



Recent Procedural and Substantive Developments in EU Merger Control

International Forum on EU Competition Law - 25 May 2023

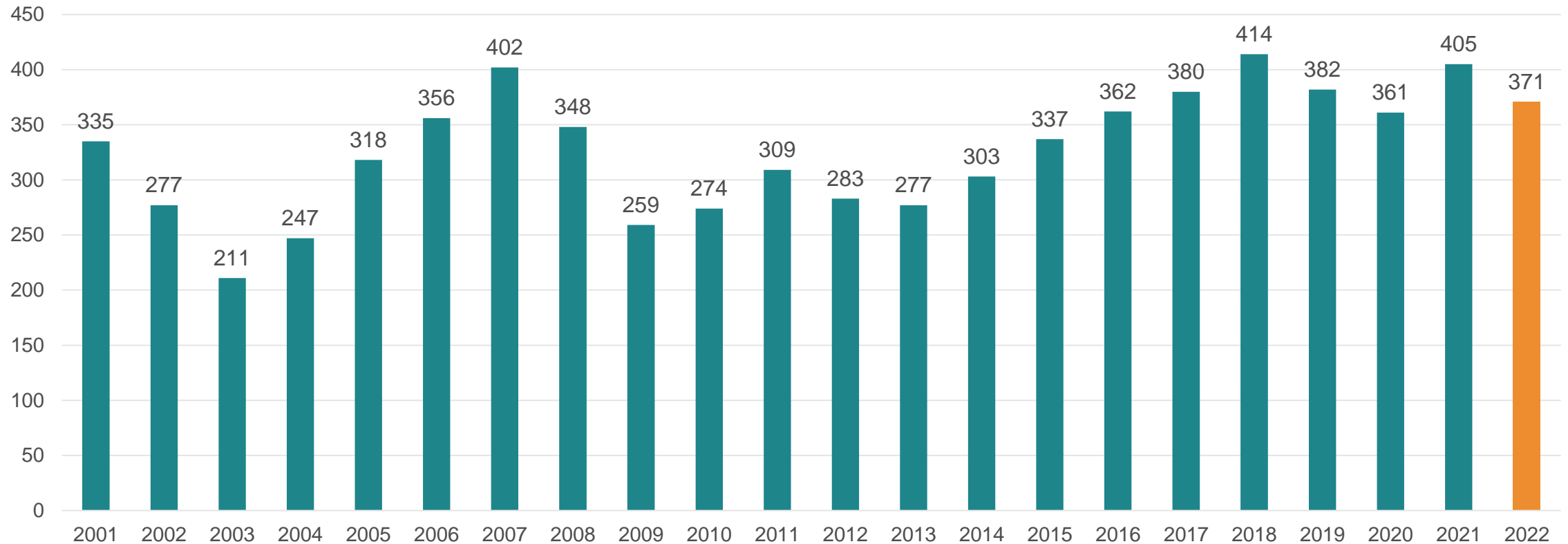
*Julia Brockhoff, Head of Unit – Mergers case support and policy
DG Competition*

Agenda - EU merger control in 2022/2023

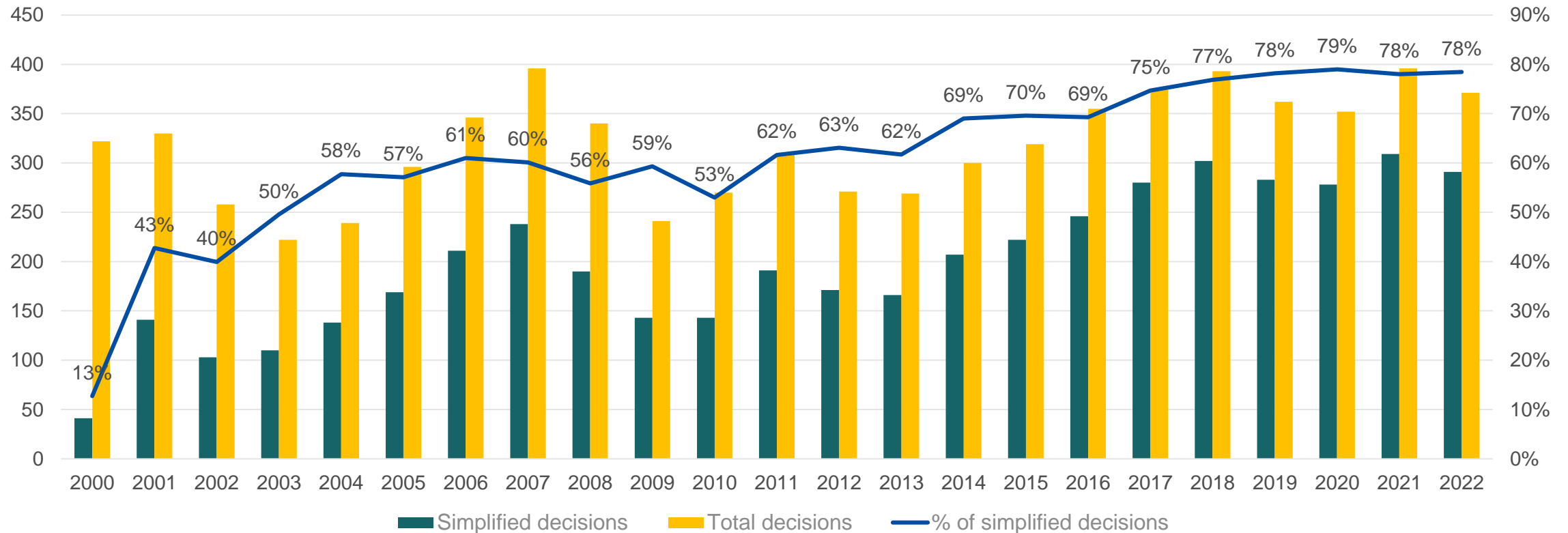
- Case overview
 - Statistics
 - Overview of 2022/2023 enforcement
- Policy developments
 - Simplification
 - Article 22
- Early acquisitions of nascent competitors and other mergers involving ecosystem theories of harm
 - Theories of harm
 - Remedies
 - Microsoft /Activision Blizzard

Case overview

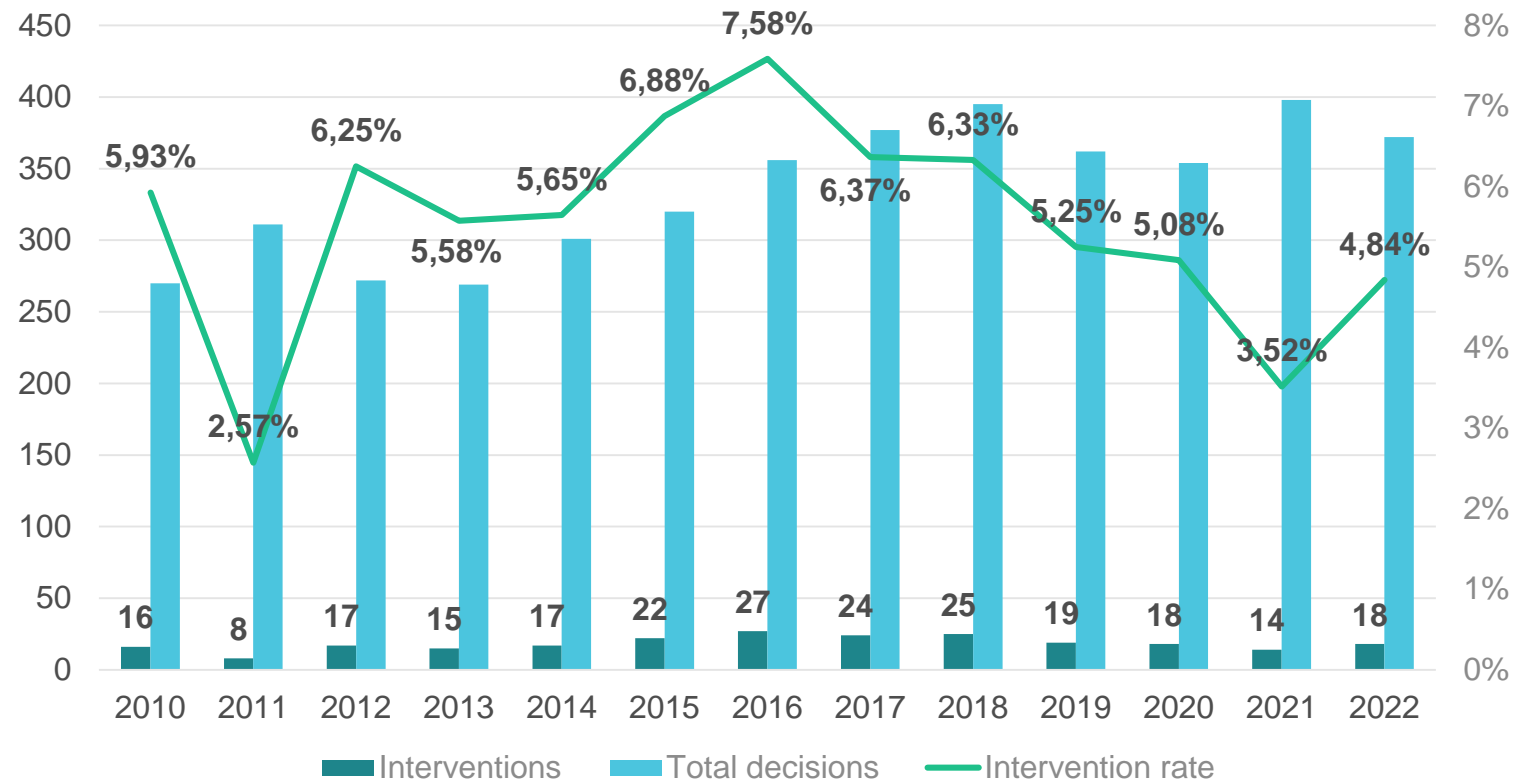
Number of notifications since 2001



Evolution of simplified cases (2000-2022)



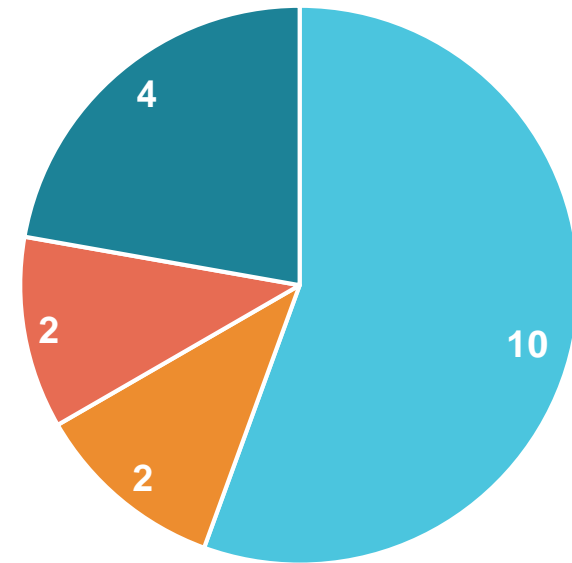
Interventions and evolution of intervention rate 2010-2022



	2010-2015	2016-2022
Intervention rate	5,47%	5,57%

EU intervention cases in 2022

- Majority of intervention cases were Phase I conditional clearances
- Only two Phase II conditional clearances
- Divestiture remedies in 11 out of 12 remedies cases
- Two prohibitions and four Phase II abandonments



■ Phase 1 Remedies ■ Phase II Remedies
■ Phase II Prohibitions ■ Phase II Abandonments

Theories of harm investigated in 2022

Horizontal unilateral effects

HHIH/DSME

Cargotec/Kronecranes

Kronospan/Pleiderer Polska

Kingspan/Trimo

Greiner/Recticel

Prince/Ferro

Parker/Meggitt

Ali Group/Welbilt

D'leteren/PHE

Bouygues/Equans

Celanese/Dupont Mobility

SalMar/NTS

ALD/Leaseplan

Horizontal coordinated effects

SalMar/NTS



Vertical/conglomerate effects

Illumina/GRAIL

Meta/Kustomer

Cargotec/Kronecranes

NVIDIA/Arm

KPS/Real Alloy Europe

Philip Morris/Swedish Match



Case developments in early 2023

- **4 phase II investigations concluded in 2023:** Orange/VOO (telecommunications), Norsk Hydro/Alumetal (aluminium), Microsoft/Activision Blizzard (video game software), MOL/OMV (retail fuel supply)
- **7 on-going Phase II investigations:** Viasat/Inmarsat (satellite-based communication services), Booking/eTraveli (online travel), Vivendi/Lagardère (media), Broadcom/VMWare (hardware/software), Korean Air/Asiana (air transport), Orange/Masmovil (telecoms)

Policy developments

Simplification

Expanded scope of simplified procedure

- 2 new categories of **simplified cases involving vertical relationships:**

- ✓ Low purchasing share (<30%)
- ✓ Limited increment to pre-existing vertical integration (<50%, HHI delta < 150)

New types of simplified cases

Flexibility clauses:

- ✓ Horizontal <25% and verticals <35%
- ✓ Highly asymmetric cases (<50% in one vertically related market and <10% in the other)
- ✓ Turnover and assets value of JV is between EUR 100 and 150 million

Streamlined review of cases

Simplified procedure

- Short Form CO replaced by **“tick-the-box” Form** which primarily contains multiple choice questions and tables
 - **Jurisdiction** questions replaced by multiple choice asks
 - **Market definition and share** questions replaced by tables
 - **Safeguards** (which allow EC to review a simplified case as normal) introduced as Yes/No questions
- **“Super-simplified” treatment** where notification is possible without pre-notification contacts, e.g., extra-EEA JVs, non-overlap cases

Normal Procedure

- Introduced **instructions for waiver requests** regarding Form CO sections
- Included tables requiring information on all horizontal overlaps and vertical relationships involving **pipeline products** (emphasis on innovation)
- **Eliminated altogether certain information requirements** of current Form CO
- Introduced the possibility for the Commission to **restart the clock ex officio where the information requested is no longer necessary**

Introduction of fully electronic notifications with valid digital signature as a default

Article 22

Article 22 Guidance - Guidance

- **Commission intends to encourage and accept** referral requests from MS that do not have initial jurisdiction over the transaction
- **Good candidate cases**
 - **Overarching principle:** turnover does not reflect actual or future competitive potential
 - **Illustrative list**, e.g., a start-up or recent entrant with significant competitive potential; important innovator; provides key inputs/components for other industries
- **Procedure**
 - **Requests for guidance** by merging parties
 - **Third party complaints**
 - **Ex officio** monitoring by Commission and NCAs

Developments since Article 22 Guidance

- **Illumina/GRAIL**: first and so far only “new” Article 22 referral
 - **Transaction** threatened to **restrict access to/increase prices** of next generation sequencers and reagents to the detriment of GRAIL’s rivals
 - GRAIL's competitive significance not reflected in its **turnover**
 - Commission’s interpretation of Article 22 confirmed by **General Court in July 2022**; General Court’s ruling under appeal to European Court of Justice
 - Commission **prohibited** transaction in September 2022; appeal pending before the General Court
- **Towercast** ECJ ruling of March 2023 confirming that NCAs can intervene against sub-thresholds mergers based on Art. 102 TFEU in combination with national procedural rules

Publication of Q&A Guidance

12 December 2022

Practical guidance

Case examples

Early acquisitions of nascent competitors and other mergers involving eco-system theories of harm

Sustantive assessment at the example of tech markets

Investigating early acquisitions of nascent competitors



- Understand **transaction rationale** and the **relevant (dynamic) counterfactual** based on internal documents
 - Internal documents describing the transaction to the board or documents discussing the deal valuation
 - Alternative plans of the acquirer: build or buy
 - Alternative plans of the target

Theories of harm

Theories of harm – Leveraging market power

- Acquirer **leverages market power from core markets into adjacent market thereby foreclosing competitors in adjacent market**
- Established framework in NHMG: Does the merged entity have the **ability** and **incentive** to foreclose competitors and would such foreclosure have an **adverse impact on competition** and **harm consumers**?
 - Total or price-related partial foreclosure vs **more subtle forms of partial foreclosure** through degradation of interoperability or hampering or delaying access to a critical input
 - Market-wide vs more **targeted foreclosure** strategies
 - Incentive to foreclose due to **indirect benefits**, e.g. steering more users into the digital platform's broader ecosystem
 - Do rivals have **effective counterstrategies** available?

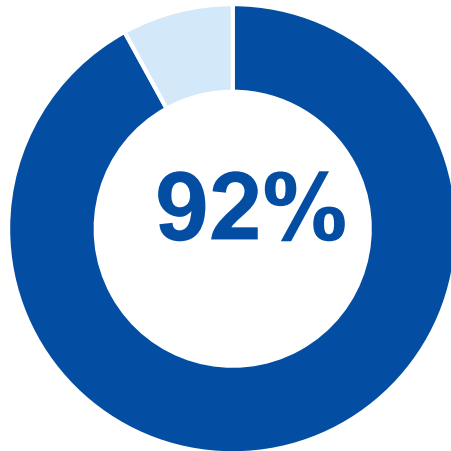
Theories of harm – protecting the acquirer's position on its core markets

- Acquisitions **increasing barriers to entry and expansion through the acquisition of assets** (like data, IP, technology or other capabilities)
 - Leading to a **strengthening of the market position in the core market** (see **point 36 HMG**)
 - Weighing the short-term benefits of improving the merged entity's product against the longer-term potential harm to rivals facing increasing difficulties in contesting the merged entity's position
 - Case examples: *Google/Fitbit and Meta/Kustomer*
- **'Killer acquisitions'** whereby the acquirer buys up the target to prevent it from growing into a challenger on the acquirer's core market

Remedies

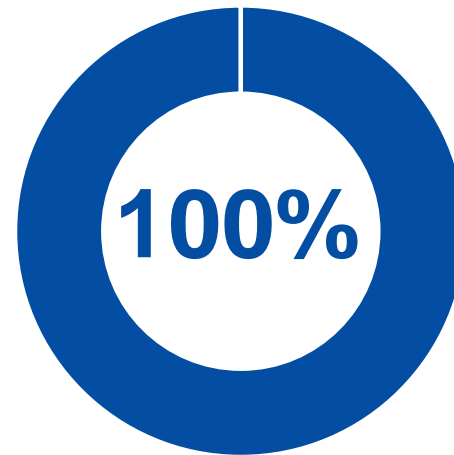
Structural remedies are the norm

- Structural remedies clearly the norm for both horizontal and non-horizontal concerns in 2022



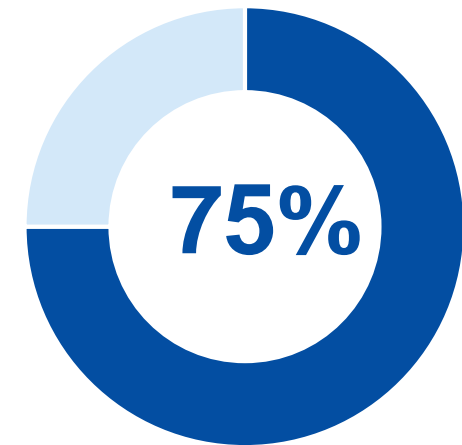
Overall remedies cases resolved by divestitures

Structural remedies in 11/12 cases. Access remedy only in Meta/Kustomer.



Horizontal concerns resolved by divestitures

All (10) horizontal cases addressed by structural remedies



Non-horizontal concerns resolved by divestitures

3/4 of cases raising vertical/conglomerate concerns addressed by divestitures

Access / interoperability remedies

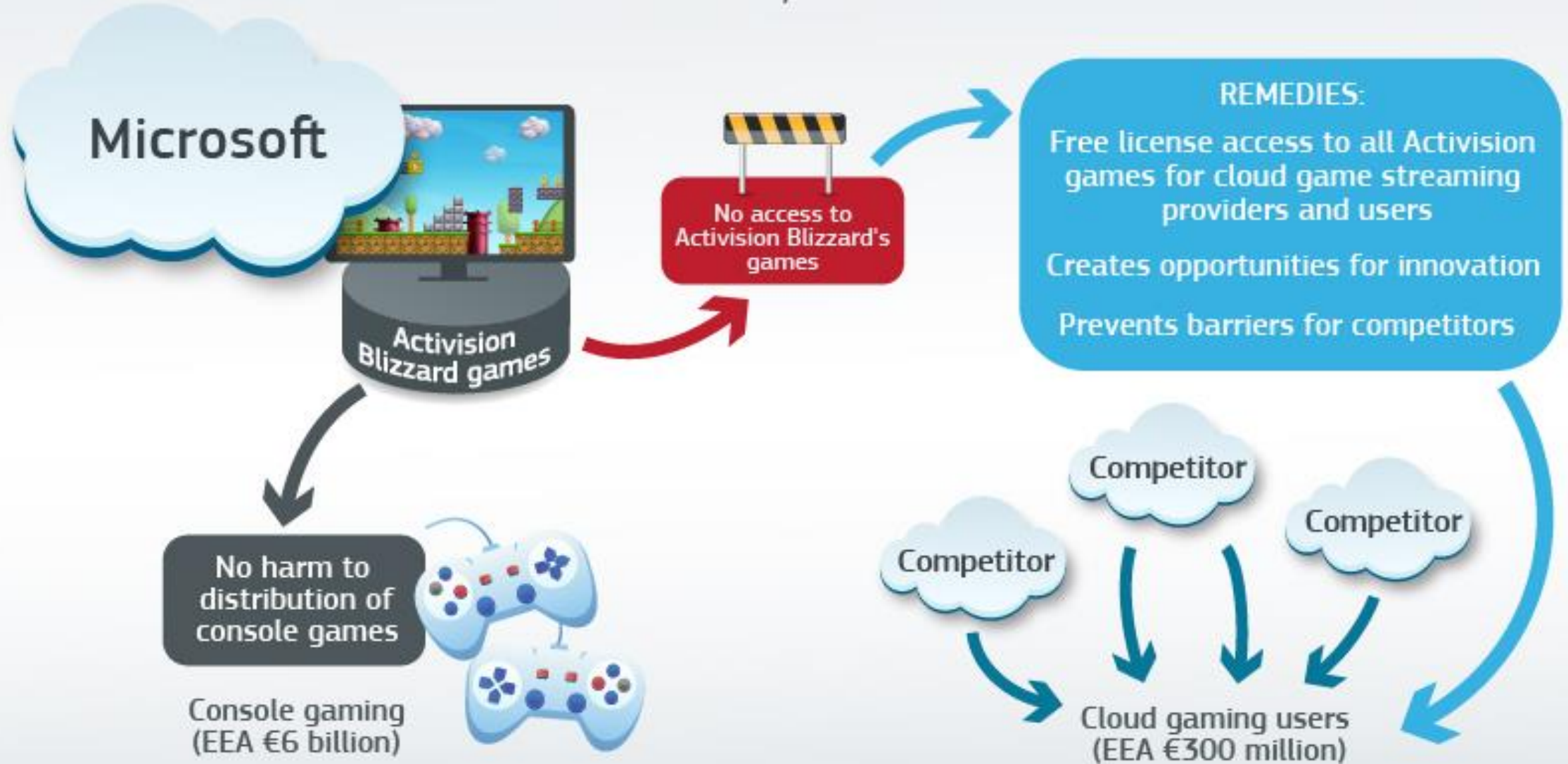
- **Clear preference for divestiture remedies**, notably in the case of horizontal mergers
- In individual cases raising non-horizontal concerns, **access or interoperability remedies** can provide suitable solutions Clearly circumscribed and identifiable foreclosure strategies
 - Market practice pre-merger
 - Limited number of access seekers or remedy takers benefitting from interoperability
 - Standardised access, free of charge



Meta/Kustomer vs Illumina/Grail

Microsoft / Activision Blizzard

Microsoft / Activision



Thank you



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