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NEW NOTICE CLARIFIES THE EUROPEAN COMMISSION'S APPROACH TO REMEDIES IN MERGER CASES

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On 22 October 2008, the European Commission (the Commission) published its amended guidance notice on remedies, also called commitments, that merging parties can offer to the Commission to overcome competition concerns raised by the Commission in merger procedures.[1] The Remedies Notice (the Notice) clarifies under which circumstances the Commission is likely to accept specific types of remedies. It also sets out procedural requirements. Notably, the merging parties now have to explain their remedies proposal in detail using a new "Form RM".[2]

OVERVIEW

In much greater detail than the predecessor Remedies Notice of 2001,[3] the new Notice provides guidance on all main aspects that are relevant when merging parties propose remedies.

The Notice's overall concern is to make sure that remedies completely eliminate the identified competition concerns, are effective and workable, and are likely to be implemented within a short period of time.

The Notice does not radically change the Commission's current approach to remedies as shaped by recent Court judgments[4] and learnings from a 2005 Commission study on the effectiveness of remedies accepted in past cases.[5] However, the emphasis that the Notice places on specific aspects indicates that, in the future even more than in the past, merging parties must be prepared to:

- provide extensive information to the Commission when submitting a remedies proposal;
- engage in difficult discussions with the Commission when proposing access

1 Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, 2008 O.J. C 267, p.1.

2 Form RM has been introduced as a new Annex IV to the Implementing Regulation by an amendment to the Implementing Regulation adopted in parallel to the Remedies Notice, 2008 O.J. L 279, p.3.

3 2001 O.J. C 68, p.3.

4 *See*, e.g., CFI judgments in cases *Royal Philips Electronics* v. *Commission* [2003] ECR II-1433; T-158/00, *ARD* v. *Commission* [2003] ECR II-3825; T-87/05, *EDP* v. *Commission* [2005] ECR II-3745; T-210/01; *General Electric* v. *Commission* [2005] ECR II-5575; T-282/02, *Cementbouw* v. *Commission* [2006] ECR II-319; and T-177/04, *easyJet* v. *Commission* [2006] ECR II-1931. *See* also, e.g., ECJ judgments in cases C-12/03 P, *Commission* v. *Tetra Laval* [2005] ECR I-987 and C-202/06 P, *Cementbouw* v. *Commission* [2007] ECR I-12129.

5 Available at the Commission's website.

remedies, divestitures of individual assets, licensing remedies, or other remedies short of the divestiture of an existing business;

- design the scope of a remedy in an over-inclusive rather than under-inclusive way;
- offer enhanced (crown jewel, up-front buyer, or fix-it-first) remedies if ordinary remedies are not certain to succeed;
- submit final remedies proposals to the Commission sufficiently early; and
- accept effective Commission oversight until the remedy is fully implemented.

DIFFERENT TYPES OF REMEDIES

The Notice reaffirms the Commission's preference for divestitures and other remedies that change the structure of competition in the market. Behavioral remedies by which the merging parties promise that they will not raise prices or otherwise engage in anti-competitive behavior are generally not acceptable in horizontal mergers and only exceptionally acceptable in other scenarios, such as conglomerate mergers.

The Notice explains in some detail the substantive requirements for the following types of remedies.

DIVESTITURE OF A BUSINESS

Key points here are that the divested business should be a viable and effective stand-alone business that is independent from the merging parties at the time of the divestiture. The divested business must include all key personnel and essential business functionality. This is most easily achieved if the divested business is already run as a stand-alone business by its current owner. If a certain functionality is shared among several businesses, such as information technology or research and development, parties must divest sufficient parts of that functionality but can retain those parts that are not essential for the divested business (carve-out or reverse carve-out). If the purchaser does not need all elements of the divestment business, the Commission can reduce the scope of the divestiture once the purchaser is identified. Except for transitional arrangements, the Commission will not normally accept continued links between the divested business and the merging parties, nor will it allow the parties to provide acquisition financing to the purchaser. Moreover, the parties must commit not to reacquire influence (which is less than control) over the divested business for a significant period of time, generally 10 years. The business can only be sold to a purchaser whom the Commission has approved as suitable according to the established criteria, which are set out again in the Notice.

Divestiture of Assets

The Notice sets rather strict requirements for accepting divestitures that do not include a stand-alone business, but only brands, licenses, or other specific assets. A licensing remedy generally will be accepted only if a transfer of the intellectual property right would have other negative consequences, such as impede ongoing research, and if the license is exclusive and unrestricted in terms of field-of-use and geography. Time-limited exclusive licenses that allow the licensee to rebrand the product, such as in the case of branded consumer goods or pharmaceuticals, will only exceptionally be allowed.

Crown-Jewel, Up-Front Buyer, and Fix-It-First Remedies

If the Commission has doubts that a divestiture remedy can be implemented effectively in a short time frame, for example, because of existing third party preemption rights or uncertainty of finding a suitable purchaser, the parties may have to offer enhanced divestiture remedies. In a crown-jewel (or alternative divestiture) commitment, the parties submit a second divestiture package (often comprising a particularly valuable asset or "crown jewel") which they commit to sell in case the preferred divestiture package cannot be implemented in a timely fashion. In an upfront buyer commitment, the Commission clears the transaction under the condition that the parties do not implement the transaction before a binding agreement about the sale of the business has been reached with a specific purchaser approved by the Commission. This is different from an ordinary divestiture, where the clearance decision allows the parties to implement the transaction and sell the divestment business afterwards. Situations in which parties enter into a binding agreement with a specific purchaser already before the Commission issues its clearance decision are defined in the Notice as "fix-it-first" divestitures. It would have been desirable for the Notice to state with greater clarity whether there are situations in which an up-front buyer remedy may not be sufficient and a "fix-it-first" solution is required. Under the Notice, it appears that the Commission will normally be satisfied with an upfront buyer commitment.

Removal of Links with Competitors

In appropriate cases, the Commission will accept as a remedy the removal of links with competitors, such as the sale of a minority stake in a competitor or in a joint venture with a competitor, or the termination of commercial agreements with competitors.

Access Remedies

The Commission's 2005 remedies study identified shortcomings with regard to access remedies that the Commission had accepted in several past cases. Accordingly, the Notice sets rather strict requirements for these types of remedies, which play a significant role in many industries. When parties offer access to their infrastructure or networks (this includes a broad range of assets, such as pipelines, telecommunications networks, pay-television platforms, gas release programs, airport slots, or intellectual property rights) to entice entry of a new competitor or eliminate foreclosure concerns, the Commission will only accept such a remedy if (i) it is sufficiently likely that actual entry will occur or that competitors will make use of the access remedy, and (ii) the remedy includes sufficient and effective monitoring and dispute resolution mechanisms such as arbitration.

Change to Long-Term Contracts

Similarly, when parties commit to lift exclusivity of their long-term contracts if such exclusivity leads to foreclosure concerns in light of the transaction, the Commission will accept such remedies only if it can be expected that the exclusivity will not continue in practice.

NEW FORM RM

In the future, parties must submit a remedies proposal together with the information requested in a new so-called Form RM. For all types of remedies, Form RM requires the parties to submit information on the object of the remedy, the conditions for their implementation, and the reasons why they are suitable to eliminate the Commission's concerns. The parties also have to identify and justify deviations from the Commission's model texts, and submit a nonconfidential version of the proposed remedies.

Moreover, in the case of divestiture remedies, Section 5 of Form RM asks for a significant amount of additional information, which will help the Commission assess the effectiveness and workability of the proposed divestiture. Section 5 notably requests the parties to explain potential obstacles to the implementation of the divestiture, continuing links between the business to be divested and the merging parties, potential needs for carve-outs, changes that have occurred in the business to be divested within the last two years or that are being planned to take place in the next two years, customer lists, tangible and intangible assets of the business to be divested, key personnel, historic and forecasted turnover, and profitability (EBITDA) information of the business to be divested.

Although the Commission may waive some of these information requirements in individual cases, parties will have to provide more comprehensive information than was the case in the past (but not unlike the practice in other jurisdictions, for example, the United States). This information must be submitted together with the remedies proposal. Hence, more time and effort will be required to put together an effective remedies package within the procedural deadlines.

The Commission has not modified the *Best Practice Guidelines* for divestiture commitments, which include the "Model Text for Divestiture Commitments" and the "Model Text for Trustee Mandates,"[6] but has pointed out that these texts can be adapted to the requirements of the specific case.

BURDEN OF PROOF

The increased informational requirements are partially a reaction to the case law of the Court of First Instance (CFI),[7] now reflected in the Notice, stating that, if the

6 Available at the Commission's website.
7 *EDP* v. *Commission* [2005] ECR II-3745.

Commission intends to prohibit a transaction for which remedies have been offered, the burden is on the Commission to prove that the transaction as modified by the proposed remedies significantly impedes effective competition. The information requested under Form RM helps the Commission assess the remedy.

Under the principle of proportionality acknowledged in the Notice, the Commission will inform the parties if their remedies proposal is broader than required to eliminate the identified competition concerns, offering the parties the opportunity to scale down their proposal if that is still possible within the tight deadlines. If the Commission ultimately concludes that the proposed remedies are necessary and sufficient, it will clear the transaction and include the remedies in the clearance decision in the form of conditions and obligations. If the Commission ultimately concludes that the competition concern does not exist, it will ignore the remedies proposal and not attach conditions or obligations to its clearance decision. If the proposed remedy is insufficient, the Commission will prohibit the transaction.

PHASE I AND PHASE II REMEDIES

Remedies in the Phase I investigation period will only be accepted if the competition problems are so straightforward and the remedies so clear-cut that "serious doubts" about the compatibility of the modified transaction with the common market—the threshold test for opening an in-depth Phase II investigation—can clearly be ruled out. Where the Commission has issued a Statement of Objections, any remedies offered in Phase II must remove the concerns identified in that Statement.

Both for Phase I and Phase II remedies, the Notice stresses the need for the parties to submit final remedies within the deadlines specified in the Merger Regulation. In Phase I, only minor clarifications, refinements, and improvements will generally be allowed after the deadline, while post-deadline modifications to remedies proposals in Phase II normally will only be accepted where the Commission can clearly determine—on the basis of information already received and without the need for any further market testing—that such remedies unambiguously resolve the competition concerns identified and where there is sufficient time for an adequate assessment by the Commission and proper consultation with Member States.

IMPLEMENTATION OF REMEDIES

Except in upfront buyer and fix-it-first scenarios, divestitures normally must be implemented within 12 months after the clearance decision. In line with its overall concern to ensure effective implementation, the Notice contains detailed explanations about the requirement to hold-separate and ring-fence the business set to be divested during the interim period. In this context, the Notice focuses on the independence, economic viability, marketability, and competitiveness of the business to be divested. The monitoring trustee and the hold-separate manager play a key role in this process, in particular if a carve-out is taking place in the interim period. Remedies should contain a review clause, allowing their modification if necessary to achieve their goal. Finally, the Notice describes in some detail the role of the monitoring trustee and the divestiture trustee, largely in line with current practice.

OTHER CHANGES TO THE IMPLEMENTING REGULATION AND EXISTING FORMS

A new Article 20a of the Implementing Regulation provides a legal basis for the involvement of trustees in the remedies process and explicitly states that the parties should bear the costs of the trustee, in accordance with current practice.

A new paragraph 4 added to Article 18 of the Implementing Regulation facilitates the Commission's task when organizing access to its file. Unless undertakings or associations that have submitted documents to the Commission explicitly request confidential treatment of these documents, paragraph 4 now allows the Commission to assume that such documents do not contain confidential information and thus to make them accessible to others.

The Commission has also adopted minor modifications to the existing Form CO, Short Form CO, and Form RS, which are, however, not of a substantive nature.

CONCLUSION

The new Remedies Notice seeks to provide meaningful guidance and create transparency while preserving a sufficient degree of flexibility for the Commission to deal with specific situations. In a number of respects, the Notice appears to err on the side of caution with regard to remedies that leave the ordinary paths. It would be welcomed if the Commission were to apply a sufficient degree of flexibility in its practice in order not to prevent creative remedy solutions that may well eliminate the competition problem while reducing the merging parties' overall burden to the necessary minimum.

If you would like more information on Arnold & Porter or the Commission's merger control process, please feel free to contact:

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