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# Vertical mergers

## Behavioural remedies: Rising trend or wishful thinking – Part II

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Part I<sup>1</sup> of this article focused on the theory and practice behind the adoption of behavioural remedies by the European Commission (Commission) and other national competition authorities (NCAs). As noted, while there is considerable divergence among the practices of the competition agencies, the acceptance of behavioural remedies is generally met with reluctance. The ongoing discussions among regulators and practitioners on the future of competition policy and enforcement in light of digitisation and industrial policy considerations has led to greater uncertainty about the potential outcomes of remedies negotiations. On the one hand, the Commission, and recently the French competition authority, are questioning the appropriateness of behavioural remedies which require ongoing monitoring, drawing on the agencies' resources and which can see them act as sector-specific regulators. On the other hand, we have seen more openness among other national agencies, including the Head of the Dutch Authority, who has highlighted the benefits of behavioural remedies.

Against this backdrop, Part II of the article will look in greater detail into recent merger decisions at the national level in Ireland, Austria and the Netherlands, where the relevant NCAs accepted purely behavioural commitments to address the competition concerns arising from vertical mergers. The design of these remedies is quite novel and some of the commitments are quite far reaching but certainly less impactful on business continuity than a clear-cut divestment. We provide an overview of each of these cases, analysing the adopted remedies and commenting on the approach followed by each respective national authority.

### *LN-Gaiety/MCD Productions*

In July 2019, following a lengthy investigation which lasted almost a year from notification, the Irish Competition and Consumer Protection Commission (CCPC) cleared the acquisition by LN-Gaiety (a joint venture between Live Nation Music and Gaiety Investments) of MCD Productions subject to purely behavioural remedies.<sup>2</sup> The merger brought together Ireland's largest ticketing company (Ticketmaster, owned by Live Nation) and operator/manager of some of Dublin's largest live music venues (through Live Nation), with MCD, a major promoter/owner of live music events in Ireland. There was some overlap in the ownership of live music festivals, but the combination was mainly vertical in nature. The vertical concerns raised by the CCPC included the potential for retaliatory or discriminatory action against rival independent live event venues because they choose or contemplate an alternative ticketing services provider, as well as anti-competitive information sharing.<sup>3</sup> There were also concerns that the merger could harm competition in future acquisitions of festivals or festival operators.

With a view to remedying these concerns, the CCPC accepted a series of behavioural commitments proposed by the parties, including:

- to refrain from retaliatory action against independent live event venues (through refusing or threatening to refuse to provide live events, or provide them on less favourable terms than current contracts with MCD) because they choose a ticketing services provider other than Ticketmaster;
- to conduct any contract negotiations or other negotiations relating to the supply of ticketing services to MCD on an "arm's length basis". In this regard, MCD and Ticketmaster are to act independently in their own interest on the basis of normal commercial conditions;
- measures to protect disclosure to MCD of confidential information on identity of artists and upcoming events shared by independent rival promoters with Live Nation as a venue operator; and
- to inform the CCPC in advance of any proposal to acquire control of a live music festival or a live music festival operator which is below the thresholds for mandatory notification to the European Commission and the CCPC, and to notify that transaction to the CCPC if requested.

All commitments apply for a period of five years (the term for commitments pertaining to arm's length dealings between MCD and Ticketmaster was not disclosed). With respect to the monitoring of the above commitments, the parties undertook to certify compliance to the CCPC on an annual basis, to promptly respond to relevant requests for information from the authority and to appoint a director responsible for monitoring compliance in each company.

In addition to the purely behavioural nature of the remedies accepted, the decision departs from the approach traditionally adopted by the Commission and some other national agencies in terms of level of specificity of commitments, as well as the acceptance of self-

policing, albeit with ongoing reports to the authority. The Commission would generally require the appointment of a third-party monitoring trustee but, as discussed in Part I, it has also tended to altogether avoid merger remedies which involve the Commission's regular supervision over an extended period. The solutions accepted by the CCPC have more echoes of a US style approach as demonstrated by the 2010 consent decree entered into by Live Nation in its merger with Ticketmaster and which included a similar prohibition on retaliation by the company against concert venues if they used another ticketing company.<sup>4</sup> Similarly, the requirement to provide prior notification to the authority of certain future acquisitions which are below the thresholds for mandatory filing, might appear intrusive from a European perspective,<sup>5</sup> but has also been a feature of US remedies.<sup>6</sup>

## *CTS Eventim/Barracuda*

In December 2019, in another ticketing/music events case, CTS Eventim, a German company active in ticketing and live entertainment, received conditional clearance from the Austrian Competition Authority for its acquisition of concert and festival organiser Barracuda.<sup>7</sup>

The remedies were intended to address two main concerns, first, that CTS Eventim would no longer offer its ticketing services to third parties, including rival events organisers, at market prices and, second, that CTS Eventim could make it more difficult for rival ticketing services providers to get access to event organisers. In order to address these concerns, the Austrian Competition Authority accepted a number of behavioural remedies, including CTS Eventim's commitments that:

- its Austrian subsidiary will, for a period of five years, offer its ticketing services in their current scope and without discrimination to all rock/pop music event organisers that want to use its services;
- its Austrian subsidiary will refrain from preventing independent advance booking offices in Austria from distributing tickets via third-party systems and from incentivising them to work exclusively with CTS Eventim; and
- JetTicket (part of CTS Eventim) would not prevent Austrian customers from using in parallel third-party ticketing systems and would limit the term of agreements entered into with independent White Label distribution platforms in Austria to two years, or, alternatively, provide for an annual termination right.

CTS Eventim also offered further commitments with a view to securing and promoting the Austrian artist and event organisers scene. In terms of monitoring compliance, the parties agreed to each appoint an independent monitoring trustee, whose duties include reviewing and reporting, on an annual basis, on compliance with the commitments. In circumstances where a trustee decides to investigate alleged breaches of the commitments, the parties undertake to provide it with the necessary support and to work towards an amicable settlement of disputes that might arise from the implementation of the commitments.

Similar to the Irish decision, the commitments accepted in this case are purely behavioural and would also involve regular monitoring, although in the Austrian case, through an independent monitoring trustee.

## *Sanoma Learning/Iddink Group*

In August 2019, for the first time, the Dutch Competition Authority (ACM) cleared a merger subject to behavioural remedies focused on access to data and equal access to a digital platform.<sup>8</sup> Sanoma Learning, which owns Malmberg, a publisher of educational materials (including digital materials), acquired Iddink, a school book distributor that owns the online learning management platform "Magister". Magister provides access to online educational materials for schools and is used by more than half the secondary schools in the Netherlands.<sup>9</sup> The ACM was concerned that, as a result of the merger, Malmberg's competitor publishers may have fewer opportunities to offer their educational materials to schools and students through Magister. They were also concerned that commercially sensitive information of competing publishers could reach Malmberg through Iddink.

To address these issues, the ACM accepted the following two main sets of remedies, one set on access and the other on firewalls:

- Malmberg's publisher competitors will be granted access to the Magister platform under equal conditions as Malmberg. They will also be granted access to Magister's data (needed to improve their products and services) in the same way as Malmberg. The undertakings on access are very specific and include Sanoma providing the same application programming interface (API) to all publishers, including regularly informing publishers about any changes to the API, and meeting demands from publishers for specific information relevant to the use and quality of digital educational materials. Access to the API and to information which is also provided to Malmberg, will be provided on fair, reasonable and non-discriminatory terms and will be monitored by an external accountant.
- To protect competitively sensitive information of rival publishers, Sanoma commits to an "organisational separation" of Malmberg (the publishing arm) and Iddink (which owns the platform) and also has to put in place technical firewalls between the two.

An 11-page document (redacted for confidential information) describes in detail how the remedies are to be implemented. For example, as regards protecting sensitive information of rival publishers, the remedies include technical firewalls, separation of the commercial management and the reporting lines of Malmberg and Iddink, cooling down periods and confidentiality undertakings for

any employees with commercial responsibilities transferred between the two companies and implementation of an internal competition compliance protocol, with sanctions for breach. The external monitoring accountant as well as their remit has to be approved by the ACM and will report into the ACM on compliance on an annual basis. There is also a fast-track dispute resolution procedure for publishers who consider that the parties are not abiding by their commitments. Interestingly, and in contrast to the Irish and Austrian decisions, the commitments are for an indefinite period with the right for Sanoma to apply for change, review or waiver of the commitments.

The ACM considers that the adoption of behavioural remedies in this case was decisive in maintaining the right balance between the potential harm to competition and the efficiencies brought by the merger, mostly focused on innovation in the supply of digital educational materials.

## Conclusions

In Part I of this article, it was observed that the Commission and most NCAs have traditionally preferred structural remedies or quasi-structural remedies over purely behavioural remedies, even in the context of vertical mergers and despite their overall pro-competitive nature. At least part of this reluctance to consider behavioural remedies is influenced by the additional burden it places on the authorities' resources to monitor ongoing compliance. However, the recent national decisions analysed in Part II demonstrate more openness on this front.

European competition policy and enforcement is at a crossroads with some member states advocating an increased role for industrial policy considerations in enforcement actions (for example, through the establishment and fostering of so-called "European Champions" and taking greater account of merger efficiencies), while shocks caused by digitisation and the rise of big tech firms have prompted calls for a broader regulatory function for competition watchdogs. This could prompt a shift towards allowing companies greater scope to achieve efficiencies through vertical mergers while addressing potential adverse effects on competition through behavioural commitments subject to a monitoring-based approach. It will be interesting to see whether the three cases discussed above are an illustration of these emerging trends in the area of merger remedies or if they remain somewhat outliers.

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## ENDNOTES

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1. This article is a follow-up of the feature on behavioural remedies, published in *Competition Law Insight* Volume 19 Issue 1. While the first part looked more generally at theory and practice for behavioural remedies in vertical mergers, the present part analyses recent national cases
2. Irish Competition and Consumer Protection Commission (CCPC) Decision in Case M/18/067 - LN-Gaiety /MCD Productions (July 2019) available at [https://www.ccpc.ie/business/wp-content/uploads/sites/3/2018/08/M.18.067-Phase-2-Determination\\_Public.pdf](https://www.ccpc.ie/business/wp-content/uploads/sites/3/2018/08/M.18.067-Phase-2-Determination_Public.pdf).
3. The CCPC decision on the substance has not yet been published.
4. <https://www.justice.gov/opa/pr/justice-department-will-move-significantly-modify-and-extend-consent-decree-live>.
5. Such a commitment would not be useful for mergers reviewed by the European Commission as they have no merger jurisdiction for transactions below thresholds but a number of national authorities in Europe have jurisdiction below thresholds, or sufficiently flexible thresholds which allows them to review most deals which raise competition concerns, regardless of the scale of revenues generated.
6. For example, final judgment, *United States v Vulcan Materials Co*, Case No 1:17-CV-02761 (DDC 2018), <https://www.justice.gov/atr/case-document/file/1049851/download>.
7. Austrian Competition Authority Commitments Decision in Case BWB/Z.4651 – *Eventim Live GmbH/Barracuda Holding GmbH* (December 2019), available at [https://www.bwb.gv.at/fileadmin/user\\_upload/Downloads/PDFs/Z\\_4651\\_Verpflichtungszusagen.pdf](https://www.bwb.gv.at/fileadmin/user_upload/Downloads/PDFs/Z_4651_Verpflichtungszusagen.pdf).
8. Dutch Authority for Consumer and Markets Decision in the acquisition of Iddink Group by Sanoma Learning (ACM/19/035555) (August 2019).
9. <https://www.acm.nl/en/publications/acm-conditionally-clears-acquisition-iddink-group-sanoma-learning>, <https://www.acm.nl/sites/default/files/documents/2019-09/bsluit-sanoma-learning-iddink-holding.pdf>.