experience in this area, since there are not nearly as many abuse of dominance cases as there are merger and cartel cases.²

Putting a stop to abusive conduct is an essential objective, but simply achieving this objective alone does not constitute a sufficient remedy. There needs to be some mechanism put in place to prevent the defendant from repeating the same or similar conduct. For instance, the defendant might already have acquired and protected its market power as a result of the abusive conduct. If the remedy is only designed to stop the abuse, the defendant would continue to benefit from this position and other dominant firms would be encouraged to engage in similar behaviour.

Another crucial objective is to restore the level of competition that would have existed in the absence of the violation. Otherwise, consumers are left exposed to the ongoing harm from a reduction in competition. For instance, if the abusive conduct has raised entry barriers, the

¹ Davies, S. And Lyons, B. (2007): Mergers and Merger Remedies in the EU. European Commission. Edward Elgar Publishing Limited: Massachusetts.

² OECD Competition Committee (2006): Remedies and Sanctions in Abuse of Dominance Cases. OECD Competition Law and Policy.

competition authority will have to look at the structural conditions that will prevail in the market after the remedy has been applied, and whether entry barriers will be lowered to the pre-violation level. Deterrence is another important objective, which ensures not only that the dominant firm becomes less likely to repeat the violation, but also that other dominant firms are less likely to engage in abusive behaviour. Yet, over-deterrence can also become a problem. If firms are overly concerned about the likelihood of being found guilty, they may exercise too much self-restraint and avoid certain behaviour that might have been pro-competitive.

There is general consensus in the literature that remedies should be *proportionate* to the violation. The scope and form of a proportional remedy does not exceed what is necessary to achieve the objectives of the law. In general, the more harmful the activity, the stricter the imposed measures should be. Proportionality in the strict sense requires that the seriousness of the intervention and the gravity of the reasons justifying it are in adequate proportion to each other. The remedy should also be *suitable* in the sense that it must appear objectively capable of satisfying the stated purpose. The remedy should also adhere to the *necessity principle*, which states that the measure is permissible only if no less restrictive *suitable* measure is available to achieve the objective.³ **Proportional remedies do not attempt to introduce more competition in the market than would have existed before the violation, since the focus is on harm and not on immorality.** In some jurisdictions, including the EU, competition statutes expressly require remedies to be proportionate to the violation committed.⁴

2.2 Remedy Design

The OECD (2006)⁵ provided a number of suggestions for designing remedies in abuse of dominance cases. Ideally, competition authorities should define their remedial objectives and devise sound strategies for achieving them before taking any enforcement action in a matter. Having enough evidence to prove liability does not necessarily mean that a successful remedy can be found in a given case. If it is not going to be possible to design and implement an appropriate remedy, then there is little point in pursuing a case. Moreover, designing a remedy that is theoretically perfect will do little good if it is highly impractical. In order to design an

³ Sullivan, E. T. (2003): Antitrust Remedies in the US and EU: Advancing a Standard of Proportionality. University of Minnesota Law School.

⁴ OECD Observer (2008): Remedies and Sanctions for Abuse of Market Dominance. Policy Brief: December 2008.

⁵ OECD Competition Committee (2006): Remedies and Sanctions in Abuse of Dominance Cases. OECD Competition Law and Policy.

effective remedy, the competition authority needs to have a thorough understanding of how the industry has developed, how it will probably evolve without intervention, and how it will likely be transformed by various remedies. In rapidly changing markets, authorities should also take into account how new technologies will affect market performance.

The **defendant's record of compliance** with competition law should be taken into account when designing the remedy: If there is a pattern of misconduct the sanction should be stronger. The defendant's history of compliance may also influence the selection of the type of remedy. For example, if fines or behavioural remedies have been imposed on a defendant before, but it continues to behave illegally, it is worth considering whether a structural remedy would do a better job of deterring anticompetitive conduct and restoring competition.

The next step is to make judgments about the **defendant's probable reaction** to each of the remedies under consideration. Authorities need to anticipate whether the defendant will try to evade, minimise or neutralise the remedy without technically violating its terms. Authorities can reduce the informational imbalance to some degree by consulting the defendant's competitors and seeking information that will help to combat evasion strategies. At the same time, the authority will need to be wary of giving those competitors a chance to increase the burden on the defendant by distorting the true market situation. Authorities might do well to consult large customers as well, since they may also be knowledgeable and possibly less biased against the defendant.

Authorities also need to determine what the possible **side-effects** of each of the contemplated remedies will be. For instance, requiring a dominant firm to provide its competitors with access to a key asset could have the unintended consequence of discouraging investments by competitors that would have led to superior alternatives to the asset. It may also be detrimental to research and development in general if companies come to believe that their most valuable innovations will have to be shared with competitors.

Authorities should also determine the **practicality** of implementing each remedy under consideration. This means figuring out not only how easy or difficult it is to put each remedy into action, but also estimating how much each one would cost to implement. The next step is to decide which remedy is optimal. Regardless of the particular remedy chosen, there has to be a realistic and useful framework in place for implementation.

3 Types of Remedies

In the economic literature remedies are generally classified into *structural* and *behavioural* remedies. Motta (2004)⁶ argues that the key distinguishing feature between these categories is their treatment of property rights. Structural remedies modify the allocation of property rights, whereas behavioural remedies set constraints on how those property rights are exercised. A structural remedy usually aims to restore pre-merger market structure, for example by full or partial divestiture of the firm. A behavioural remedy usually aims to control the impact of a change in market structure, for example by price controls, non-discrimination provisions, and compulsory licensing and access agreements. Structural remedies are also typically irreversible, while behavioural remedies can be modified over time as market conditions change and typically require *ex post* monitoring. Remedies that transfer property rights by contract are sometimes classified as quasi-structural remedies.

3.1 Structural Remedies

Each type of remedy has certain advantages and disadvantages. In general, structural remedies are able to eliminate market power rapidly, while creating or invigorating competitors. Divestitures restructure defendants into two or more firms or require them to sell some of their assets to another firm. Divestitures are considered to be the most drastic type of remedy and their use has been controversial, especially in abuse of dominance cases. They can, however, eliminate market power rapidly and are more likely to have long run pro-competitive effects than other remedies. Divestitures can also be easier to design than other remedies. For instance, in complex cases it may be easier to restore competition and promote deterrence by dividing a firm than it would be to craft an equally effective behavioural remedy.

Furthermore, divestitures are more efficient to administer since they may require only a single intervention, as opposed to the ongoing oversight of behavioural remedies. Yet, most divestitures are coupled with some kind of behavioural remedy which requires at least a modest amount of oversight. For example, firms are usually prohibited from buying back divested assets and divested entities are usually prohibited from giving each other preferential treatment over competitors. Divestitures can be very disruptive initially and can create immediate inefficiencies.

⁶ Motta, M (2004): Competition Policy: Theory and Practice. Cambridge University Press.

For example, creating several rivals out of one firm will require at least some duplication of investment and may result in the loss of economies of scale. Not every corporate structure can be prudently separated and even when there is an easy way to divide a firm into separate entities, the allocation of employees and capital may be difficult. Thus the separate entities that are created are often not successful or viable competitors.

Divestiture remedies for abuse of dominance cases are not available under the competition laws of many OECD countries, and where they are available, are treated somewhat sceptically. **For instance, EU Regulations state that structural remedies should only be imposed if there are no equally effective behavioural remedies. Furthermore, divestitures cannot be used to alter the pre-violation structure of a firm when a competitive problem is rooted in the structure of the market. The problem has to be rooted in the corporate structure of the firm itself.**

3.2 Behavioural Remedies

Behavioural remedies can be tailored to fit individual defendants and specific market circumstances. They are less controversial than divestitures and have been applied more frequently in abuse of dominance cases. However, they are sometimes criticised because they do not address market power and concentration issues directly. They also typically require ongoing, and sometimes extensive, oversight and intervention by the authorities. Part of the reason for this is that behavioural remedies do not change the firm's incentive structure, which means that considerable supervision and detailed compliance provisions are often needed. The involvement of the authorities is often needed to resolve disputes about the precise meaning of an order and to approve certain business decisions. These oversight procedures can be expensive, time consuming and distracting for all the relevant parties.

Remedies that require a defendant to give its competitors or customers access to an important asset are particularly likely to require substantial oversight. If an authority decides to mandate access to a key asset, it must be prepared to specify the price and quality terms of the agreement. In general competition authorities are not well-suited to specify these terms. Non-

discrimination provisions are also likely to necessitate continued oversight, since parties will generally disagree on the terms of these provisions.⁷

Direct operating costs associated with behavioural remedies exist at the design, monitoring and enforcement stages. At the design stage an authority may lack sufficient information, or asymmetric information may result in the failure to fully understand the business model of a particular industry. At the monitoring and enforcement stages, costs are typically linked to the complex and lengthy implementation of the remedy. Monitoring and enforcement activities may involve constant gathering and processing of information and may transform the competition authority into a market regulator.⁸

Furthermore, behavioural remedies are susceptible to strategic neutralisation, minimisation, or evasion by firms. The best way to ensure that behavioural remedies are effective may be to adjust them continually to cover new forms of anticompetitive conduct that may arise as market conditions and strategies evolve. The problem is that they are likely to be ineffectual when drawn narrowly to avoid preventing legitimate competitive activity. If they are drawn broadly to close all possible loopholes, they are likely to handicap firms in competing legitimately.

Monetary sanctions, including fines, damages, and the disgorgement of profits, have the advantage of being relatively easy to administer and requiring little ongoing supervision. They are also very difficult to evade. Unless they are too weak, monetary sanctions can also deter future infringements. It is difficult, however, to determine the optimal level of a monetary sanction and to strike a balance between discouraging abusive conduct and avoiding a punishment that is too severe. Another problem is that sanctions by themselves do little to restore competition, because they do not address the market power that a defendant may have accumulated through its abusive conduct.

Competition authorities tend to prefer behavioural remedies over structural remedies in abuse of dominance and vertical merger cases, while structural remedies are generally preferred in horizontal merger cases. Behavioural remedies are widely used in support of structural commitments. They can be used to ensure the viability of divested businesses and may provide an adequate solution when the absence of a suitable buyer makes divestiture

⁷ OECD Competition Committee (2006): Remedies and Sanctions in Abuse of Dominance Cases. OECD Competition Law and Policy.

⁸ Ezrachi, A. (2005): Under and Over Prescribing of Behavioural Remedies. University of Oxford Centre for Competition Law and Policy: Working Paper 13/05.

impossible. This may be the case when a merger involves vertical elements which limit access to infrastructure and result in foreclosure. In these circumstances divestiture is likely to be less effective and to generate unnecessary costs. The flexibility and reversibility of behavioural remedies also make them superior tools in dealing with changing market conditions, especially in technology markets or network industries. Yet, the difficulties in designing, monitoring and enforcing behavioural remedies may lead authorities to under-prescribe them, even when they may yield efficiencies in theory. In other words, competition authorities may at times have an inherent preference for structural remedies even in circumstances where these might underperform compared to behavioural remedies.⁹

4 Remedies in South Africa

This section discusses the remedies that have been applied by the competition authorities in South Africa. Until recently, it seems that remedies in South Africa have mainly been imposed in merger cases, while the competition authorities favoured administrative fines in cases of abuse of dominance. According to the Competition Commission¹⁰, there can be three outcomes to merger cases, approval, conditional approval or prohibition. If it is found that a merger would contravene the Act, the authorities will approve the merger conditionally and attempt to impose a remedy, if possible, before deciding that it be prohibited. Hence the focus in this section will be on mergers approved with conditions, while the recent implementation of remedies in the Sasol abuse of dominance case is examined at the end of the section.

4.1 Merger Remedies in South Africa

Table 1 and Figure 1 illustrate merger activity in South Africa between 2002/03 and 2008/9, by type of concern. Historically the majority of mergers cases finalised have been horizontal mergers, although the proportion has declined since 2002/03. At the same time there has been

⁹ Ezrachi, A. (2005): Under and Over Prescribing of Behavioural Remedies. University of Oxford Centre for Competition Law and Policy: Working Paper 13/05.

¹⁰ Competition Commission South Africa and Competition Tribunal South Africa (2009): Ten Years of Enforcement by the South African Competition Authorities: Unleashing Rivalry 1999-2009.

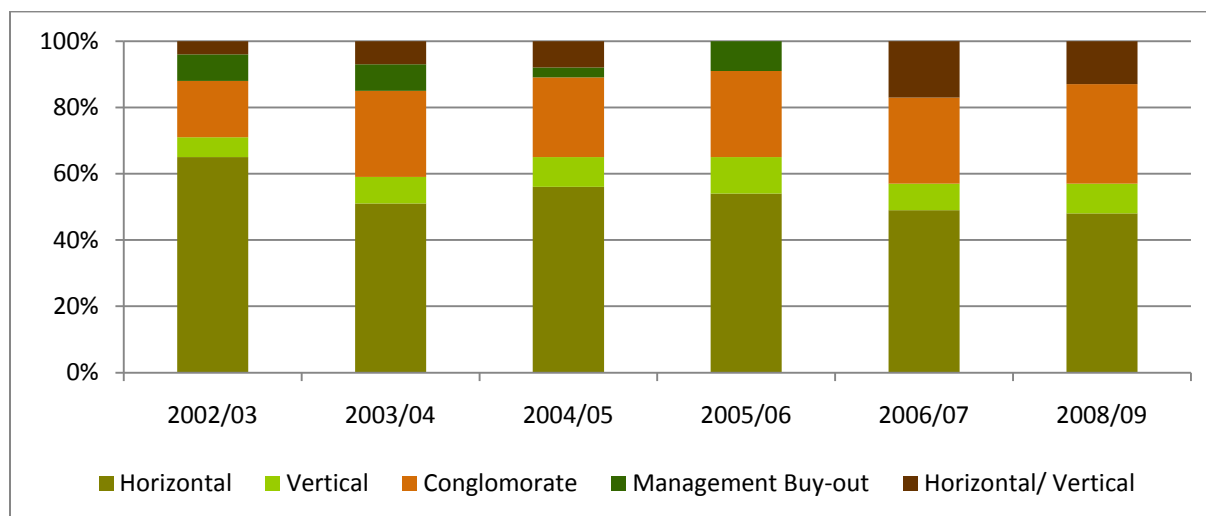
an increase in mergers with both horizontal and vertical aspects and conglomerate cases. Horizontal merger cases still represented almost half of the total merger activity in 2008/09.

Table 1: Merger Activity by Type of Concern

	Horizontal	Vertical	Conglomerate	Management Buy-out	Horizontal/ Vertical
2002/03	65%	6%	17%	8%	4%
2003/04	51%	8%	26%	8%	7%
2004/05	56%	9%	24%	3%	8%
2005/06	54%	11%	26%	9%	0%
2006/07	49%	8%	26%	0%	17%
2008/09	48%	9%	30%	0%	13%

Source: Competition Commission Annual Reports

Figure 1: Merger Activity by Type of Concern



Source: Competition Commission Annual Reports

Table 2 lists the outcomes of the cases finalised between 2001/02 and 2007/08. There has been a rapid increase in the amount of mergers notified and finalised. Clearly the vast majority of cases are approved without any conditions. A relatively small number of cases are either approved conditionally, prohibited or withdrawn each year. For instance, 455 out of 480 case finalised in 2007/08 were approved unconditionally, while only eleven were approved with conditions attached and three were prohibited. There has been a slight increase in the absolute

number of these outcomes, as Figure 2 illustrates, the majority of which have been in the manufacturing sector. Although the outcomes that involve remedies, i.e. conditionally approved mergers, have increased during the period under review, they remained nevertheless small in percentage terms. (Before 2002/03 no distinction was made in the reporting data of the competition authorities between mergers approved with and without conditions).

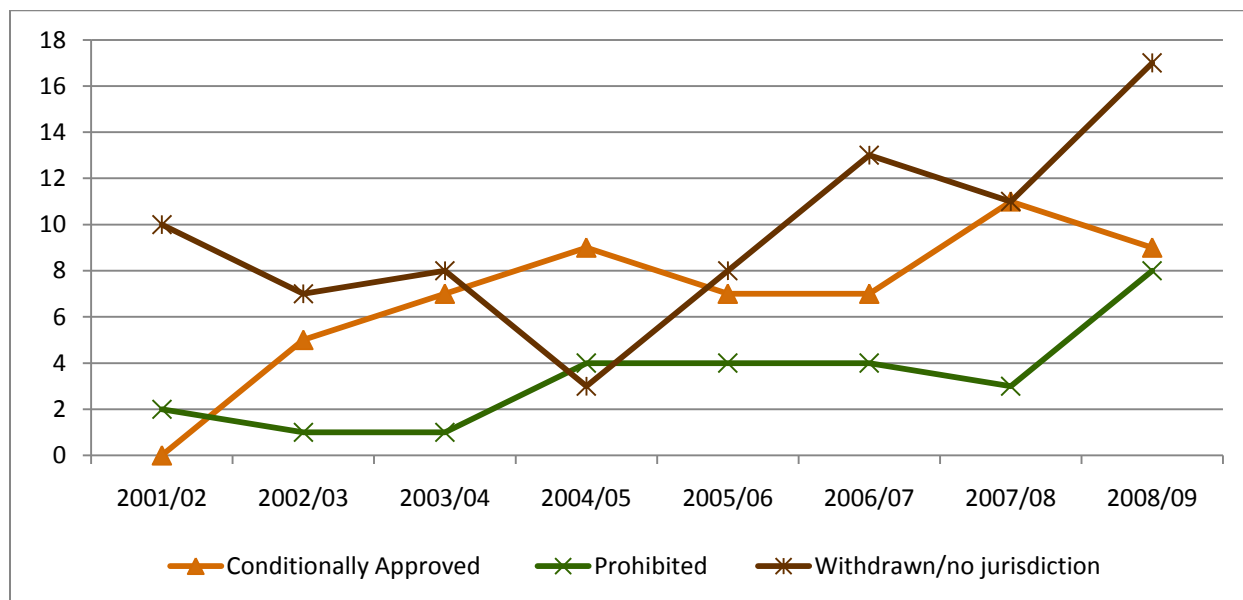
Table 2: Outcomes of Merger Cases Finalised

Year	Finalised	Approved	Conditionally Approved	Prohibited	Withdrawn/ no jurisdiction
2001/02	225	213	0	2	10
2002/03	202*	194	5	1	7
2003/04	278	262	7	1	8
2004/05	301	285	9	4	3
2005/06	394*	376	7	4	8
2006/07	410	386	7	4	13
2007/08	480	455	11	3	11

Source: Competition Commission Annual Reports

*These totals correspond to the official figures and do not add up.

Figure 2: Outcomes of Merger Cases



Source: Competition Commission Annual Reports

Table 3 reports the number of merger cases finalised between April 2007 and March 2008. Table 9 in the Appendix provides the same information for the other years. Almost 95% of total cases finalised in this reporting period were approved unconditionally and only 2% of cases

involved a remedy. The vast majority of the cases finalised where mergers of an intermediate size. The Commission recommended the conditional approval of one large merger to the Tribunal and conditionally approved one small and nine intermediate mergers.

Table 3: Merger cases finalised between 1 April 2007 and 31 March 2008

	Small	Intermediate	Large	Total	Percentage
Approved	4	354	97	455	94.8%
Conditional Approval	1	9	1	11	2.3%
Prohibited	0	2	1	3	0.6%
Withdrawn	5	3	1	9	1.9%
No Jurisdiction	0	2	0	2	0.4%
Total Cases Finalised	10	370	100	480	100%

Source: Competition Commission South Africa – Annual Report 2007/08

The competition authorities have imposed structural and behavioural remedies as conditions in order to redress the anticipated anticompetitive effects of mergers. These remedies typically involve the divestiture of certain assets or parts of the business. In some cases, structural remedies have entailed the divestiture of whole businesses, as in the case of the Lafarge Roofing/Kula Enterprises¹¹ merger in 2006. In other cases it has entailed the selling-off of brands, such as the Distillers/Stellenbosch Farmers Winery¹² merger in 2003.

The behavioural remedies imposed by the competition authorities have typically entailed contracts that regulate supply conditions and moratoria on retrenchments. When a merger has led to concerns about input or customer foreclosure, the authorities have approved the merger subject to the merged firm agreeing to provide a minimum contract to rival manufacturers to ensure minimum scale viability, such as in the Coleus Packaging/Rheem Crown Plant¹³ merger in 2002. In the Trident Steel/Dorbyl¹⁴ merger in 2000, a potential essential facility problem was resolved by requiring the merged firm to lease out a portion of a quayside area it leased from the harbour authority. Other remedies have involved prohibiting the appointment of directors on competing boards to prevent opportunities for information sharing.

The Commission has stated that it generally prefers to impose or to recommend structural conditions to correct the anticipated anticompetitive effects.¹⁵ The Commission has generally

¹¹ Competition Tribunal Case number 63/LM/Jul06.

¹² Competition Tribunal Case number 31/CAC/Sep03.

¹³ Competition Tribunal Case number 75/LM/Oct02.

¹⁴ Competition Tribunal Case number 89/LM/Oct00.

¹⁵ Competition Commission South Africa (2006): Annual Report 2007/08. Available at: www.compcom.co.za

preferred stronger and more permanent conditions than the Tribunal. For instance, occasionally the Tribunal has approved mergers without the conditions recommended by the Commission or with less stringent conditions attached. Nevertheless, the Competition Authorities seem to have favoured different types of remedies for horizontal and vertical mergers. The Tribunal previously pointed out that vertical mergers are viewed with more sympathy since they raise fewer competition concerns and generate larger pro-competitive gains. However, when one or both of the parties dominate their respective markets, such a transaction could raise barriers to entry and enable a party to protect its dominant position.

Table 10 to Table 13 in the Appendix present summaries of the conditionally approved cases between 2005/06 to 2008/09. These Tables provide a list of conditionally approved mergers by the case name, the anticompetitive effect of the merger, the Commission’s intervention recommendation and the ultimate Tribunal decision. Unfortunately, the annual reports do not distinguish between types of merger cases. Table 4 shows the types of remedies implemented according to the reported anticompetitive effect of the mergers, based on these summaries. These categories come from various issues of the Competition Commission’s annual reports and are not mutually exclusive. For instance, there might well be some overlap between the removal of an effective competitor, high barriers to entry and high market concentration. In addition, “Anticompetitive Effect” was only reported as a motivation for intervention in the earlier issues of the annual reports. Interestingly, behavioural remedies were used more frequently than structural remedies, while a mixture of remedies was only used once in this sample.

Table 4: Merger remedies according to anticompetitive effect of merger (2005/06 – 2008/09)

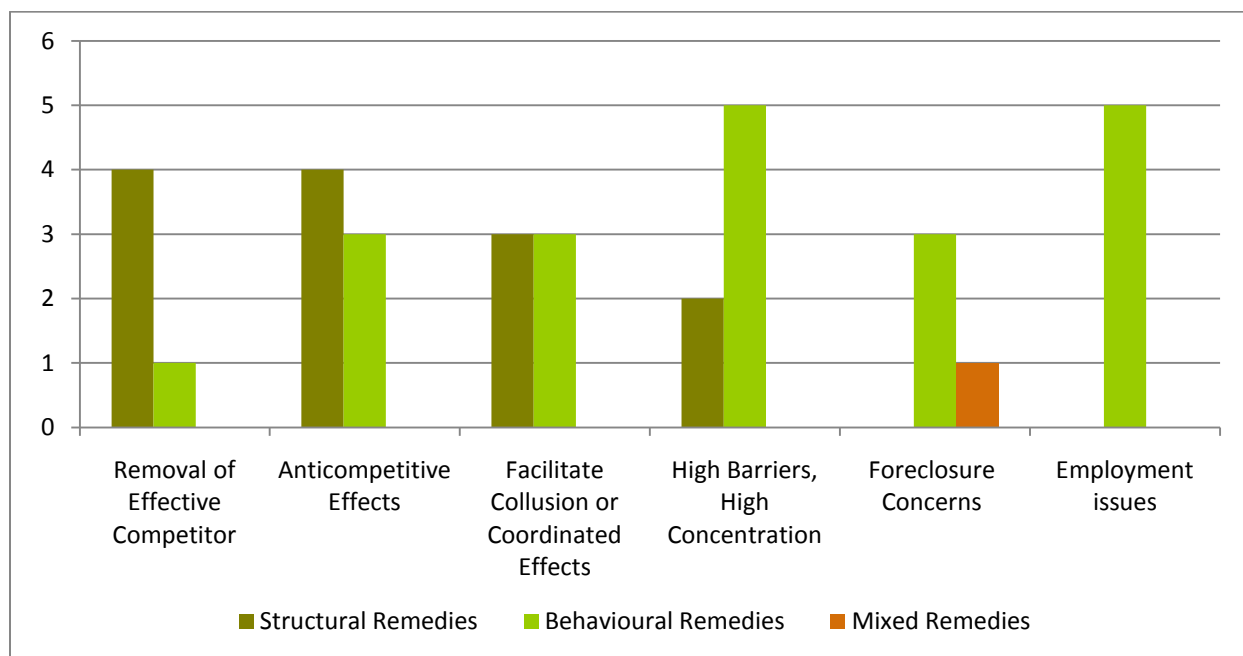
Anticompetitive effect	Structural Remedies	Behavioural Remedies	Mixed
Removal of Effective Competitor	4	1	0
Anticompetitive Effect	4	3	0
Facilitate Collusion or Coordinated Effects	3	3	0
High Barriers, High Concentration	2	5	0
Foreclosure Concerns	0	3	1
Employment issues	0	5	0
Total	13	20	1

Source: Econex calculations, Competition Commission – Various Annual Reports

Figure 3 plots these values for merger remedies. Structural remedies have been employed more frequently when the merger was expected to lead to the removal of an effective competitor or to have anticompetitive effects more broadly. Behavioural remedies have been used exclusively when the merger raised foreclosure concerns or employment concerns. A high

market concentration and high barriers to entry were addressed more often with behavioural remedies than structural remedies. There has been no clear preference in cases where the merger was expected to facilitate collusion or lead to coordinated effects. It seems as though the Authorities have imposed structural conditions only in cases where it was deemed to be absolutely necessary.

Figure 3: Merger remedies according to anticompetitive effect of merger (2005/06 – 2008/09)



Source: Econex calculations, Competition Commission – Various Annual Reports

4.1.1 Some illustrative cases – a short summary

The following examples illustrate that the Competition Tribunal has preferred to impose structural remedies in situations with horizontal concerns, while vertical concerns and issues of public interest have more often been dealt with through behavioural remedies. This approach roughly corresponds to the results above in the sense that concerns about effective competitors and collusion would likely arise in horizontal cases, while concerns about foreclosure employment would probably arise in vertical cases. This approach is also in line with that followed in the EU and the US. However, it is of course important to deal with each concern on its own merits.

a) Astral Foods/National Chick

The Astral Foods/National Chick¹⁶ transaction involved both horizontal and vertical aspects. Horizontal because of a product overlap in the animal feed market and vertical through the acquisition of an independent downstream producer of day-old chicks. The Competition Commission initially prohibited the merger because it would substantially lessen competition in the relevant markets by removing an efficient competitor. The Commission was also concerned that the post-merger vertical structure of the market would provide Astral with the ability to price-discriminate in favour of its own downstream operations, since the dominant supplier would be purchasing its largest independent customer. The Commission argued that Astral's largest upstream competitor would not be able to take up excess demand in this market and that many independent breeders would be without an alternative source of supply in the event of a margin squeeze.

The Tribunal subsequently approved the merger subject to certain conditions. A structural remedy was prescribed for the horizontal leg of the merger, whereas behavioural remedies were imposed on the vertical leg. For the horizontal leg, the efficient competitor Nutrex had to be sold to an independent buyer within a specified time period. In the event that a suitable buyer could not be found within the time period, a trustee would be appointed to carry out the divestiture. For the vertical leg, a standard supply contract had to be drafted and approved, the aim of which was to lessen the regulatory role for the Commission after the merger. In case of disease or any other supply constraint, Astral was not allowed to stop supplying its independent customers in favour of its own in-house operations, and supply would be reduced on a pro-rata basis. Astral was also prohibited from discriminating against independent customers who did not wish to conclude the standard agreement, or customers that sold products from other suppliers, through price or volume discounts. Finally, Astral offered to implement an audit procedure, to be conducted by independent auditors, to ensure that all stock was sold at the same price to independent customers and to its own in-house operations.

In reply to these remedies the Commission cautioned against the use of behavioural rather than structural remedies, since these remedies were likely to be circumvented. Although the Tribunal agreed in principle, they suggested that there were circumstances where either divestiture or prohibition might be too drastic and where other remedies could address anticompetitive effects adequately without imposing an unreasonable monitoring burden on the Commission. They

¹⁶ Competition Tribunal Case number 69/AM/Dec01.

argued that the Astral Foods/National Chick case fell within this category, since all of the perceived difficulties were temporary structural problems, which should disappear in the long run.

b) Bayne Investments (PG Bison)/Clidet 451 (Woodchem)

In general, vertical mergers can cause harm to competition when a transaction increases the likelihood that the merged entity will foreclose its rivals upstream (customer foreclosure) or downstream (input foreclosure) by refusing to supply or by raising competitor's costs. For example, the Tribunal approved the Bayne Investments/Clidet 451 merger conditionally, which resulted in the vertical integration of PG Bison and Woodchem.¹⁷ They argued that in this case customer foreclosure was unlikely, given that PG Bison had a long term supply agreement with Woodchem prior to the merger and did not intend to source formaldehyde resin from any other producer. They did find that the transaction raised foreclosure concerns in the particle board market, since the barriers to entry in both the upstream and downstream markets were very high.

The Commission found that a structural remedy, such as requiring a divestiture of the resin production business, was not feasible because Woodchem's plant was on one site and was run as an integrated entity that was not readily divisible. Hence a behavioural remedy was imposed, ensuring that Woodchem continued to supply existing customers on a non-discriminatory basis. Specifically, Woodchem would continue to supply its independent customers at the price, volume and quality that it was supplying before the merger. Woodchem also had to agree to supply any particle board producer on terms that were non-discriminatory compared to existing customers, subject to availability. In the event of shortages, Woodchem would reduce its supply to each customer and its subsidiaries on a pro-rata basis to the volumes supplied during the preceding six months. In the event that the Commission believes that the merged parties are not complying with these conditions, a written report can be requested, providing information on volumes and prices.

c) Chemical Services/Chemiphos

The Tribunal also approved the large merger between Chemical Services and Chemiphos SA conditionally.¹⁸ These firms were both active in the market for the manufacture and distribution

¹⁷ Competition Tribunal Case number 90/LM/Aug07.

¹⁸ Competition Tribunal Case number 100/LM/Dec04.

of chemical products and Chemiphos supplied a number of Chemserve's subsidiaries with various chemical products. The merger therefore entailed both vertical and horizontal dimensions. However, given the low market share of the merged entity, the Tribunal was persuaded that the transaction would not result in a substantial prevention or lessening of competition in the distribution market for specific chemicals.

However, the Tribunal was concerned with the possibility of customer or input foreclosure. They argued that there were no suitable substitutes for white phosphoric acid or polyphosphoric acid. In the event of shortages or disruptions in supply, Chemserve subsidiaries might get preferential treatment, which could compromise competitors' ability to provide a reliable service. Accordingly, the Commission recommended certain conditions aimed at ensuring continued supply to all current customers at current prices for a period of three years. In particular, the merged entity had to continue to supply white phosphoric acid or polyphosphoric acid to all current customers on a non-discriminatory basis and on the same terms and conditions which existed prior to the merger. In the event of production stoppages, supply would be restructured on a pro-rata basis. The Tribunal also provided a formula according to which the merged entity could increase its prices charged to customers. Compliance had to be verified annually with an audit certificate.

d) ATC Telecoms/Aberdare

A structural remedy was applied to the merger between ATC Telecoms and Aberdare¹⁹. The only horizontal overlap in their activities was in the market for the production of indoor copper cables. During their investigations the Commission discovered that Aberdare owned 33% of Kewberg, its largest competitor in this market. The Commission was concerned that this could result in Aberdare being able to influence the decision-making of Kewberg. Accordingly, the Tribunal approved the merger providing that Aberdare sell its stake in Kewberg to an approved independent buyer.

e) Intelstat/PanAm Sat

The merger between these two multinational companies was approved subject to a behavioural remedy. The Commission found that the transaction was likely to substantially prevent or lessen competition in an already concentrated market, since the merged entity would have an

¹⁹ Competition Tribunal Case number 70/LM/Aug06.

estimated 65% of the market share in the sale of satellite transponder capacity in Sub-Saharan Africa. However, within the subsequent two years, four new satellites with significant capacity were to be launched, which would constrain the market power of the merged entity. New and existing entrants would allow customers to switch between satellite operators, which would further constrain the ability of the merged entity to unilaterally raise its prices. The merger was therefore approved with the condition that, for a period of two years, Intelsat and PanAm Sat customers billed in South Africa could not be subjected to a price increase, except for an inflation-related adjustment.²⁰ This case illustrates that structural remedies are not automatically necessary in horizontal merger cases.

f) Tiger Brands/Ashton Canning Company

Because the Act also recognises public interest concerns, some remedies have been designed to redress public harm directly. For instance, in cases where the merger would lead to employment losses, the Tribunal has sometimes ordered that a cap be set on merger-specific retrenchments. Although the Tribunal has been reluctant to set these caps independently, the cases have usually involved requiring a firm to respect the retrenchment figures that it originally communicated to unions.

In the merger between Tiger Brands and the Ashton Canning Company²¹ the Commission found that the merger did not raise competition concerns and therefore recommended approval to the Tribunal. However the transaction was expected to have a significant negative effect on public interests. Both companies operate within the Ashton area, which is dependent on the canning industry for employment. The transaction was expected to result in the retrenchment of about 45 permanent employees and about 1 000 fewer seasonal workers being contracted. The Commission recommended that the merging parties set up a R2 million training fund. The training would include the unemployed community in Ashton and the firms' seasonal workers who had been contracted in the preceding high season, but who had, as a result of the merger, not been contracted in either of the two high seasons following the merger. The Tribunal approved the merger subject to similar conditions, in order to alleviate the negative effects on employment and the Ashton community in general. However, the availability of the training fund was limited to those employees and seasonal workers directly affected by the merger.

²⁰ Competition Commission South Africa (2006): Annual Report 2005/06. Available at: www.compcom.co.za

²¹ Competition Tribunal Case number 46/LM/May05.

g) Shell/Tepco

Behavioural remedies have also been used to address public interest issues of empowerment and transformation. For example, in the Shell/Tepco²² merger in 2001, involving a large firm and a BEE company, the firms wanted to merge the empowerment company's branded retail stations into that of the larger firm. The Commission imposed a behavioural remedy on the merged firm in order to prevent the elimination of the empowerment firm's business and brand from the market. The argument was that empowerment in the sector would be set back if the BEE business and brand lost its separate identity in the market. However the merging parties opposed the condition and successfully appealed to the Tribunal to set the conditions aside. The Tribunal argued that a failing firm should not be propped up on the grounds of empowerment.

4.2 The Recent Sasol Case

On 25 June 2010, Sasol Nitro, a division of Sasol Chemical Industries Limited (SCI) concluded a settlement agreement with the Competition Commission. The settlement finalised the Nutri-Flo and the Profert complaints filed on 3 November 2003 and August 2004. The case had two aspects to it, namely collusion and abuse of dominance. On the collusion side, the Commission concluded that Sasol, Omnia and Kynoch (Yara) agreed to fix the price of ammonia-based fertilizers. Sasol previously reached a settlement with the Commission for their participation in the cartel, which involved an administrative fine of R 250 million. The remaining parties in the collusion case, Kynoch (Yara) and Omnia were planning to defend the case at the Tribunal.²³

The second aspect of the case involved an allegation of abuse of dominance. In the Nutri-Flo complaint²⁴ the Commission alleged that SCI had charged excessive prices through a series of strategies that enabled it to sustain the price of ammonia at import parity prices. The Commission concluded that these prices were excessive when compared to a range of benchmarks, including prices charged to other customers, the cost of production, prices charged when other wholesale supplies became available and the price at which the products were exported. Furthermore, SCI allegedly engaged in conduct that was aimed at 'disciplining'

²² Competition Tribunal Case number 66/LM/Oct01.

²³ Erasmus, D. (2010): Sasol Nitro starts unique settlement with Competition Commission. *Farmers Weekly*, 16 July 2010 (p13).

²⁴ Competition Tribunal Case number 31/CR/May05.

Nutri-Flo and other players in the market for the supply of fertiliser. SCI also allegedly prevented Nutri-Flo from independently importing fertiliser product by threatening to withdraw the supply of a key input. Thus the Commission found that SCI had engaged in exclusionary conduct, which reduced the capacity of competitors to supply their products at lower rates and to expand their market penetration. In the Profert complaint²⁵ the Commission alleged that Sasol had engaged in price discrimination to the detriment of Profert and had excluded Profert in other ways, including the refusal to supply.

The settlement finalises the abuse aspect of the case, but does not affect the collusion case in which Sasol admitted guilt. According to the settlement Sasol will escape an administrative fine for alleged abuse of dominance, exclusionary conduct and price discrimination in the supply of ammonia and derivative fertiliser products, after agreeing to certain structural and behavioural remedies. In terms of the structural remedies, within 12 months after confirmation of the settlement by the Tribunal, Sasol has to divest five of its fertiliser blending facilities located across the country, with the exception of its Secunda plant. Moreover, SCI has to house the ammonia plants and related business operations as a business unit separate from Sasol Nitro. This separate unit will be responsible for the marketing of ammonia produced at Sasolburg and supplied from Secunda. The executive management of the business will be separate from the remainder of Sasol Nitro, with its own decision making power, separately audited books of accounts and will be incentivised according to the performance of the separate business unit. This business will sell ammonia on an arm's length basis to Sasol's own operations and to third parties.

On the behavioural remedies side, SCI had to commit not to differentiate its pricing of ammonium nitrate-based fertilisers, other than on standard commercial terms such as volume and off-take commitments. These terms have to be transparent and available to all customers. Sasol has to sell ammonium nitrate-based fertilisers on an ex-works basis from its plants at Sasolburg and Secunda and depots within 100 km of them. SCI also agreed, within 25 months of confirmation, to cease all ammonia imports, except for internal use or on behalf of third parties due to supply disruptions and plant maintenance shutdowns. The settlement did not, however, include an admission of liability by SCI.²⁶

²⁵ Competition Tribunal Case number 45/CR/May06.

²⁶ Wilson, R., Quilliam, L., Clark, J. and Avivi, L. (2010): Settlement Agreement Between The Commission And Sasol Confirmed. Webber Wentzel Attorneys: Competition e-Alert, July 2010.

This is the first time the Commission has accepted structural and behavioural remedies as a settlement in a referred enforcement case, which in the past have generally been settled with an administrative penalty. The Commission is of the view that the structural and behavioural remedies agreed in the settlement, together with addressing cartel conduct, will effectively address competition concerns in the fertiliser market. Specifically the pricing and divestiture commitments will remove the incentive and ability to exclude competitors in fertiliser blending and retailing. Although the Commission did note that these remedies do not address the fact that Sasol will remain the sole local producer of ammonia.²⁷

The Tribunal subsequently confirmed a settlement agreement with two additions. The two addenda which the Tribunal asked the parties to include in their agreement related to a condition guaranteeing supply to existing customers and a monitoring mechanism to ensure that Sasol provides the Commission with information about its compliance with the agreement. The Tribunal was especially concerned about the monitoring aspect of the behavioural remedies in the settlement agreement and asked for appropriate monitoring mechanisms to be inserted, especially since the agreement is binding for a significant period of time. The settlement agreement will remain binding upon SCI for a minimum of 12 years from the date of the divestitures.²⁸

5 Evidence from the EU and USA

This section will investigate the evidence on remedies imposed in the EU and the USA. While structural remedies have usually been the preferred intervention in these jurisdictions, these remedies have often been ineffective in solving competition problems raised by the mergers. The evidence shows that competition authorities should be careful with drastic structural remedies that can typically not be reversed, especially in abuse of dominance cases.

5.1 Remedies in Europe

In 2005 the competition authorities in Europe published a detailed ex-post assessment of merger remedies between 1996 and 2000.²⁹ This study, the first of its kind in Europe, reviewed

²⁷ Competition Commission South Africa (2010): Sasol Agrees to Divestiture in the Fertiliser Case. Media Release, 05 July 2010.

²⁸ Competition Tribunal Case number 45/CR/May06

²⁹ DG Competition (2005) Merger Remedies Study. European Commission, October 2005.

96 remedies adopted in 40 merger decisions, which represented 44% of the decisions involving remedies during the five-year period covered. Each market affected by the merger was taken to be the unit of observation. The analysis relied mainly on qualitative information, based on interviews and questionnaires submitted to merging parties, asset buyers and monitoring trustees. The objective was to verify how the implementation of remedies had taken place.

One of the interesting aspects of the study was that the usual distinction between structural and behavioural remedies was set aside. Instead, a wider and more detailed classification was adopted.³⁰ Table 5 demonstrates the use of these remedies between 1996 and 2000. The transfer of a market position was the most frequent, and was split further into three sub-categories according to the extent of the divestiture. An exit from a joint venture required the parties to relinquish control over a business by transferring it to a suitable purchaser. Commitments to grant access were measures that provided market participants with access to key assets, including access to infrastructure or technical platforms, access to technology via licences or other IPRs, and termination of exclusive vertical agreements. Broadly speaking, however, this taxonomy can be aligned with the structural/behavioural dichotomy. **Transferring a market position and exit from a joint venture are divestitures and therefore structural remedies. Granting access is a behavioural remedy and changes in long-term exclusive licences of IPRs can be thought of as quasi-structural remedies.**

Table 5: EC Remedy Types (1996 to 2000)

	Population	Sample
Transfer a market position of which:	56%	65%
<i>Stand-alone Business</i>	15%	17%
<i>Extensive Carve-out</i>	34%	40%
<i>Package of assets</i>	7%	8%
Exit from JV	17%	15%
Long-term Exclusive Licences	11%	8%
Grant Access	10%	9%
Others	6%	3%

Source: Davies and Lyons (2007)

³⁰ Papandropolous, P. and Tajana, A. (2006): The Merger Remedies Study - In Divestiture we Trust? European Competition Law Review (443-454).

Table 6 summarises the remedies according to the type of competition concern. **It illustrates that horizontal concerns were addressed by all types of remedies, but most commonly by divestitures, while access remedies were more frequently applied for vertical concerns.** Interestingly, access remedies were sometimes used for horizontal merger cases. Despite the European authorities' faith in the greater effectiveness of structural remedies, the study revealed their limitations.

Table 7 provides an overview of the number of effective, partially effective and ineffective remedies. The results suggested that divestitures were only effective in 56% and partially effective in 25% of cases, where effectiveness meant that the divested entity remained a viable and effective competitor in three to five years after the divestment. Access remedies proved to be even less effective, as they properly addressed the concern in only two of the five cases.

Table 6: Remedy by Type of Competition Concern

Type of Concern	Type of Remedy				Total
	Transfer Market Position	Exit From JV	Access	Other	
Horizontal	58	13	3	3	77
Horizontal and Vertical	10	1	2	0	13
Vertical	0	1	5	0	6
Total	68	15	10	3	96

Source: Davies and Lyons (2007)

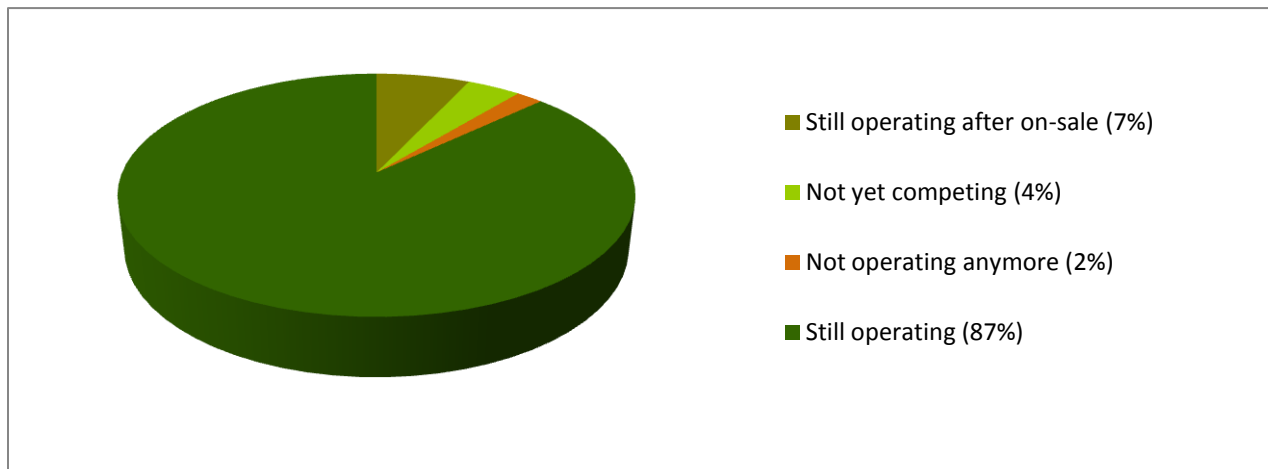
Table 7: Overview of Effective, Partially Effective and Ineffective Remedies, by Type

Type	Transfer		Exit from JV		Access	
	#	%	#	%	#	%
Effective	36	56	10	77	2	40
Partially Effective	16	25	1	8	2	40
Ineffective	4	6	0	0	1	20
Unclear	8	13	2	15	0	0
Total	64	100	13	100	5	100

Source: Davies and Lyons (2007)

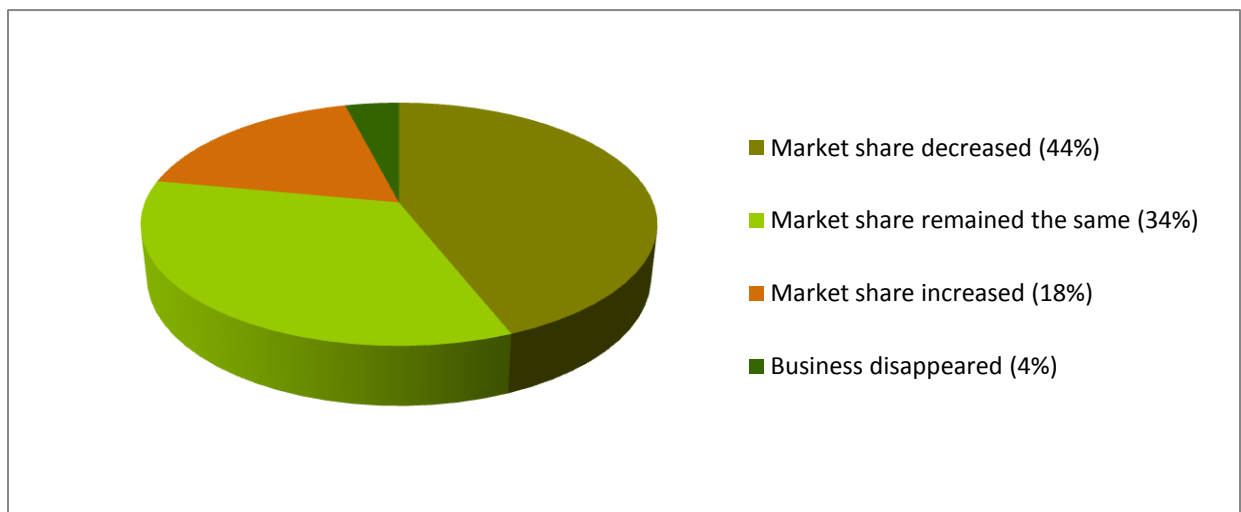
Figure 4 illustrates the percentage of divested firms that were still operating in three to five years after the divestiture. However the fact that a divested firm is still operating in the market does not necessarily mean that the purchaser is effectively competing. The evolution of market shares, illustrated in Figure 5, provides an additional indication of the remedy's likely effectiveness. Thus, although 87% of divested firms were still operating, the market share of these firms decreased in 44% of cases, sometimes losing more than 50%, while remaining stable in 34% of cases.

Figure 4: Percentage of Divested Firms Still Operating



Source: Papandropolous and Tajana (2006)

Figure 5: Evolution of Divested Firms' Market Shares

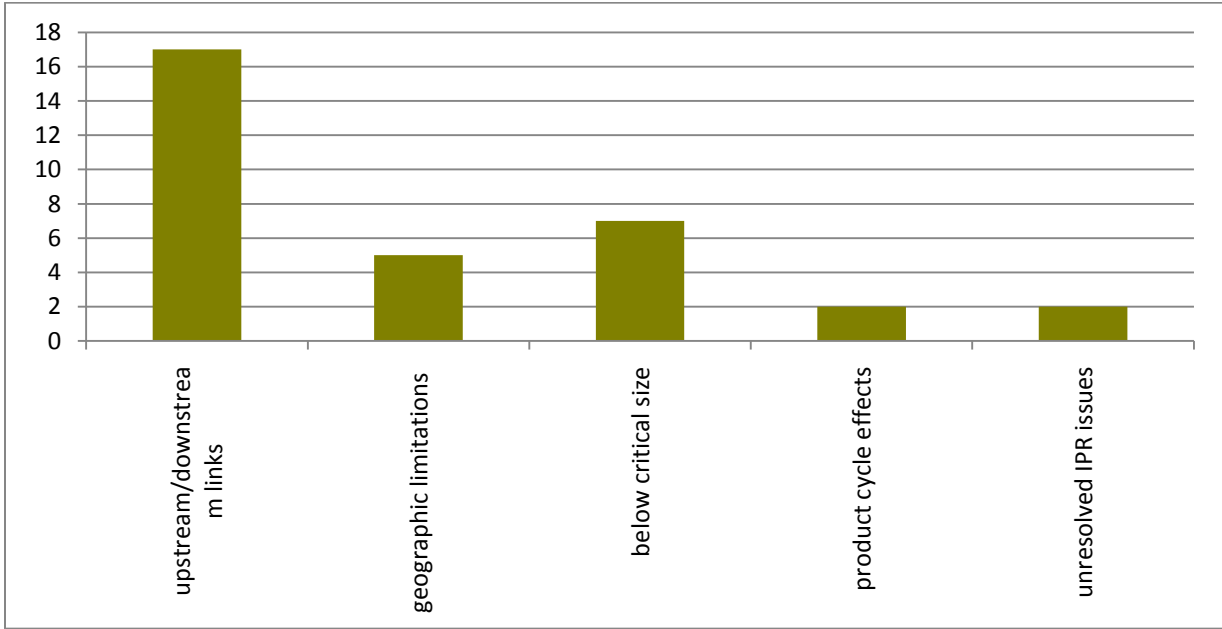


Source: Papandropolous and Tajana (2006)

The most serious danger to the effectiveness of a divestiture was that its scope was inadequately defined. Indeed, serious problems were identified in 79% of divestiture cases.

Figure 6 illustrates the number and types of problems with the scope of divested firms. One of the sources of inadequacy was the omission of key assets necessary for the viability of the business. Parties were not obliged to disclose information on which parts of the business were essential for its viability. This allowed for opportunistic behaviour by the seller, with the buyer frequently ending up in *ex post* hold-ups. An additional difficulty was that the Commission usually defined the scope of the business to be divested solely by referring to the overlap in the parties' market activities. Too much focus was put on market structure and market shares, while insufficient consideration was given to the ability of the divested business to restore effective competition. The neglected factors necessary for the viability of the divested business include upstream/downstream links between the divested and the retained business, critical size of the divestiture package and the role of IPRs.

Figure 6: Number and Type of Serious Issues in the Scope of Divested Firms



Source: Papandropolous and Tajana (2006)

Issues regarding the suitability of the purchaser were raised in 48% of the divestitures analysed. In at least 11 cases the choice of an inadequate purchaser led to a partially ineffective remedy. The study confirmed the existence of purchaser risk, and acknowledged that small firms may encounter more difficulties to compete when acquiring a new business. There have been cases in which parties, instead of maintaining the viability of the business, have actively contributed to its degradation.

Three divestitures designed to remedy vertical competition concerns were also analysed. The study confirmed that the same inadequacies occurred in the design of remedies for vertical concerns. Two of the remedies failed to ensure the viability of the divested business by not taking upstream/downstream dependence and critical size criteria into account.

The view that structural remedies are superior fades when it appears that firms are likely to divest their least performing physical assets and that the appropriate human resources and know-how associated with physical assets are not necessarily identifiable by third parties. Thus there is a real risk that competitors will end up owning worthless assets. More generally, behavioural remedies appear more appropriate in the context of vertical mergers. In sectors where companies are subject to industry-specific regulation, behavioural remedies may also be favoured. Papandropolous and Tajana (2006)³¹ argue that the Commission should adopt an approach that ties the preferred remedy to the type of merger and industry in question.

Yet, since the beginning of 2007, cases in which the Commission have accepted behavioural remedies have remained rare and limited to access obligations to key infrastructure or technology and other types of vertical foreclosure scenarios. From 1 January through 30 June 2009, the Commission cleared seven mergers subject to remedies in Phase I, all of which involved substantial divestitures. At the same time, the Commission cleared two mergers subject to remedies in Phase II. Despite its general resistance to behavioural remedies, the Commission has demanded more transitional behavioural remedies in support of permanent structural measures.

Table 8 illustrates that this type of mixed remedy outnumbered purely structural remedies in 2008 and the first half of 2009. In fact, since the implementation of the new notice on merger

³¹ Papandropolous, P. and Tajana, A. (2006): The Merger Remedies Study - In Divestiture we Trust? European Competition Law Review (443-454).

remedies, the vast majority of conditional merger clearances have been subject to a mix of behavioural and structural remedies.³²

Table 8: Number of Mergers Cleared

Reference Period	2007	2008	2009 (30 June)	New Notice
Total Number of Decisions	22	24	9	13
Phase I	18	19	7	10
Phase II	4	5	2	3
Type of Remedy				
Structural (Divestiture)	14	9	2	2
Behavioural (Incl. Access Obligations)	4	3	0	1
Mixed (Divestiture with Behavioural)	9	14	4	8

Source: Papanikolaou and Rosenthal (2010)

5.2 Remedies in the USA

In an earlier study Crandall (2001)³³ looked at all of the remedies in abuse of dominance cases in the US between 1890 and 1996. The range of remedies examined included everything from divestiture, to mandated access and licensing of intellectual property rights. Of the 336 monopolisation cases he examined, 95 cases involved structural remedies, almost 30%, and 63 of those involved divestiture. However, Crandall found that these remedies were rarely effective in increasing competition, raising total output or lowering prices. Often the market in question was evolving to a more competitive position anyway. He found that in some cases structural remedies were actually counter-productive, since they sacrificed economies of scale and efficiencies, and consequently removed important cost savings from the market that would

³² Papanikolaou, A. and Rosenthal, M. (2010): Merger Efficiencies and Remedies. Global Competition Review: The European Antitrust Review 2010.

³³ Crandall, R. W. (2001): The Failure of Structural Remedies in Sherman Act Monopolization Cases. Oregon Law Review, Vol. 109, No. 116.

otherwise have been passed on to consumers. In cases involving mandated access, rivals may be forced to link up to the dominant firm's costs base, which could mean that the market effectively cartelised.

Nevertheless, Crandall does not appear to be against structural remedies in principle. Instead, he suggested that their limitations could offer some guidelines. First, if a structural remedy is to be contemplated, it should be clear that there is an anti-competitive problem to remedy and that the market itself is not going to correct this problem in the medium term. Second, structural remedies should not sacrifice net efficiencies. In other words, any sacrifice to static short-run efficiencies from the loss of economies of scale should be clearly outweighed by the likely benefits to dynamic efficiencies. Third, a structural remedy should not itself harm competition. Lastly, structural remedies should not be used simply because a behavioural remedy is difficult to monitor, since that would be creating a remedy to respond to regulatory failure rather than to a market problem.³⁴

6 Conclusions

Internationally most competition authorities prefer to impose structural remedies instead of behavioural remedies. But it is important to remember that both types have advantages and disadvantages that have to be taken into account. Although behavioural remedies are more difficult to monitor and enforce, this should not be the reason for imposing a structural remedy instead. We examined the remedies that have been used in South African merger cases and found that behavioural remedies have been used more frequently. However, structural remedies seem to be preferred when horizontal concerns are present, while behavioural remedies are generally preferred when vertical concerns are present. The evidence from the EU and the USA showed that authorities should be cautious when imposing structural remedies, since they have not been very successful. Competition authorities have increasingly employed a mixture of both structural and behavioural measures in order to combine their strengths. This was also the case in the recent Sasol agreement. What is certain is that there is definitely a need for more analysis of the appropriateness and effectiveness of remedies imposed in South Africa.

³⁴ Marsden, P. (2008): Article 82 and Structural Remedies After Microsoft. International Competition Forum.

Appendix

Table 9: Comparison of the outcomes of small intermediate and large merger reviews

Merger Review Cases	2001/02	2002/03	2003/04	2004/05	2005/06	2006/07	2007/08
Notified	220	211	284	311	408	413	513
Small	5	68	6	6	11	2	13
Intermediate	169	138	213	233	300	317	394
Large	46	5	65	72	97	94	106
Finalised	225	202	278	301	394	410	480
Small	4	68	5	7	9	4	10
Intermediate	179	129	214	229	284	315	370
Large	42	5	59	65	101	91	100
Approved	213	194	262	285	376	386	455
Small	4	62	4	5	8	4	4
Intermediate	170	128	205	222	277	305	354
Large	39	4	53	58	91	77	97
Approved with Conditions	0	5	7	9	7	7	11
Small	0	2	1	0	0	0	1
Intermediate	0	2	4	2	7	3	9
Large	0	1	2	7	0	4	1
Prohibited	2	1	1	4	4	4	3
Small	0	1	0	1	1	0	0
Intermediate	1	0	0	3	0	0	2
Large	1	0	1	0	3	4	1
Withdrawn/no jurisdiction	10	7	8	3	8	13	11
Small	0	6	0	1	1	0	5
Intermediate	8	0	5	2	5	7	5
Large	2	1	3	0	2	6	1

Source: Competition Commission Annual Reports – Various Issues

Table 10: Conditionally approved mergers between 1 April 2008 and 31 March 2009

Parties	Anti-competitive effect of merger	Commission's intervention	Outcome
Scaw South Africa/ Ozz Industries	High market shares and high barriers to entry	Behavioural condition: supply conditions were set	Tribunal imposed the condition
Investec Bank Limited/ RJ Southey	Structural links between the parties which could facilitate collusion	Structural condition: divestiture of businesses	Tribunal imposed the condition
Media 24 Limited/ UpperCase Media	Removal of an effective competitor	Structural condition: divestiture of businesses	Tribunal imposed the condition
Zungu Investment Company/ African Vanguard Resources	Coordinated effects	Behavioural condition: appointment of director condition was set	Tribunal imposed the condition
Alstom Electrical SA/ Current Electric	Foreclosure concerns	Behavioural condition: supply conditions were set	Parties accepted the Commission's conditions
Eveready/ House of York	Employments issues	Behavioural condition: supply conditions were set	Parties accepted the Commission's conditions
WPP Group Plc/ Taylor Nelson Sofres Plc	High barriers and removal of effective competitor	Structural condition: divestiture of businesses	Parties accepted the Commission's conditions

Source: Competition Commission South Africa - Annual Report 2008/09

Table 11: Conditionally approved mergers between 1 April 2007 and 31 March 2008

Parties	Anti-competitive effect of merger	Commission's intervention	Outcome
Large Mergers			
Bayne Investments (PG Bison) / Clidet 451 (Woodchem) Particle boards and resins	Transaction would have led to the vertically integrated firm having the ability and incentive to raise their rivals' costs	Behavioural condition: merging parties required to supply resins to rivals for 10 years	Tribunal imposed the condition for 8 years
Intermediate Mergers			
Akzo Nobel / Imperial Chemical Industries Decorative coatings	Structural links between the parties would facilitate collusion in the decorative coatings market	Behavioural condition: no cross-directorships allowed	Tribunal imposed the condition
Yara International ASA / Kemira GrowHow Oyj Fertilisers	Transaction would create one major supplier of urea which might make it difficult for smaller companies to source urea	Behavioural condition: merging parties required to supply small firms	Tribunal imposed the condition
Circuit Breaker Industries / Moeller Electric Electrical circuit breakers	High market shares, high entry barriers and lack of customers' countervailing power would lead to decreased competition, which could allow the merging parties to change discounts and discontinue Moeller products	Behavioural condition: merged entity must keep any discount, rebates and bundling structures and strategies of Circuit Breaker Industries and Moeller products separate	Parties accepted Commission's conditions
Afrimat / Malan Holdings Trust Aggregate stone products	In the Port Elizabeth region, the merger would lead to the removal of an effective competitor and could facilitate collusion	Structural condition: divestiture of Afrimat's quarry in Port Elizabeth region	Parties accepted Commission's conditions
Pearson / Harcourt Education International Publishing books	High market shares and high barriers to entry would lead to firm having the ability and incentive to increase book prices	Behavioural condition: no integration of business functions of the publishers without notification to Commission	Parties accepted Commission's conditions
York Timber Organisation / Global Forest Products / South African Plywood Saw logs	Effective competitors exist post merger. But many small firms already lack access to a regular and sustainable source of log supply, which reduces their competitive effectiveness to the merging parties	Behavioural condition: no further acquisitions by York for 5 years without prior consent by the Tribunal	Parties accepted Commission's conditions
Weir Group (Overseas Holdings) / Warman Africa Slurry pumps	High market share and removal of an effective competitor	Behavioural condition: the parties will make South Africa an export hub, create efficiencies and jobs	Parties accepted Commission's conditions
Wheelabrator Allevard SA / Thor Foundry Metallic abrasives	Merging parties held 90% market share, increased likelihood of coordinated conduct post-merger	Behavioural condition: price cap, increase in production and sponsor entrance of a BEE firm	Parties accepted Commission's conditions
Schering-Plough Corporation / Organon BioSciences Pharmaceuticals	The market in animal healthcare products was highly concentrated and subject to high barriers to entry	Structural condition: divestiture of licence for one product, and cancellation of contracts with various rivals subject to Commission approval	Parties accepted Commission's conditions
Small mergers			
Med-e-Mass / Mastermed Medical software	Transaction resulted in technological barriers preventing or hindering customers' ability to switch to other software products	Behavioural condition: for 3 years all technological or electronic processes required to switch are made available to customers	Parties accepted Commission's conditions

Source: Competition Commission South Africa - Annual Report 2007/08

Table 12: Conditionally approved mergers between 1 April 2006 and 31 March 2007

Parties	Anti-competitive effect of merger	Commission's intervention	Outcome
Barmac/ATC and Abedare Cables Scrap metal	Structural links between the parties and a competitor would facilitate collusion	Structural conditions: sale of shares and resignation of director also sitting on board of competitor to prevent coordinated effects	Tribunal imposed the structural condition
Lafarge Roofing/Kulu Group Concrete roof tiles	Monopoly power in Western Cape would allow parties to increase prices in the construction industry	Structural condition: divestiture of business in Western Cape	Tribunal imposed structural and behavioural conditions. The behavioural condition relates to securing access to supply of cement inputs to competitors of the merging parties in the KZN market
Afrox/Refrigeration Co. Refrigerant gas distribution	Parties' combined post-merger market share and position in the market would allow them to increase prices. Large players would reduce from 3 to 2	Structural condition: divestiture of assets to ensure pre-merger competitive conditions remain	Tribunal imposed structural conditions
Metso/Aker Kvaerner Paper manufacturing equipment	Parties were the only identified effective competitors. The merged entity would be able to increase prices	Structural condition: divestiture of assets	Parties accepted Commission's conditions
Johnson & Johnson/Pfi zer Pharmaceuticals	Merged entity would have market power in certain markets and be able to increase prices	Structural condition: divestiture of assets	Parties accepted Commission's conditions

Source: Competition Commission South Africa - Annual Report 2006/07

Table 13: Conditionally approved mergers between 1 April 2005 and 31 March 2006

Parties	Anti-competitive effect of merger	Commission's intervention	Outcome
Large Mergers			
Tiger Brands / the Canning Business of Ashton Canning Company Food Canning	Effect on employment	Recommended a condition to the Tribunal limiting the number of seasonal workers not employed and the creation of a training fund	Tribunal approved the transaction subject to similar conditions, but limited the use of the training fund to the affected seasonal workers only
Lonmin / Southern Platinum	Effect on employment	Condition to address employment concerns: <i>moratoria</i> on retrenchments and re-training of affected employees	Accepted by parties
Chemical Services / Chemiphos	Anti-competitive effects	Recommended a behavioural condition to the Tribunal to ensure access to product at reasonable prices	Behavioural condition imposed by the Tribunal
Media 24 / Lexshell	Anti-competitive effects	Recommended a structural condition to Tribunal	Accepted by parties
AP Moller-Maersk / Royal P&O Nedlloyd NV Containerised Shipping Services	Anti-competitive effects	Structural condition recommended: divestiture of PONL's assets, rights and obligations	Tribunal imposed structural conditions
Intermediate Mergers			
Reatile Mining / Mondi Imbani	Negative effect on employment	Condition to address employment concerns: <i>moratoria</i> on retrenchments and re-training of affected employees	Accepted by parties
4284488 Canada Inc / Creo Incorporated	Possible negative effect on employment	Condition to address employment concerns: <i>moratoria</i> on retrenchments	Accepted by parties
Intelsat Holdings / PanAmSat Holding Corporation Communications Services	Anti-competitive effects	Behavioural conditions: price increases capped at inflationary adjustments	Accepted by parties
Natal Portland Cement / National Asphalt	Anti-competitive effects	Behavioural conditions ensuring equal access to product for customers	Accepted by parties
Lufthansa / Swiss Air	Anti-competitive effects	Structural conditions ensuring that new entries are possible	Accepted by parties
Novartis Deutschland GmbH / Hexal AG Pharmaceutical	Anti-competitive effects	Structural condition: divestiture of assets	Accepted by parties

Source: Source: Competition Commission South Africa - Annual Report 2005/06