

REMEDIES FOR COORDINATED EFFECTS UNDER THE EUROPEAN UNION MERGER REGULATION

Nicolas PETIT*

Introduction

This article discusses remedies in coordinated effects cases under the European Union Merger Regulation (“the EUMR”).¹ A remedy is a modification of a proposed concentration which the merging parties (“the parties”) commit to implementing with a view to dispelling the European Commission’s (“the Commission”) “*serious doubts*” regarding their purported transaction (and ultimately benefit from a clearance decision). In coordinated effects cases (also labeled “*collective dominance*” cases), parties offer remedies to allay the Commission’s concerns that their merger will likely create or strengthen a situation of tacit collusion. Tacit collusion typically occurs on oligopolistic markets, when rival firms coordinate their commercial conduct *ex post* merger (e.g., prices, output, innovation, etc.) without however entering into a formal anticompetitive agreement.²

The current legal framework provides little, if no, guidance on such remedies. The Commission’s Notice on Remedies acceptable under the EUMR (“the Remedies Guidelines”) does not address specifically the issue of remedies in coordinated effects cases.³ It endorses a holistic approach of remedies which focuses on the “*types*” of acceptable remedy. However, it says nothing of the nexus between on the one hand, the theory of harm on which the Commission relies when it suspects coordinated effects and, on the other hand the remedies which the parties can craft to alleviate the Commission’s concerns. Similarly, the Commission’s Guidelines on the assessment of horizontal mergers (“the Horizontal Guidelines”) are silent on the issue of remedies.⁴

* Professor, University of Liège (ULg), Belgium. Director of the Global Competition Law Centre (GCLC) College of Europe. Director of the Brussels School of Competition (BSC). Nicolas.petit@ulg.ac.be. The author is grateful to David Henry, Paul Hofer, Nicholas Levy and Patrick Smith for their helpful comments.

¹ See Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, p. 1-22.

² Or a concerted practice, as the case may be. See §22b) of the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5-18.

³ See Commission Notice on remedies acceptable under the Council Regulation 139/2004 and under Commission Regulation 802/2004, OJ C 267, 22.10.2008, p. 1-27.

⁴ See Guidelines on the assessment of horizontal mergers, *supra*.

This dearth of guidance is all the more unfortunate in light of the dramatic consequences which parties to a merger may face, should they fail to offer adequate remedies.⁵ To date, out of 20 prohibition decisions the Commission vetoed – directly or indirectly – 4 mergers on grounds of collective dominance (*i.e.*, *Gencor/Lonrho*, *Airtours/First Choice*, *Alcan/Pechiney* and *SCA/Metsä Tissue*).⁶ In 3 of those cases, the parties had offered remedies which the Commission deemed insufficient.

The present article seeks to offer guidance on this issue. To this end, it is divided in three parts. Part I reviews the remedies applied to date by the Commission in coordinated effects cases (I). Part II discusses the substantive standard against which such remedies are evaluated (II). Part III underlines a number of practical difficulties which arise when merging parties devise remedies to allay the Commission's coordinated effects concerns (III).

I. A Review of the Remedies Applied in Coordinated Effects Cases

A. Statistical Overview and Proposed Typology of Remedies

Since the entry into force of the EUMR, the Commission has applied remedies in order to resolve coordinated effects concerns in 34 decisions (see Table 1 below).⁷ 20 of those decisions are Article 6(1)b) decisions (Phase I conditional clearance). 14 of those decisions are Article 8(2) decisions (Phase II conditional clearance). In 29 of those decisions, the Commission suspected the emergence of a dominant duopoly.

⁵ This unfortunate state of affairs is aggravated by the paucity of literature on this issue. This, in turn, may be due to the fact that the number of coordinated cases has been erroneously perceived as limited, as opposed to unilateral effects cases.

⁶ See the following Commission Decisions: IV/M.619, *Gencor/Lonrho*, 24/04/1996; IV/M.1524, *Airtours/First Choice*, 22/09/1999; COMP/M.2097, *SCA/Metsä Tissue*, 31/01/2001. See Commission Press Release, "Alcan abandons its plans to acquire Pechiney to avoid the prospect of a decision by the European Commission to block the merger", IP/00/258, 14/03/2000.

⁷ This table is based on a research performed on 5 July 2010 with the "Merger Advanced Search" tool available on DG COMP's website at <http://ec.europa.eu/competition>. We have first compiled the decisions adopted pursuant to Article 6(2) (conditional clearance in Phase I) and Article 8(2) (conditional clearance in Phase II) of Regulations 4064/89 and 139/2004 since the entry into force of the EUMR. Subsequently, we have performed a search in each of the retrieved decisions (published in English and French) using the following keywords as proxys for tacit collusion, duopoly, coordinated effects and collective dominance: tacit, collusion, coordinated, coordination, collective, duopoly, parallel. This table leaves aside coordinated effects cases where the Commission subjected the implementation of the transaction to conditions but not in relation primarily to tacit collusion concerns (see Commission Decisions, *Arjowiggins/M-real Zanders Reflex*; *Kronospan/Constantia*; *Toshiba/Westinghouse*; *Axalto/Gemplus*; *Fortis/ABN Amro Assets*; *IPIC/MAN Ferrostaal AG*). Moreover, this table does not mention cases where the parties spontaneously amended their transaction during the review process to eliminate from the outset any possible Commission concerns. See, for instance, Commission Decision, COMP M.2569, *Interbrew/Beck's*, 26.10.2001. All those decisions can be found on DG COMP's website.

Table I – Commission Decisions involving Remedies for Coordinated Effects Concerns

Case	Decision Date	Type of Procedure	Anticipated Market Structure	Type(s) of Remedy
Nestlé/Perrier	22/07/1992	Phase II	Duopoly	Type I and III
Kali und Salz	14/12/1993	Phase II	Duopoly	Type II
ABB/Daimler-Benz	18/12/1995	Phase II	Duopoly	Type I
Allianz/AGF	08/05/1998	Phase I	Duopoly	Type II
Danish Crowne/Vestjyke Slagterier	08/03/1999	Phase II	Duopoly	Type I, II and III
Axa/GRE	08/04/1999	Phase I	Duopoly	Type II
Rohm and Haas/Morton	18/04/1999	Phase I	Duopoly	Type II
Vodafone/Airtouch	21/05/1999	Phase I	Duopoly	Type II
Exxon/Mobil	29/09/1999	Phase II	4-3 (and more)	Type II
New Holland/Case	28/10/1999	Phase I	Duopoly	Type I
AKZO Nobel/Hoechst Roussel	22/11/1999	Phase I	4-3	Type I
Air Liquide/BOC	18/01/2000	Phase II	Duopoly	Type I
Alcan/Alusuisse	14/03/2000	Phase II	Duopoly	Type I
VEBA/VIAG	13/06/2000	Phase II	Duopoly	Type II
REXAM(PLM)/American National Can	19/07/2000	Phase I	Duopoly	Type I
France Télécom/Orange	11/08/2000	Phase I	Duopoly	Type II
Grupo Villar Mir/EnBW/Hidroeléctrica del cantabrico	26/09/2001	Phase II	Duopoly	Type I
Norbanken/Postgirot	08/11/2001	Phase I	Duopoly	Type II
Shell/DEA	20/12/2001	Phase II	Duopoly	Type I and II
BP/E.ON	20/12/2001	Phase II	Duopoly	Type I and II
EnBW/EDP/Cajastur/Hidrocantabrico	19/03/2002	Phase I	Duopoly	Type I
Solvay/Montedison-Ausimont	09/04/2002	Phase I	Duopoly	Type I
Bayer/Aventis Crop Science	17/04/2002	Phase II	Duopoly	Type I
Wallenius Lines AB/Wilhelmsen ASA/Hyundai Merchant Marine	22/11/2002	Phase I	3	Type II
Air Liquide/Messer Targets	16/04/2004	Phase I	Duopoly	Type I
AREVA/Urenco/ETC	06/10/2004	Phase II	Duopoly	Type II
AP Moller-Maersk AS/P&O Nedlloyd (PONL)	29/07/2005	Phase I	[...]	Type II
Amer/Salomon	12/10/2005	Phase I	Duopoly	Type II
TUI/CP Ship	12/10/2005	Phase I	[...]	Type II
Linde/BOC	06/06/2006	Phase I	Duopoly	Type I and II
Antalis/MAP	24/10/2007	Phase I	Duopoly	Type I
Lesaffre/GBI UK	11/07/2008	Phase I	Duopoly	Type I
ABF/GBI Business	23/09/2008	Phase II	Duopoly	Type I
RWE/Essent	23/06/2009	Phase I	Duopoly	Type I

On close examination, three types of remedy have been offered, and accepted, in those cases.⁸ First, the parties have proposed, and the Commission has approved, remedies creating/restoring “*competitive forces*” external to the oligopoly (hereafter, “type I remedies”).⁹ Those remedies typically purport to establish a new entrant or to strengthen an existing competitor. In so doing, they restore – albeit in a different form – the *pre-merger* market structure. To date, type I remedies have been applied in 20 decisions. In the majority of those cases, the remedy consisted in a divestiture (of a stand-alone business,¹⁰ a production facility,¹¹ and/or of other assets (intellectual property rights,¹² supply contracts,¹³ etc.)). By contrast, quasi-structural commitments (to transfer technology,¹⁴ to increase production capacity,¹⁵ or to supply on non exclusive terms)¹⁶ to the benefit of a new entrant have been less frequent.

Second, the parties have proposed, and the Commission has approved, remedies seeking to sever structural links within the oligopoly (hereafter, “type II remedies”). In brief, those remedies intend to eradicate collaborative opportunities between incumbent oligopolists. To date, type II remedies have been applied in 18 decisions. The concept of a structural link covers a whole raft of measures (*e.g.*, shareholdings in rival companies,¹⁷ joint ventures,¹⁸ interlocking directorates, commercial links,¹⁹ bylaws of a professional organisation,²⁰ etc.).²¹ A vast majority of those remedies involve the withdrawal of joint ventures.

⁸ In this study, the notion of remedies is interpreted from an outcome-oriented perspective. Accordingly, a remedy is the economic solution sought by the parties to resolve the Commission’s concerns. Pursuant to this definition, a remedy can cover several “*commitments*”. For instance, a remedy that seeks to facilitate the entry of a new player on the market will often entail two distinct commitments (for instance, a commitment from the parties (i) to divest production capacity to a suitable purchaser; and (ii) to license all the intellectual property rights necessary to the operation of the divested business on FRAND terms).

⁹ The concept of “*competitive force*” is borrowed from DG Competition, European Commission, Merger Remedies Study, Public version, October 2005, available at <http://ec.europa.eu/comm/competition>.

¹⁰ See, for instance, Commission Decisions, *ABB/Daimler Benz*; *Antalis-MAP*; *RWE/Essent*.

¹¹ See, for instance, Commission Decision, *REXAM (PLM)/American National Can*; *Lesaffre/GBI UK*.

¹² See, for instance, Commission Decision, *Nestlé/Perrier*.

¹³ See, for instance, Commission Decision, *Linde/BOC*.

¹⁴ See, for instance, Commission Decision, *AKZO Nobel/Hoechst Roussel*.

¹⁵ See, for instance, Commission Decision, *EnBW/EDP/Cajastur/Hidrocantabrico*.

¹⁶ See, for instance, Commission Decision, *Rohm and Haas/Morton*.

¹⁷ See, for instance, Commission Decision, *Vodafone/Airtouch*.

¹⁸ See, for instance, Commission Decisions, *Rohm and Haas/Morton*; *France Telecom/Orange*; *Kali und Salz*; *VEBA/VIAG*; *Solvay/Montedison-Ausimont*.

¹⁹ See, for instance, Commission Decisions, *AP Moller-Maersk AS/P&O Nedlloyd (PONL)*; *Wallenius Lines AB/Wilhelmsen ASA/Hyundai Merchant Marine*; *Amer/Salomon*; *TUI/CP Ships*.

²⁰ See, for instance, Commission Decision, *Danish Crowne/Vestjyke Slagterier*.

²¹ Not unlike a type I remedy, a type II remedy may also entail a divestiture. However, its primary purpose is not to restore the *pre-merger* market structure through the entry of a new market player on the relevant market.

Third, the parties have proposed, and the Commission has approved, remedies seeking to eliminate “*facilitating practices*”, *i.e.* business conduct which facilitates tacit collusion (hereafter, “type III remedies”). To date, type III remedies have only been applied in 2 decisions. In *Nestlé/Perrier*, the market players disseminated information on sales volumes through a trade association.²² This practice increased market transparency and, in turn, contributed to risks of coordinated effects. Nestlé thus committed to stop disclosing fresh data on sales volumes to any professional association. Similarly, in *Danish Crowne/Vestjyke Slagterier*, the Commission found that the main Danish slaughterhouses were members of a professional association which implemented a weekly price quotation system. This system led to a convergence in the price of live pigs purchased to farmers. The parties proposed to abolish any commitment to follow a common price quotation.²³ The Commission considered that this remedy would entitle slaughterhouses to compete on the sourcing of raw material to farmers.

B. Discussion

1. Type I v. Type II Remedies?

Unlike in other areas of merger control where divestitures creating/restoring a new competitive force are the most popular remedies (*e.g.*, in unilateral effects cases), our sample of Commission decisions shows that coordinated effects cases are often resolved with other types of remedy.²⁴ More specifically, the Commission’s decisional practice demonstrates that type II remedies are almost as frequent as type I remedies in coordinated effects cases. A further breakdown even suggests that amongst 19 Phase I decisions, more cases (10) were resolved with type II remedies than with type I remedies (9).²⁵

Those findings deserve, however, a number of qualifications. First, in Phase II cases, type II remedies are not as prevalent as in Phase I cases.²⁶ Amongst 11 Phase II decisions, 7 cases

²² See Commission Decision, *Nestlé/Perrier*, §136.

²³ See Commission Decision, *Danish Crowne/Vestjyke Slagterier*, §215.

²⁴ At §17, the Remedies Guidelines declare that “*Divestiture commitments are the best way to eliminate horizontal concerns*”. Further, at §22, they provide that “*Where a proposed concentration threatens to significantly impede effective competition the most effective way to maintain effective competition, apart from prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture by the merging parties*”.

²⁵ This breakdown covers 19 Phase I decisions (and not the 20 Phase I decisions mentioned in the table). It excludes the Commission Decision in *Linde/BOC*, which gave rise to the submission of both a type I and a type II remedy.

²⁶ This breakdown covers 11 Phase II decisions (and not the 14 Phase II decisions mentioned in the table). It excludes the three following Commission Decisions, which applied cumulatively type I, II and/or III remedies): *Danish Crowne/Vestjyke Slagterier*; *Shell/DEA*; *BP/E.ON*.

were resolved with type I remedies, and 4 cases were resolved with Type II remedies. This seems to suggest that in cases involving *serious* competition concerns, the statistically safest solution for the parties is to offer a type I remedy.

Second, the 5 latest Commission decisions in coordinated effects cases involve type I remedies. Moreover, in at least 5 other cases, the Commission found that divestitures submitted to correct non-coordinated or vertical anticompetitive concerns, had the welcome effect of removing ancillary coordinated effects concerns.²⁷

Overall, there does not seem to be a specific Commission approach to remedies in coordinated effects cases, which would hinge on a marginalization of type I remedies as compared to type II remedies. This notwithstanding, the above sample of decisions shows that in coordinated effects cases, the Commission may be more open to discuss commitments other than type I remedies. In particular, the Commission may accept type II remedies when divestitures are unworkable.²⁸

2. Type I and/or Type II Remedies?

The decisional practice of the Commission suggests that type I and type II remedies are often alternative in nature. In 30 coordinated effects cases out of 34, the Commission concerns were resolved by either a type I remedy or a type II remedy.

Moreover, amongst the 4 decisions in which a type I and a type II remedy were applied cumulatively, the remedies often sought to defuse distinct collective dominance concerns.²⁹ In *Linde/BOC*, for instance, the type I and II remedies addressed two different coordinated effects scenarios (geographical market sharing and output limitation), on distinct markets (industrial gases in the EEA and national markets for helium).

3. The Ancillary Nature of Type III Remedies

²⁷ For recent cases involving non-coordinated effects, see the following Commission Decisions: *Arjowiggins/M-real Zanders Reflex*; *Kronospan/Constantia*; *Toshiba/Westinghouse*; *Axalto/Gemplus*; *Fortis/ABN Amro Assets*. For recent cases involving vertical effects, see Commission Decision, *IPIC/MAN Ferrostaal AG*.

²⁸ Because, for instance, no suitable purchaser, “*independent*” and “*unconnected*” to the parties can be identified. See §48 of the Remedies Guidelines, *supra*. A Commission official acknowledged in this regard that it is often difficult to find a new entrant willing to penetrate an entrenched oligopoly. See C. RAKOVSKY, “Remedies: A Few Lessons from Recent Experience” in *EC Merger Control – 10 Years On* in International Bar Association Conference Volume, 2000. Yet, this finding also applies to unilateral effects cases, in particular in situations of individual dominance. Moreover, divestitures to actual competitors may be somewhat problematic, because incumbent oligopolists often share structural (capital), economic (distribution and supply agreements) or personal links.

²⁹ See Commission Decisions, *Danish Crowne/Vestjyke Slagterier*; *Shell/DEA*; *BP/E.ON*; *Linde/BOC*.

By contrast to type I and type II remedies, type III remedies do not constitute stand-alone remedies in collective dominance cases. In other words, type III remedies are, in and of themselves, insufficient to rule out a coordinated effects theory of harm. A careful reading of the Commission's decisions in *Nestlé/Perrier* and *Danish Crowne/Vestjyke Slagterier* indeed reveals that the type III remedy submitted by the parties played only an ancillary role, in supporting the effectiveness of other type I and II remedies. Put differently, the core of the Commission's concerns was primarily addressed through type I and II remedies.

In addition, the above data set demonstrates that type III remedies are clearly marginal in collective dominance cases.³⁰ There is thus no want of merit to any possible contention that the Commission has relied on the EUMR to clean-up oligopolies from anticompetitive, facilitating practices (and possibly intrusively regulate them).³¹ A possible explanation for the marginalization of type III remedies in merger proceedings hinges on the fact that the Commission can rely on other provisions (*i.e.*, Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU")) to eliminate facilitating practices. This being said, the applicability of Articles 101 and in particular, 102 TFEU to unilateral facilitating practices (*e.g.*, price signalling or the publication of price lists) remains a disputed issue.³²

Rather, a more plausible explanation is that, from an administrative standpoint, a type III remedy entails heavy Commission *ex post* monitoring, by contrast to a type I or II remedy.³³ Moreover, from an economic standpoint, the Commission often considers that facilitating practices have a merely supportive – but not decisive – influence on the emergence of tacit collusion.³⁴ Finally, from a legal standpoint, the admissibility of a type III remedy is open to dispute. The EUMR and the Remedies Guidelines only refer to "*modifications of*

³⁰ In several collective dominance cases, the Commission found that the parties' own practices contributed to a risk of coordinated effects. For instance, in *Solvay/Montedison-Ausimont*, the Commission stressed that "*Solvay maintains a general price list on its catalogue*" and that "*this g[ave] a degree of price transparency*". See Commission Decision, *Solvay/Montedison-Ausimont*, §47

³¹ See, for other cases involving the publication of sensitive commercial information which increased market transparency, the following Commission Decisions: *Exxon/Mobil*; *Gencor/Lonrho*; *Shell/DEA*.

³² See C. A. HOLT and D. T. SCHEFFMAN, "Facilitating Practices: The Effects of Advance Notice and Best-Price Policies", (1987) 18(2) *RAND Journal of Economics*, 187. Those practices are pervasive in a number of oligopolistic markets such as airlines, cigarettes, etc.

³³ See Remedies Guidelines, §14: "*The Commission may reject such remedies in particular on the grounds that the implementation of the remedies cannot be effectively monitored and that the lack of effective monitoring diminishes, or even eliminates, the effect of the commitments proposed*". See also §69: "*promises by the parties to abstain from certain commercial behaviour (e.g. bundling products), will generally not eliminate the competition concerns resulting from horizontal overlaps. In any case, it may be difficult to achieve the required degree of effectiveness of such a remedy due to the absence of effective monitoring of its implementation*"

³⁴ Their elimination might thus not, as such, be sufficient to dispel its concerns.

concentrations".³⁵ Those texts thus seem to preclude other modifications, such as commitments from the parties to alter their market practices.³⁶

II. The Elusive Substantive Standard for the Assessment of Remedies in Coordinated Effects Cases

Neither the EUMR, nor the various set of Commission Guidelines define the substantive conditions which proposed remedies must fulfil to eradicate coordinated effects concerns.³⁷ The Remedies Guidelines simply state that to be acceptable, the commitments must eliminate the competition concerns "*entirely*", and have to be "*comprehensive and effective*".³⁸

The case-law of the Commission and of the EU Courts provides little additional guidance. In most decisions rendered to date, the link between the Commission's theory of harm and the proposed remedies is not expressly articulated. Of course, the Commission systematically evaluates proposed remedies in merger proceedings. Yet, and due possibly to time constraints, most of the discussion of proposed remedies seems in practice to revolve around implementation and commercial issues (attractiveness and viability of the divested business, for instance). By contrast, the ability of a remedy to effectively address the Commission's coordinated effects concerns garners less attention. In recent cases, the Commission simply (i) sought primarily to evaluate whether the proposed remedy would remove the overlap and restore the pre-transaction market structure; and (ii) referred to the satisfactory outcomes of its market test.³⁹

This perfunctory and structural approach to the evaluation of proposed remedies is not in line with the substantive standard devised by the EU Courts in *Airtours plc. v. Commission* (and refined by the Commission in its Horizontal Guidelines) to establish coordinated effects.⁴⁰ Pursuant to this standard, *ex post* merger coordination is likely and sustainable if the following cumulative conditions are satisfied: (i) it is relatively simple to reach a common

³⁵ See Remedies Guidelines, §2.

³⁶ See, on this issue, C.J. COOK and C.S. KERSE, *EC Merger Control*, 4th Ed., Thomson/Sweet&Maxwell, London, 2005, §8-001, p.283.

³⁷ See M. MOTTA, M. POLO and H. VASCONCELOS, "Merger Remedies in the European Union: An Overview" in F. LEVÊQUE and H. SHELANSKI (Eds), *Merger Remedies in American and European Competition Law*, Edward Elgar, Cheltenham, 2003, pp.114-115.

³⁸ See Remedies Guidelines, §9.

³⁹ See the Commission's latest decisions on coordinated effects (under the section devoted to the "*effectiveness*" of the proposed remedy), *Rewe/Essent*, §461; *Lesaffre/GBI UK*, §57; *Antalis/MAP*, §93; *ABF/GBI UK*, §§384 and 389. To the exception of the latest decision, only a few paragraphs are devoted to the assessment of the effectiveness of the commitments.

⁴⁰ See CFI, Case T-342/99, *Airtours plc. v. Commission*, [2002] ECR II-2585.

understanding on the terms of coordination; (ii) the coordinating firms are able to monitor to a sufficient degree whether the terms of coordination are being adhered to; (iii) there is some form of credible deterrent mechanism that can be activated if deviation is detected; and (iv) the reactions of outsiders (current and future competitors not participating in the coordination, as well as customers), should not jeopardise the coordinated course of action.⁴¹

Against this background, the murky standard for the assessment of remedies may prompt the parties to act with excessive caution when negotiating with the Commission. Faced with possible Phase II proceedings (or with a prohibition decision), parties could offer disproportionate remedies. More precisely, parties may offer demanding type I remedies which restore the pre-merger market structure, whilst a less intrusive remedy focusing on – and defusing – one only of the four *Airtours* conditions could have been equally effective (e.g., a type III remedy whereby the parties would cease to publish price lists; extend the duration of contracts to limit retaliation opportunities; rescind “*meet and release*” contractual clauses, etc.).

Of course, this is not to say that type I remedies are wholly inappropriate. Those remedies often offer a clear-cut solution to a risk of tacit collusion in cutting across several, if not all of the, *Airtours* conditions.⁴² This being said, a clear-cut remedy is not necessarily proportionate, and from a legal standpoint, the Commission may violate EU law in conditioning the implementation of a proposed merger to a disproportionate remedy.⁴³

As a matter of principle, the Commission should thus (i) clarify the substantive standard for the assessment of remedies in coordinated effects cases; and (ii) systematically apply it.⁴⁴ In our opinion, this standard ought logically to be based on the four *Airtours* conditions. Accordingly, a remedy should be deemed acceptable in so far that it addresses one, or more, of those conditions. In addition to ensuring that remedies are not disproportionate, this proposed evolution of the case-law would grant the parties more leeway when devising remedies. To dispel the Commission’s coordinated effects concerns, the parties could indeed

⁴¹ See Horizontal Guidelines, §41.

⁴² See Commission Decision, *Rewe/Essent*, §464.

⁴³ See Recital 30 of the EUMR which states that “*commitments should be proportionate to the competition problem*”. From a basic economic perspective, the fact that the Commission could use its powers under the EUMR to improve market outcomes (rather than to prevent alterations of market performance) might lead parties abandon efficient mergers, in particular if other competition agencies follow a similar approach. See on this H. VASCONCELOS, “Efficiency Gains and Structural Remedies in Merger Control”, (2005b), mimeo. J. FARRELL, “Negotiation and Merger Remedies: Some Problems” in F. LEVÊQUE and H. SHELANSKI (Eds), *op.cit.*

⁴⁴ See M. MOTTA et al., “Merger Remedies in the European Union: An Overview”, *op. cit.*, pp.114-115.

offer to address one (or more) of the four *Airtours* conditions, and not necessarily the particular change brought about by their proposed transaction. Furthermore, a clarification of the standard for the assessment of remedies would usher in increased judicial accountability, in entitling the EU courts to scrutinize more accurately the Commission's assessment of proposed remedies.

This suggested approach may however prove unworkable in cases where a merger satisfies *all* the *Airtours* conditions by a significant margin (*i.e.*, *ex post* merger, the market is very transparent; detection is immediate; punishment is extremely easy, etc.).⁴⁵ In such cases, the calibration of a remedy focusing on one of the *Airtours* conditions will indeed be extremely complex. Unless the proposed remedy renders one of those conditions clearly and wholly ineffectual, it will be very difficult to prove that it makes tacit collusion unlikely and unsustainable.⁴⁶ A preferable approach might thus be to follow a structural solution (*e.g.*, a type I remedy) which addresses the four *Airtours* conditions.⁴⁷

III. Practical Obstacles to the Submission of Adequate Remedies in Coordinated Effects Cases

The parties' ability to assuage the Commission's coordinated effects concerns through the submission of type I, II and III remedies might be hampered by several practical obstacles. As far as type I remedies are concerned, the parties may face "*effectiveness*" issues, when the proposed remedy gives rise to adverse economic effects (A). As far as type II remedies are concerned, the parties may face "*enforcement*" issues, when the implementation of the proposed remedy involves third parties (B). As far as type III remedies are concerned, the parties may face "*scope*" issues, when the predicted tacitly collusive outcome stems from exogenous market features (C).

A. Effectiveness issues

⁴⁵ I am grateful to P. HOFER for bringing this point to my attention. In the same vein, Commission officials view tacit collusion as a matter of degree. See A. AMELIO, P. ASBO, M. de la MANO, R. MAXIMIANO and V. PORUBSKY, "ABF/GBI Business: coordinated effects baked again", *Competition Policy Newsletter*, Number 1 – 2009, 91, p.93.

⁴⁶ In its empirical *ex post* study on remedies, the Commission noted that a commitment to remove transparency had been well implemented, but that "its effectiveness in removing the competition concern was only partial". See European Commission, Merger Remedies Study, *supra*, p.122.

⁴⁷ This problem may, however, arise because the *ex ante* market situation is already conducive to tacit collusion. In such settings, the Commission is faced with a situation of "*strengthening*" of an already existing collective dominant position. One can thus legitimately question whether the Commission can apply type I remedies which go beyond the pre-merger market configuration.

The conventional – and increasingly pervasive – perception that type I remedies bring an effective response to coordinated effects concerns rests on a static analytical framework.⁴⁸ It disregards two adverse economic side-effects that may arise following the implementation of a type I remedy. The Commission has occasionally acknowledged those problems.

1. The Cooperative Effect of Type I Remedies

As explained previously, type I remedies typically seek to create a “*newcomer*” on the market or to strengthen a previously marginalized competitor through a divestiture.⁴⁹ In this regard, commercial discussions between the merging parties and the prospective buyer may well exacerbate the risks of future market coordination.⁵⁰ In the context of commercial negotiations, the seller may secretly encourage the buyer to join a tacitly collusive course of conduct.⁵¹ Moreover, because selling a business inevitably entails the disclosure of information on a number of sensitive issues (business plan, costs, prices, profitability, sales, investments, etc.), the divestiture process may usher in a *pro*-collusive market environment. Finally, in those cases where the parties fail to identify a suitable purchaser – so that the divestiture is implemented by a trustee at no minimum price –⁵² the parties’ incentives to extract supra-competitive profits through *ex post* merger coordination might be strengthened.⁵³

2. The Symmetry-Enhancing Effect of Type I Remedies

⁴⁸ For an illustration of the conventional view, see Commission Decision, *Rewe/Essent*, §464 where the Commission declares that the proposed type I remedy brings a “*clear-cut*” solution to its concerns. See also our analysis above, which shows that type I remedies are increasingly popular in merger proceedings.

⁴⁹ See, for an illustration of a remedy seeking to create a “*newcomer*”, Commission Decision, *ABF/GBI Business*. For a long time now, the Commission has rightly recognized that in coordinated effects cases, this option was preferable to the strengthening of a marginalized rival. See XXIXth Annual Report on Competition Policy, 1999, §176. This is because a divestiture to an existing oligopolist may actually maintain the scope for collusion on the market.

⁵⁰ See European Commission, Merger Remedies Study, *supra*, note 275, p.103, where the Commission noted that: “*In certain markets, an incumbent operator as purchaser could entail the risk of co-ordination among equally strong competitors. This may have been the situation in remedy r39, where specific industry experience was required from a purchaser and subsequently a large customer was approved. It transpired from interviews in the Study that, after the divestiture, the purchaser competed only half-heartedly with the merged entity. In fact, the purchaser may have simply replaced one of the two players in the pre-merger (collusive) duopoly*”.

⁵¹ See J. FARRELL, “Negotiation and Merger Remedies: Some Problems”, in F. LEVÊQUE and H. SHELANSKI (Eds), *op.cit.*, p.95: “[a]gencies should beware of over-trusting the buyer of the divested assets. A strong argument can be made that the buyer is a team-mate not of the agency but of the merging parties”. This risk is all the more plausible because those commercial negotiations fall beyond the scope of the Commission’s oversight capabilities (they are implemented by the parties and trustees). Of course, the Commission is aware of this risk, and has insisted that “*the trustee should carry out its mission under the supervision of the Commission and is to be considered as the Commission’s ‘eyes and ears*””. See Remedies Guidelines, §118.

⁵² See Remedies Guidelines, §121.

⁵³ The parties will indeed try to compensate the losses accruing from the low valuation of the mandatorily divested business.

A type I remedy is also inappropriate in the context of mergers leading to the creation of an asymmetric oligopoly, where the predicted collusive outcome takes the form of price leadership.⁵⁴ Whilst the type I remedy will reduce the merging parties' market share – and thus discard risks of oligopolistic price leadership – it may concomitantly increase the overall symmetry of market shares within the entire oligopoly. In such cases, a divestiture to a third party will simply change the nature of collusion on the market.

This risk is far from hypothetical. In *Alcan/Pechiney*, the Commission found that the merged entity and VAW (the second largest producer of aluminium flat-rolled products) would occupy a duopolistic dominant position. The Commission observed that thanks to its prevailing position within the duopoly, the merged entity would be able to enrol VAW into a tacitly collusive scheme. To alleviate the Commission's concerns, the parties offered to divest part of their aluminium rolling capacity. The Commission rejected the proposed remedy. Anticipating that VAW would likely acquire the divested capacity, the Commission predicted that the remedy would maintain a duopolistic dominant position, in creating “*two players with symmetrical market positions*”.⁵⁵

B. Enforcement Issues

The Commission's decisional practice demonstrates that a type II remedy often constitutes an alternative to a type I remedy. Yet, in practice, a type II remedy may be unavailable to the parties, simply because it cannot be enforced. The enforcement of a type II remedy may indeed be contingent on the goodwill of the third parties with whom the merging parties share links. To take but an example of this, parties offering to withdraw from a joint venture (through a divestiture, for instance) may need to obtain prior approval from their contractual partner.⁵⁶ In such a case, the Commission will typically reject the parties' proposed remedy. In *Alcan/Pechiney*, the Commission refused Alcan's proposed undertakings to amend its existing joint venture agreements with VAW. Amongst other things, the Commission noted

⁵⁴ In such a setting, one firm – the one with high market shares – “leads” the market (*i.e.*, it sets the prices), and the others follow.

⁵⁵ See Commission Press Release, IP/00/258, *supra*. In addition, should the divested capacity be acquired by another aluminium producer, this “*would increase the already extremely high concentration of the European aluminium industry*”.

⁵⁶ Faced with a situation of this kind, the Commission is powerless. Its enforcement powers under the EUMR can exclusively target on the “*undertaking concerned*”, *i.e.* those participating in the concentration. The Commission thus cannot request third parties to assist the merging parties in severing commercial, industrial, and other financial links. See Article 8(2) of the EUMR, *supra*.

that those commitments were not “*self-executing*”.⁵⁷ The remedy could not “*be performed by Alcan alone but [could] only be implemented with the prior agreement of VAW*”.

Moreover, because the implementation of the merger might be conditional on the attendant execution of the proposed type II remedy, third parties may be in a position to thwart the merging parties’ plans through a range of subtle tactics. The Commission’s 2005 Merger Remedies Study found empirical evidence that third parties could “*prevent or impede the implementation of remedies that affect them*” through lengthy and drawn-out negotiations with joint venture partners, requests for excessive financial compensation, initiation of litigation, refusals to disclose confidential know how to a purchaser, etc.⁵⁸

C. Scope Issues

It was suggested earlier that type III remedies may be more proportionate than other remedies. This notwithstanding, a primary shortcoming of such remedies is that their scope is relatively narrow. Hence, their expected corrective effect is likely, at best, to be limited.

For obvious reasons, the merging parties can only commit to eliminate their *own* facilitating practices. By contrast, the parties have no bearing on similar rival oligopolists’ practices which may nonetheless facilitate tacit collusion. The Commission’s decisional practice is replete with illustrations of market-wide facilitating practices. In *Gencor/Lonrho*, for instance, the fact that *all* the market participants traded platinum on metal exchanges made the market highly transparent in terms of prices.⁵⁹ Similarly, in *New Holland/Case*, the Commission’s concerns were also partly based on the fact that the various manufacturers active on the market published recommended price lists.⁶⁰ More recently, in *Antalis-MAP*, the Commission observed that a general “*habit of merchants in the UK to give their important customers a printed individualised price list could also enable the rival merchants to obtain transparency via the customers*”.⁶¹

In addition, type III remedies fail to catch a slew of other facilitating practices, which are not under the merging parties’ control. First, the parties can do little to change consumer behaviour that facilitates tacit collusion (*e.g.*, multi-sourcing strategies which increase

⁵⁷ See Commission Press Release, IP/00/258, *supra*.

⁵⁸ See European Commission, Merger Remedies Study, *supra*, pp.46-47.

⁵⁹ See Commission Decision, *Gencor/Lonrho*, §144.

⁶⁰ See Commission Decision, *New Holland/Case*, §45

⁶¹ See Commission Decision, *Antalis-MAP*, §67.

transparency or short duration contracts which render retaliation timely).⁶² Second, type III remedies cannot remove facilitating practices initiated by other industry stakeholders (*e.g.*, sales agents, professional associations, journalists, etc.).⁶³ Third, type III remedies do not cover facilitating practices that originate from public institutions. A random walk through the Commission's decisional practice of the Commission suggests however that those practices are pervasive.⁶⁴ In *Exxon/Mobil*, the Commission noted that the decisions of the OPEC provided a focal point to petrol producers which, in turn, nurtured a risk of collective dominance.⁶⁵ Likewise, in *Linde/BOC*, the Commission found that the US Bureau for Land Management published on its website monthly statistics which enhanced market transparency, in providing aggregate inventory data and individualized company information on the periodic sales of crude helium.⁶⁶

D. Final Remarks

On closer analysis, the three practical issues that were just discussed are not remedy-specific. Besides *effectiveness* issues, a type I remedy may also give rise to *enforcement* issues. In *Grupo Villar Mir/EnBW/Hidroeléctrica del cantabrico*, for instance, the parties had committed to increase interconnection capacity between France and Spain. The commitment sought to assist the entry of outside competitive forces on the Spanish market (through exports from France). This type I remedy, however, was contingent on the cooperation of the French State, which controlled the energy network through its ownership of EDF/RTE.⁶⁷

⁶² See Commission Decision *ABF/GBI Business*, §193. In this case, the fact that customers “shop[ped] around and ask[ed] for new offers” was deemed to increase market transparency, and in turn to facilitate tacit collusion. See also Commission Decision, *REXAM(PLM)/American National Can*. The Commission noted at §24 that “The frequency and regularity of the bids, coupled with the feedback that suppliers receive from tendering customers, enhances the degree of transparency of the market”.

⁶³ In *Gencor/Lonrho*, companies external to the parties published regularly statistics on production and sales, thereby strengthening market transparency. See Commission Decision, *Gencor/Lonrho*, §145. In *Shell/DEA*, the Commission found that price reporting agencies published reference prices for spot and longer term sales on a quarterly to weekly basis. See Commission Decision, *Shell/DEA*, §145. Those prices closely reflected the result of individual negotiations and applied to the majority of the contracts. Likewise, in *ABF/GBI Business*, the Commission observed that the bakery industry was covered by a large number of journals, as a result of what prices were very transparent. See Commission Decision, *ABF/GBI Business*, §193

⁶⁴ In the context of its assessment of collective dominance in *Vodafone/Airtouch*, the Commission stressed that entry was restricted by the need to obtain a license from the national regulator (which was itself restricted by the limited amount of available radio frequencies). See Commission Decision, *Vodafone/Airtouch*, §25.

⁶⁵ See Commission Decision, *Exxon/Mobil*, §33. In addition, the Luxembourg government had set a mandatory cap on the retail price for oil, which also facilitated tacit coordination. See §§635-640.

⁶⁶ See Commission Decision, *Linde/BOC*, §185.

⁶⁷ See Commission Decision, *Grupo Villar Mir/EnBW/Hidroeléctrica del cantabrico*, §59. In this particular case, the Commission overcame this enforcement issue by considering that EDF/RTE constituted an “*undertaking*”

Similarly, besides *enforcement* issues, a type II remedy may give rise to *effectiveness* issues on markets where pure tacit collusion remains possible.⁶⁸ In this variant, the parties' commitment to sever structural links will not rule out the Commission's concerns, but will simply make coordination a little less easy.

Finally, the *scope* issues described in relation to type III remedies can equally arise in the context of type II remedies. For instance, the structural links within the oligopoly may take the form of a network of bilateral agreements to which the parties do not necessarily participate.

Conclusion

The present article has attempted to lift the veil of uncertainty that surrounds the issue of remedies in coordinated effects cases under the EUMR. It has shown in particular that the Commission has developed (with some limited exceptions however) a strong decisional record on this issue.

With this in mind, the fact that EU merger law provides scant formal guidance on this issue is somewhat puzzling. This unfortunate state of affairs is further compounded by the fact that the EU courts have, to date, only rarely scrutinized merger remedies in collective dominance cases.⁶⁹

Not unlike in other provinces of EU competition law, the Commission may simply be reluctant to adopt formal guidelines on this issue, on pain of reducing its margin of maneuver in individual cases. If valid, this assumption rests on a short-sighted calculation. In the arena of merger control, time is of the essence and administrative resources are scarce. The Commission has thus a lot to gain in providing accurate *ex ante* guidance to firms and their counsels, if only to prompt merging parties to offer timely and suitable remedies.

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concerned" within the meaning of Article 8(2) of the EUMR. It was therefore susceptible of assuming commitments.

⁶⁸ See J. TEMPLE LANG, "Oligopolies and Joint Dominance in Community Antitrust Law" in B. HAWK (Ed.), (2000) *Fordham Corporate Law Institute*, 269, p.347.

⁶⁹ For an exception, see however CFI, T-102/96, *Gencor v. Commission*, [1999] ECR II-753.