

# THE REMEDY IS THE DIFFICULT PART ...

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# THE REMEDY IS THE DIFFICULT PART ...

## INTRODUCTORY THOUGHTS

- ◉ REMEDIES MAY BE AN IMPORTANT PART OF BOTH ANTITRUST CASES (ARTICLES 101 AND 102 TFEU) AND MERGER CASES
- ◉ IN PRACTICE MUCH MORE IS KNOWN ABOUT MERGER REMEDIES THAN ANTITRUST REMEDIES
- ◉ BUT IN PRINCIPLE THE SAME CONSIDERATIONS APPLY IN BOTH SITUATIONS
- ◉ MY COMMENTS RELATE BOTH TO ANTITRUST AND TO MERGER CONTROL

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## INTRODUCTORY THOUGHTS

- IN SOME CASES THE REMEDY IS SIMPLE
  - STOP THE CARTEL
  - DON'T ENTER INTO ANYTHING LIKE THIS ARRANGEMENT AGAIN
  - AND A RECIDIVIST UPLIFT OF THE FINE WILL BE APPLIED TO YOU IF YOU DO INFRINGE COMPETITION LAW AGAIN
- THERE HAVE BEEN TWO RECIDIVIST UPLIFTS IN THE EU RECENTLY: *SLOVAK TELEKOM* (GENERAL COURT, DECEMBER 2018, UPHOLDING AN EARLIER COMMISSION DECISION) AND *MASTERCARD* (JANUARY 2019)

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## INTRODUCTORY THOUGHTS

- IN OTHER CASES THE REMEDY MAY BE EXTREMELY COMPLEX. FOR EXAMPLE:
  - MULTI-MEDIA MERGERS: FOR EXAMPLE SUPPLY OF CONTENT ON FRAND TERMS; ACCESS TO PLATFORMS FOR THIRD PARTY CONTENT
  - *MICROSOFT (1)*: WINDOWS WITHOUT A MEDIA PLAYER (AT THE SAME PRICE AS WITH A MEDIA PLAYER)
    - BUT NOTE THE IMPORTANT PRECEDENT IN LAW THAT THE *MICROSOFT* CASE ESTABLISHED: INCLUSION OF THE MEDIA PLAYER WAS AN ABUSE
  - *MICROSOFT (II)*: DISPLAY OF COMPETING BROWSERS
  - *GOOGLE SHOPPING*: DISPLAY OF COMPETING SHOPPING TOOLS

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## INTRODUCTORY THOUGHTS

- AND IN SOME CASES THE REMEDY MAY BE EXTREME
  - IN THE US, THINK OF *STANDARD OIL* AND *AT&T*
  - IN THE UK A COMPETITION INVESTIGATION OF *BRITISH GAS* LED TO IT VOLUNTARILY ENDING ITS VERTICAL INTEGRATION
  - ALSO IN THE UK A COMPETITION INVESTIGATION OF *BRITISH AIRPORTS AUTHORITY* LED TO IT HAVING TO DIVEST ITSELF OF GATWICK AND STANSTEAD AIRPORTS IN LONDON, RETAINING HEATHROW
  - QUERY: COULD COMPETITION LAW INTERVENTION LEAD TO ANY OF THE MAJOR DIGITAL PLATFORMS BEING BROKEN UP?

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## INTRODUCTORY THOUGHTS

- A COMPETITION AUTHORITY NEEDS TO ASK AT AN EARLY STAGE OF AN INVESTIGATION ‘IS THERE A SENSIBLE EXIT STRATEGY FOR THIS CASE?’
- BUSINESSES UNDER INVESTIGATION NEED TO ASK AT AN EARLY STAGE ‘IS THERE A REMEDY THAT CAN GET US OUT OF THIS SITUATION?’
- IT MAY BE NECESSARY TO HAVE DIFFERENT TEAMS TO RUN THE INVESTIGATION AND TO CONSIDER REMEDIES

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## LEGAL INSTRUMENTS IN THE EU

- ◉ REGULATION 1/2004 FOR ANTITRUST INFRINGEMENTS:
  - INTERIM MEASURES - ARTICLE 8
  - INFRINGEMENT DECISIONS - ARTICLE 7, INCLUDING **CARTEL SETTLEMENTS** AND **COOPERATION CASES**
  - COMMITMENT DECISIONS - ARTICLE 9
  - FINES - ARTICLE 23
  - PERIODIC PENALTY PAYMENTS - ARTICLE 24
- ◉ EUMR 139/2004 FOR MERGERS
  - ARTICLE 6(2): PHASE 1 COMMITMENTS
  - ARTICLE 8(2): PHASE II COMMITMENTS

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## STATISTICS

- ANTITRUST - 2016
  - INTERIM MEASURES 0
  - INFRINGEMENT DECISIONS 7
    - CARTEL SETTLEMENTS 6
    - COOPERATION 1
  - COMMITMENT DECISIONS 3
- ANTITRUST - 2017
  - INTERIM MEASURES 0
  - INFRINGEMENT DECISIONS 10
    - CARTEL SETTLEMENTS 4
    - COOPERATION 3
  - COMMITMENTS DECISIONS 1



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## STATISTICS

- ANTITRUST - 2018
  - INTERIM MEASURES 0
  - INFRINGEMENT DECISIONS 12
    - CARTEL SETTLEMENTS 3
    - COOPERATION 5
  - COMMITMENT DECISIONS 3
- ANTITRUST - 2019
  - INTERIM MEASURES ? (BROADCOM)
  - INFRINGEMENT DECISIONS 8
    - CARTEL SETTLEMENTS 2
    - COOPERATION 3
  - COMMITMENTS DECISIONS 6

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## STATISTICS

- ◉ THOSE STATISTICS SHOW THAT SINCE 2016 THERE HAVE BEEN 50 ANTITRUST DECISIONS OF WHICH:
  - 10 WERE FULLY CONTENTIOUS (AND ALL OF THEM WERE APPEALED)
  - 15 WERE CARTEL SETTLEMENTS
  - 12 WERE COOPERATION CASES
  - 13 WERE COMMITMENT DECISIONS
- ◉ NOTE THAT COOPERATION CASES SOMETIMES INVOLVE SIGNIFICANT AGREED REMEDIES (ARA FORECLOSURE: DIVESTITURE; ABINBEV: LABELLING)

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## STATISTICS

### ◎ MERGERS - 2017

■ NOTIFICATIONS	380
■ PHASE I UNCONDITIONAL CLEARANCE	353
■ PHASE I CONDITIONAL CLEARANCE	18
■ PHASE II UNCONDITIONAL CLEARANCE	0
■ PHASE II CONDITIONAL CLEARANCE	2
■ PROHIBITION	2

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## STATISTICS

### ◎ MERGERS - 2018

■ NOTIFICATIONS	414
■ PHASE I UNCONDITIONAL CLEARANCE	366
■ PHASE I CONDITIONAL CLEARANCE	17
■ PHASE II UNCONDITIONAL CLEARANCE	4
■ PHASE II CONDITIONAL CLEARANCE	6
■ PROHIBITION	0

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## STATISTICS

### ◎ MERGERS - ALL TIME

■ NOTIFICATIONS	7443
■ PHASE I UNCONDITIONAL CLEARANCE	6587
■ PHASE I CONDITIONAL CLEARANCE	316
■ PHASE II UNCONDITIONAL CLEARANCE	62
■ PHASE II CONDITIONAL CLEARANCE	131
■ PROHIBITION	30

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## STRUCTURAL V BEHAVIOURAL

- ◉ IN **MERGER** CASES STRUCTURAL REMEDIES ARE INVARIABLY PREFERABLE TO BEHAVIOURAL ONES
- ◉ NOTE THE IMPORTANCE OF FINDING A 'SUITABLE PURCHASER' IN DIVESTITURE CASES
- ◉ A STRUCTURAL REMEDY FOR AN **ANTITRUST** INFRINGEMENT IS MUCH MORE CONTROVERSIAL
- ◉ THE POWER DOES EXPLICITLY EXIST IN ARTICLE 7 OF REGULATION 1/2004, BUT HAS NEVER BEEN USED (THERE WAS NO EXPLICIT POWER IN REGULATION 17/62)

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## STRUCTURAL V BEHAVIOURAL

- ◉ BEHAVIOURAL REMEDIES ARE OBVIOUSLY MORE PROBLEMATIC THAN STRUCTURAL ONES, IN PARTICULAR BECAUSE OF THE PROBLEM OF MONITORING THEM
- ◉ HOWEVER ‘NEVER SAY NEVER’: SOMETIMES A BEHAVIOURAL REMEDY MAY BE APPROPRIATE
- ◉ THE LEGITIMACY OF BEHAVIOURAL REMEDIES WAS RECOGNISED BY THE GENERAL COURT IN *COMMISSION V TETRA LAVAL*, 2005

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## STRUCTURAL V BEHAVIOURAL

- CAN A PRICE CAP BE A REMEDY?
  - SEE THE CURRENT COMMISSION INVESTIGATION OF THE 'EXCESSIVE' PRICES OF *ASPEN PHARMACEUTICALS*: IF THE CURRENT PRICE IS EXCESSIVE
    - WHAT PRICE IS NOT EXCESSIVE?
    - WHO DECIDES THIS: ASPEN OR THE COMMISSION?
    - HOW WILL THAT PRICE BE MONITORED?
    - DOES THE COMMISSION BECOME A PRICE REGULATOR?
    - NOTE A RECENT MERGER CASE IN THE UK: RAIL SERVICES FROM NORWICH TO ELY, 15 AUGUST 2019 - PRICE CAP FOR RAIL FARES



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## JUDICIAL REVIEW OF REMEDIES

- REMEMBER THAT REMEDIES OFTEN ARE FOLLOWED BY LITIGATION INVOLVING DISAPPOINTED THIRD PARTIES, FOR EXAMPLE:
  - *ALROSA V COMMISSION*, AFTER THE *DE BEERS* COMMITMENTS
  - *MORNINGSTAR V COMMISSION*, AFTER *THOMSON REUTERS*
  - *GROUPE CANAL V COMMISSION*, AFTER *HOLLYWOOD STUDIOS*
- MANY MERGER CASES

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## EX POST ANALYSIS OF REMEDIES

- ◉ REMEDY-SETTING IS A NEVER-ENDING LEARNING PROCESS
- ◉ IT IS IMPORTANT IN PRINCIPLE FOR COMPETITION AUTHORITIES TO LEARN FROM EXPERIENCE, AND TO CONDUCT *EX POST* ANALYSIS
- ◉ SEE THE UK CMA'S 'MERGER REMEDY EVALUATIONS', 18 JUNE 2019, CMA 109
- ◉ AND THE EUROPEAN COMMISSION REPORT OF 2005
- ◉ ALSO FTC, 2017; CANADIAN CB 2011

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THANK YOU FOR YOUR ATTENTION!