



International
Competition
Network

ICN Merger Working Group

Teleseminar on Merger Remedies

10 February 2010

Welcome by Irish Competition Authority

Teleseminar agenda

I Introduction by MWG Co-Chair

II Panel discussion

- The remedies universe and choice of remedies (OFT / CC)
- Structural remedies (OFT / CC)
 - Presentation on a structural remedy case (FTC)
- Behavioral remedies (OFT / CC)
 - Presentation on a behavioral remedy case (JCRA)

III Panelist reactions to case studies and advice on practical application

IV Q&A with audience

Introduction of Panelists

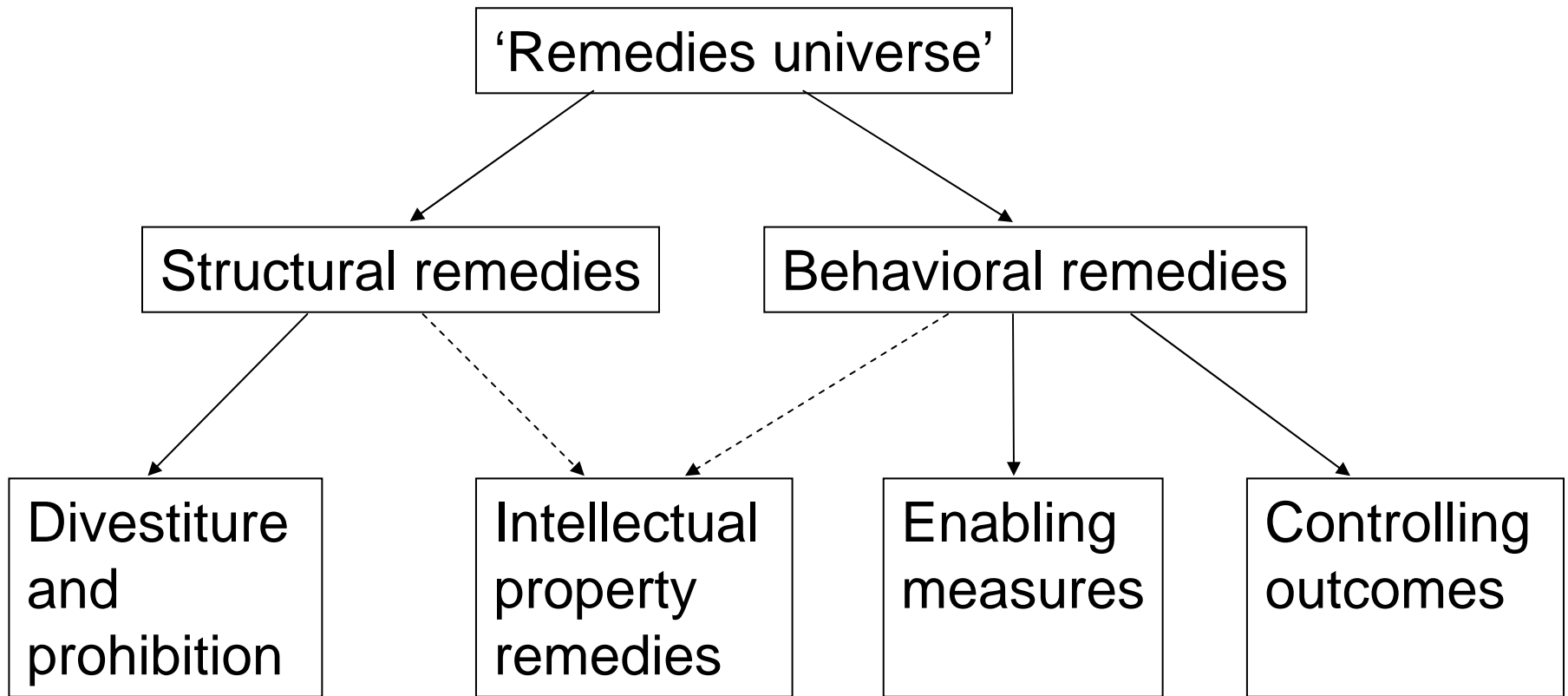
- Adam Land – Director of Remedies & Business Analysis
UK Competition Commission
- Eve Cinnirella – Principal Case Officer, Mergers
UK Office of Fair Trading
- Rob van der Laan – Senior Competition Investigator
Jersey Competition and Regulatory Authority
- Dan Ducore – Assistant Director, Bureau of Competition
US Federal Trade Commission

Introduction by MWG Co-Chair

Choice of remedies

Choice of remedies (1)

The Remedies Universe



Choice of remedies (2)

Basics of UK approach

- Consider **effectiveness** of remedy options *then* **proportionality**
- **Risk based** approach
 - No remedy is completely “risk free”
 - **Identify** risks associated with each remedy option
 - **Evaluate** the extent to which risks can be addressed
 - **Manage** the risks of your preferred option, through careful remedy design and implementation

Choice of remedies (3)

UK view on structural vs. behavioral

- **Structural remedies** generally have advantages
 - Structural solution to a structural problem
 - Directly restore competition lost through the merger, including dynamic benefits of rivalry
 - Relatively clean cut solution - do not require ongoing monitoring, enforcement and/or cooperation between the parties
- But sometimes **behavioral remedies** may be preferred
 - If structural remedies are unavailable (e.g. jurisdictional issues)
 - If competitive harm is expected to be short-lived (e.g. rail franchises)
 - If merger generates large customer benefits that would be lost through divestiture (NB vertical mergers)

Structural remedies

Structural remedies - principles

- **Aim:**
 - restore the competition lost as a result of the merger by either creating a new source of competition or strengthening an existing source of competition through disposal of a business or assets
- **Critical success factors:**
 - Appropriate divestiture package
 - Suitable purchaser
 - Effective divestiture process

Structural remedies - risks

- **Composition risks**
 - Is the divestiture package sufficient to enable the purchaser to be a viable competitor?
- **Purchaser risks**
 - Criteria for suitable purchaser. Merger parties may prefer to sell to weak or inappropriate purchaser.
- **Asset risks**
 - Will the competitive capacity of the divestiture package deteriorate before it is sold?
- These risks can normally be overcome by careful remedy design (e.g. up-front buyer, interim measures, divesting businesses rather than assets)

Structural remedies at first stage

- On average OFT accepts **5 to 6 merger** remedies a year
- OFT starting point is to restore competition to pre-merger levels
- Remedy must be '**clear-cut**', **effective** and **proportionate**
- Remedy must not be too narrow
- Structural vs. behavioral (**31 vs. 3**) - policy preference for competitive market structures over regulated markets
- Procedural safeguards used by OFT:
 - Up-front buyer (to ensure there is a willing buyer with the necessary expertise, incentives and finances to run the business)
 - No structural link between parties
 - No risk of new competition concerns

Implementation issues

- Process and timescales
- Managing risks during divestiture process
- Use of monitoring and divestiture trustees
- Purchaser approval
- Final approval of divestiture and Sale & Purchase Agreement (SPA)

FTC structural remedy case study

- Lafarge Acquisition of Blue Circle (2000)
- In North America, #3 Acquiring #5
- Cement plants and terminals serving
 - Great Lakes Region
 - Syracuse, NY

Great Lakes



Lafarge



Southdown



Blue Circle



Essroc



St. Lawrence



Federal White

Northeast



- Lafarge
- Blue Circle
- Essroc

Great Lakes Remedy - Blue Circle Business

- Complete:

- 2 cement plants; one grinding facility
- all terminals in the Great Lakes
- all barges, tugs, and trucks
- all quarries used to produce cement at the plants

Not Up-Front

- Hold Separate; Trustee if Needed

Syracuse Remedy – Terminal

Syracuse, NY Terminal to Glens Falls Lehigh

- Up-front Buyer
- Therefore, no Hold Separate needed

Behavioral remedies

Behavioral remedies - principles

- **Aim:**

- Restore the loss of competition through enabling measures (e.g. lower barriers to entry);

- or**, as a last resort

- Mitigate the harm to consumers by controlling outcomes (e.g. price caps)

- **Circumstances of use:**

- To support structural measures (e.g. *LSE* mergers) or

- As main remedy (<20% of UK cases e.g. *Macquarie / NGW*)

Behavioral remedies - risks

- **Specification risks**
 - Can we define the required behaviour?
- **Circumvention risks**
 - Can parties go around our remedies?
- **Distortion risks**
 - Can we avoid creating market distortions?
- **Monitoring and enforcement risks**
- Addressing these risks may not always be feasible and can add to cost and complexity of behavioral remedies

Behavioral remedies – implementation and monitoring

Implementation

- Negotiating undertakings with merger parties
- Issues regarding benchmarking on price (eg dealing with inflation)
- Other QRS issues

Monitoring

- Monitoring compliance is resource intensive
- 3rd party monitors can reduce burden on OFT
- Changes in circumstances

JCRA behavioural remedy case studies

- Short introduction of Jersey

GNI = £3.7b, 90k inhabitants, 118 km²

- Short introduction of JCRA

Competition (Jersey) Law 1 November 2005

40 Merger Decisions, of which

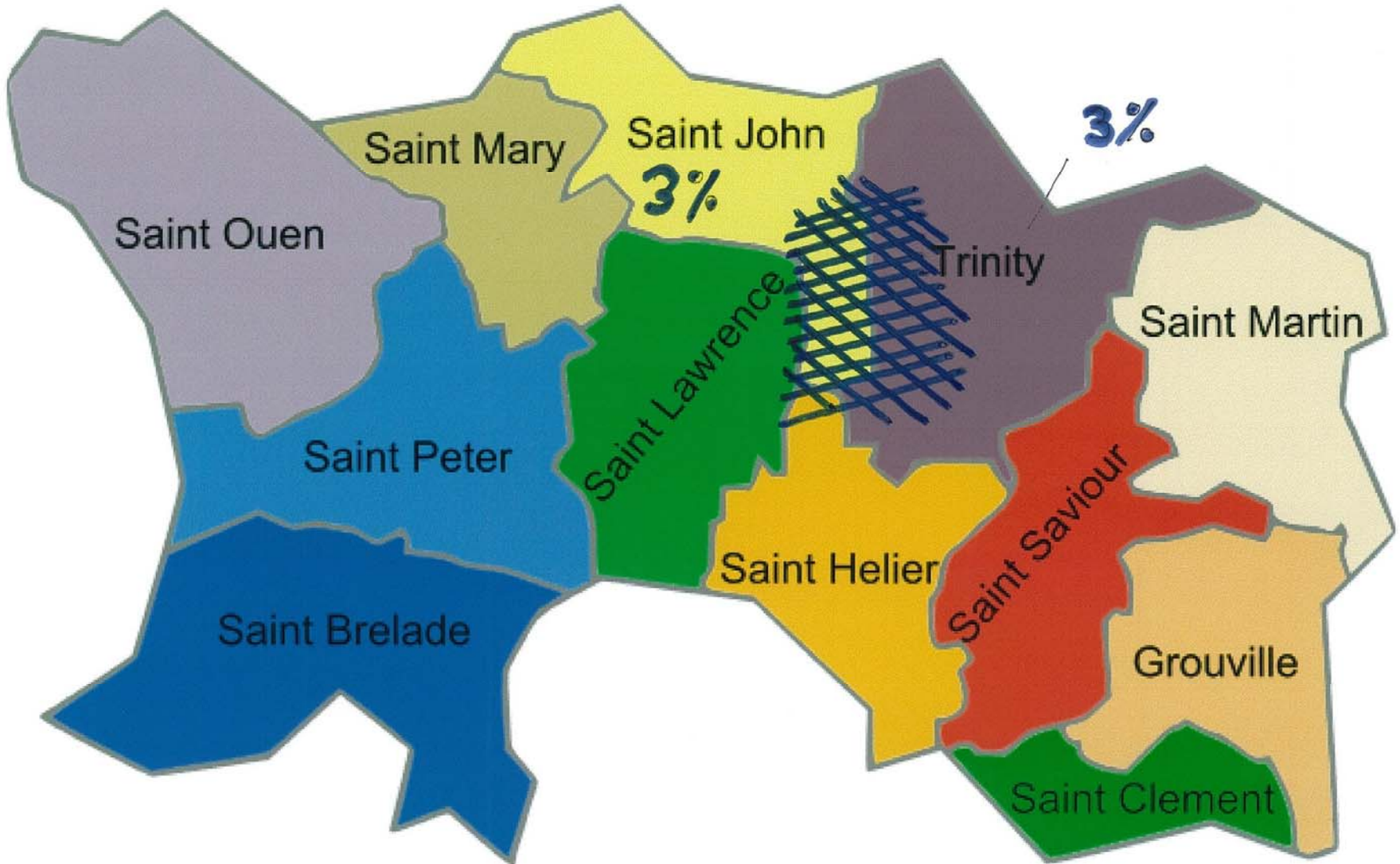
3 approval with conditions, of which

2 behavioural remedies and 1 structural remedy

JCRA behavioral remedy case study I

- Spar chain of 11 convenience stores proposed to acquire other chain of 12 convenience stores
- Substantial lessening of competition in one particular area within Jersey
- Consideration of structural remedy: not considered viable
- Consideration of behavioral remedy: imposed uniform pricing in Jersey

Jersey



JCRA behavioral remedy case study II

- Acquisition by leading agricultural customer JRPM of John Deer tractor dealer.
- Input foreclosure: access to spare parts by competitors of JRPM that have John Deer tractors
- Consideration of structural remedy: not viable
- Consideration of behavioral remedy: imposed service level agreement that would make discrimination breach of contract.

Panellists reactions to case studies

Advice on practical application

- Issues that can come up where there is an international dimension
- Encourage early discussion with parties
- Parties' incentives not always aligned with those of the agency
- Use of monitoring / divestiture / hold separate trustees

Q&A with audience

Questions from the audience to panelists



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