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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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Working Party No. 3 on Co-operation and Enforcement

REMEDIES IN MERGER CASES

-- European Union --

28 June 2011

The attached document is submitted to Working Party No.3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on the 28 June 2011.

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- Email address: antonio.capobianco@oecd.org]

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1. The Commission set out its policy for accepting remedies under the EU Merger Regulation ("EUMR")[1] in the Commission's Remedies Notice[2], as revised in 2008 (the "Remedies Notice"). The guiding principle – already explained in the EU Merger Regulation, endorsed by the European Courts[3] and set out in detail in the Remedies Notice – is that remedies have to eliminate the competition concerns raised by a concentration entirely and must be comprehensive and effective from all points of view.[4]

1. What is your process for considering possible remedies for mergers that present competitive problems? Are parties responsible for proposing remedies, and are they required to follow particular procedures or time lines in order to do so? If your merger review system involves a 2-phase process, are there different procedures and standards for reviewing proposed remedies in the 2 phases

2. Under the EU Merger Regulation, the Commission may clear a notified transaction subject to commitments by the notifying parties if those commitments remedy the anti-competitive effects which the transaction would have otherwise given rise to. Consequently, remedies in EU merger investigations have to be proposed by the parties and the Commission cannot unilaterally impose them. Where a transaction would significantly impede effective competition and where no or no adequate remedies have been offered, the Commission must prohibit the transaction. The Commission's remedies policy therefore focuses on the "commitments" of the parties.

3. The Commission's merger control system involves a two-phase procedure and the Commission may accept commitments in either phase of the procedure. Different standards are being applied for remedies in Phase I and Phase II: For commitments to be accepted in Phase I, they must clearly rule out "serious doubts" that the concentration may significantly impede effective competition (as this is the test for the Commission to open Phase II proceedings).

4. This means that Phase I remedies are acceptable only when the competition problem is readily identifiable and can easily be remedied (as already set out in Recital 30 EUMR), given that an in-depth investigation can only be carried out in Phase II. Also, the remedies need to be clear-cut given the time constraints of Phase I. Remedies need to be submitted within 20 working days after notification, triggering an extension of the Phase I proceedings in order to allow for a proper market testing of the commitments submitted. After the deadline, only limited modifications of already submitted commitments are acceptable.

5. In Phase II, the parties have to submit remedies by working day 65 after opening of Phase II proceedings. If the parties submit commitments within 10 working days before day 65, the overall deadline for Phase II proceedings is extended by 3 weeks to 105 working days, again, in order to allow for proper market testing of the remedies proposed. After the deadline for the submission of commitments, the

1 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 20.1.2004, p. 1-22.

2 Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p. 1-27.

3 See judgments from the General Court in Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, para. 52 ("*General Electric*") and Case T-87/05 *EDP v Commission* [2005] ECR II-3745, para. 105 ("*EDP/GDP/ENI*").

4 See recital 30 of the EU Merger Regulation; paragraph 9 of the Remedies Notice and judgments from the General Court in Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, para. 52 ("*General Electric*") and Case T-87/05 *EDP v Commission* [2005] ECR II-3745, para. 105 ("*EDP/GDP/ENI*").

Commission may accept modifications of the remedies submitted if there is still sufficient time for the necessary procedural steps, in particular a further market test, if required.

6. In terms of standard, the substantive test for the finding of concerns changes with the issuing of a Statement of Objections in Phase II: Before the issuing of a Statement of Objections, the Commission has to take a clearance decision as soon as the "serious doubts" are removed, in particular if the parties submit commitments. Thereafter, the commitments have to be sufficient to eliminate the significant impediment to effective competition identified in the Statement of Objections (provided that the Commission does not abandon the concerns following the parties' reply to the statement of objections). The remedies can generally be more targeted in Phase II, given that more time is available, and, irrespective of the actual standard, the Commission may obviously drop concerns at any point during an on-going Phase II investigation if it does not consider them to be founded any longer.

2. When crafting merger remedies, does your agency employ structural remedies? Do you employ behavioural remedies or hybrid remedies? How do you decide what remedy or combination of remedies best cures the competitive harm of concern? Is the approach different in horizontal and vertical mergers?

7. According to the case law of the European Courts, the basic aim of commitments is to ensure competitive market structures. Therefore, commitments which are structural in nature, such as the commitment to sell a business unit, are, as a rule, preferable from the point of view of the Merger Regulation's objective, because they prevent, durably, the competition concerns which would be raised by the merger as notified, and do normally not, moreover, require on-going monitoring measures.

8. Nevertheless, the possibility cannot automatically be ruled out that other types of commitments may also be capable of preventing the significant impediment of effective competition. The question of whether a remedy and, more specifically, which type of remedy is suitable to eliminate the competition concerns identified, has to be examined on a case-by-case basis.

9. A general distinction can be made between (i) divestitures, (ii) other structural remedies, such as granting access to key infrastructure or inputs on non-discriminatory terms, and (iii) commitments relating to the future behaviour of the merged entity. Divestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps, and may also be the best means of resolving problems resulting from vertical or conglomerate concerns.

10. Other structural commitments may be suitable to resolve all types of concerns. However, divestitures are the benchmark for other types of remedies in terms of effectiveness and efficiency. The Commission therefore may accept other types of commitments, but only in circumstances where the other remedy proposed is at least equivalent in its effects to a divestiture.

11. As will be set out in more detail below, commitments relating to the future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances and, in any case, only if their workability is fully ensured by effective implementation and if they do not risk leading to distorting effects on competition.

3. When seeking structural relief, under what circumstances do you require the divestiture of a stand-alone business? Do you ever require the divestiture of identified assets that are not a stand-alone business? Do you ever require the divestiture of intellectual property in lieu of the divestiture of a stand-alone business or a collection of physical assets? When do you use each type of divestiture remedy?

12. The divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and that is divested as a going concern. Normally such a divestment business should be an existing stand-alone business and must contain all the assets necessary for its operation and all the personnel currently employed.

13. However, the Commission, taking into account the principle of proportionality, may also consider the divestiture of businesses which have existing links, or are partially integrated with businesses retained by the parties and therefore need to be "carved out". In order to reduce the risks for the viability and competitiveness to a minimum in such circumstances, the Commission's preferred option is if the parties propose to carve out those parts of an existing business which do not necessarily have to be divested. In effect, an existing, stand-alone business is being divested in those circumstances although, by way of a "reverse carve-out", the parties may carve-out the limited parts which they may keep. In situations in which a carve-out is accepted, it may also be necessary to duplicate some of the shared assets in order to avoid a lack of viability of the business to be divested. Carve-outs may also raise certain risks during the interim period, until divestiture, for the selection of the assets to be carved-out and the personnel. The Commission therefore normally expects an active role of the Hold Separate Manager and Monitoring Trustee in this regard (see below).

14. A divestiture consisting of a combination of certain assets which did not form a uniform and viable business in the past may create risks as to the viability and competitiveness of the resulting business. This is in particular the case if assets from more than one party are involved. Such an approach may be accepted by the Commission only if the viability of the business is ensured notwithstanding the fact that the assets did not form a uniform business in the past. This may be the case if the individual assets can already be considered a viable and competitive business.

15. Similarly, only in exceptional cases a divestiture package including only brands and supporting production and/or distribution assets may be sufficient to create the conditions for effective competition. In such circumstances, the package consisting of brands and assets must be sufficient to allow the Commission to conclude that the resulting business will be immediately viable in the hands of a suitable purchaser.

16. Divestments of brands are acceptable if competition is mainly based on brands and if the resulting business will be immediately viable in hands of suitable purchaser. In case of doubts concerning the availability of a suitable purchaser, an up-front buyer or fix-it-first solution would be typically required. In such cases, the Commission prefers the transfer of a brand over an exclusive license to use the brand or a temporary licence for re-branding. A clear transfer avoid any on-going links between the parties and the purchaser of the brand, thereby facilitating competition between them, and makes sure that the purchaser will be active in the market on the basis of its own assets, without having to rely on the purchaser's future incentives to make a re-branding exercise work.

17. A recent example for how the Commission deals with the divestiture of brands is the case *Unilever/Sara Lee*[5]. The Commission's Phase II investigation showed that the merger would have lead to significant overlaps and a very strong leadership position of Unilever in a number of Member States for

5 Case COMP/M.5658 *Unilever/Sara Lee Body Care*.

deodorants by combining the parties' brands, most notably Sara Lee's Sanex brand with Unilever's brands Dove and Rexona. These brands were in fierce competition with each other pre-merger so that the merger would have removed an important competitive force. The Commission considered that the final commitments, consisting in the full divestiture of the Sanex brand (including contracts, key personnel, etc.) across all product categories and for the whole of the EEA provided a clean, workable and effective remedy to create a viable and effective competitor.

18. In this case, the parties made different proposals before which , however, were not considered as sufficiently effective to create a viable competitor. The first proposal would have required a complex re-branding exercise of two different brands, leading to a geographic split of the brands for the re-branding period and making it doubtful that a purchaser would invest sufficiently into the brand to make it an appropriate remedy. The second proposal would have allowed the parties to re-brand the Sanex products apart from the deodorants, leading to a split of the Sanex brand between different products and Member States for the re-branding period. The parties' re-branding exercise could thus have significantly harmed the Sanex' activities to be divested and would have involved significant uncertainties for the effectiveness of the remedy.

19. This is in line with the Commission's general policy, as set out in the Remedies Notice, to accept re-branding exercises only in exceptional cases in which the Commission can conclude with the required degree of certainty that the licence will be sufficient to re-establish an effective competitor after re-branding the products. The case also shows that it may be necessary to divest a brand not only for the countries and products for which competition concerns have been identified but also for neighbouring products and the entire European Union in order to ensure the viability of the brand and effective competition post-divestiture.

20. Apart from divestitures of stand alone businesses and brands, the Commission's practice allows for other types of structural remedies, although statistically these cases amount only to a minority of our remedy cases.

21. In some cases, a commitment relating to the dissolution of a joint venture of the divestiture of a minority share may be sufficient to remedy the competition concerns a notified transaction would lead to. In *MAN Ferrostaal/IPIC*, this type of solution was used to resolve a vertical problem of input foreclosure[6] in which the merged entity would combine a large market share in the downstream market with a minority stake at upstream level in a significant producer of a key input.

4. What types of behavioural remedies does your agency use? In what circumstances have you used firewalls, fair dealing clauses, transparency requirements, anti-retaliation provisions or prohibitions on anticompetitive contracting practices?

22. As set out before, divestitures or the removal of links with competitors are the Commission's preferred remedies. They are, however, not the only solutions the Commission may be prepared to accept. The benchmark for the acceptance of any other types of remedies is that they are as effective and efficient as divestitures.

23. The Commission distinguishes between other structural remedies, apart from divestitures, such as access remedies and remedies which are merely related to the future behaviour of the merged entity. Whereas the former ones are often used in practice, the latter ones are accepted only exceptionally. Below a short discussion of each type.

6 Case COMP/M.5406 *MAN Ferrostaal/IPIC*. See for another example of a commitment to divest a minority participation Case COMP/M.3653 *Siemens/VA Tech*

24. The typology of access commitments is very wide and they can be described in general as ensuring effective access to infrastructure, networks, e.g. pay-TV platforms[7], key technology or IP rights[8] or essential inputs. They may be helpful for lowering entry barriers with the effect that actual entry of new competitors is likely or to resolve foreclosure concerns (but only if competitors will actually use these commitments). These commitments may be acceptable if they have the same effect as a divestiture.

25. One essential pre-requisite is that such commitments can be monitored, either via market participants through arbitration clauses (self-enforcement of commitments) or via recourses to national regulators (e.g. telecoms or energy). The sensitive issues in this respect are that the access terms, in particular the access fees, can rarely be defined precisely in advance, but have to leave room for the particular situation of potential beneficiaries. In other instances, for example for remedies concerning access to technical interfaces[9], the release of technical information and assistance is critical so that an effective monitoring mechanism is required in that regard.

26. Over the last couple of years the Commission has dealt with a number of airlines mergers that have been cleared on the basis of slot release remedies characterised by the release (and, eventually, transfer) of slots without compensation.[10] The legal standard for these remedies, confirmed by the General Court's *easyJet*[11] judgment is that they must lead to actual and sufficient entry of new competitors and such entry must be timely and likely. The market test of the remedies should confirm interest of competitors to enter the problematic routes. In the most recent cases, the Commission aimed at making those remedies more effective by introducing a shorter time-window and assimilating them to a transfer of slots by providing for a transfer of grandfathering rights if the slots are used regularly in a minimum period of IATA seasons).

27. Commitments relating to the future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances and will generally not be acceptable in order to eliminate competition concerns resulting from horizontal overlaps. In any case, those types of remedies can only exceptionally be accepted if their workability is fully ensured by effective implementation and if they do not risk leading to distorting effects on competition.

28. Therefore, the Commission's experience in this regard is limited. However, we have seen in practice that long term supply contracts can create links and interaction between competitors and promote information dissemination about the cost structures of the competitor. They also contribute to fix existing and possibly less-than-ideal market structures. For example, the use of price caps involves a heavy degree of intervention in the market – something that we regard as outside the mission of a competition authority. We have also found that firewalls are virtually impossible to monitor.

29. The type of cases for which the Commission may exceptionally consider remedies related to the future behaviour of the merged entity may also be explained by looking at two significant cases in the IT area which the Commission decided within the last year. These cases are *Cisco/Tandberg*, based on horizontal concerns, and *Intel/McAfee*[12], where the Commission accepted remedies based on conglomerate

7 See for example Case M.2876 *Newscorp/Telepiù*

8 See for example Case COMP/M.1715 *Alcan/Pechiney* or Case COMP/M.3998 *Axalto/Gemplus.*

9 See for example Case COMP/M.3083 *GE/Instrumentarium* or Case COMP/M.2861 *Siemens/Drägerwerk/JV.*

10 See for example Case COMP/M.5364 *Iberia/Vueling/Clickair*, Case COMP/M.5335 *Lufthansa/SN Airholding (Brussels Airlines)* or Case COMP/M.5440 *Lufthansa/Austrian Airlines*.

11 Case T-177/04 *easyJet v Commission* [2006] ECR II-1913.

12 Case COMP/M.5669 *Cisco/Tandberg* and Case COMP/M.5984 *Intel/McAfee*

concerns. The remedies were significantly different in the two cases, although the competition concerns identified in both cases involved interoperability issues.

30. In *Cisco/Tandberg*[13], the Commission identified horizontal competition concerns arising from the transaction in the market for videoconferencing solutions. In particular, the Commission considered that the merged entity could, based on its strengthened position in this market, could impose its own technology as a *de facto* standard for interoperability and thereby impede competitors from competing effectively as there was no industry standard available and raise barriers to entry further.

31. In order to address the Commission's concerns, Cisco committed, *inter alia*, to divest the rights attached to its proprietary Telepresence Interoperability Protocol to an independent industry body, ensuring that actual and potential competitors would have access to the protocol and could make their devices interoperable with the parties' devices. Within this framework all competitors will be able to participate in the future development of the protocol, making the process similar to an open standard-setting process. The Commission preferred this transfer of the IP rights to an independent body over the granting of a license as a simple licensing remedy would have kept the relevant technology under Cisco's control and Cisco could have decided on future developments of the protocol on its own.

32. In *Intel/McAfee*[14], the Commission identified conglomerate concerns arising from the companies being active in neighbouring and complementary markets (Intel in CPUs and chipsets and McAfee in internet security software). The Commission considered, after a Phase I investigation, that the merger would, *inter alia*, likely lead to the introduction of technical tying between Intel CPUs and McAfee security products and to a lack of interoperability of other security vendors with Intel CPUs since Intel might withhold the information regarding CPUs to which security vendors needed to have access for the development of new solutions. This could result in the exclusion of rival IT security products from the marketplace given Intel's strong presence in the world markets for computer chips and chipsets.

33. The commitments submitted by Intel addressed those problems and provided that the competitors of McAfee will be able to continue to run on Intel CPUs and will have access to all necessary Intel technical information to use the functionalities of Intel's CPUs and chipsets in the same way as McAfee. The commitments were therefore designed to maintain interoperability between the merged entity's products and those of their competitors, thereby ensuring competition on an equal footing between the parties and their competitors.

34. The remedies in the Intel/McAfee case may partly be considered to relate to the future behaviour of the merged entity, while other parts of it are more in line with traditional access remedies. Given that the concerns identified were of conglomerate nature, the Commission concluded that the commitments were suitable to remove the competition concerns identified while preserving efficiencies brought about by the merger. The commitments also fulfilled the need for an effective monitoring mechanism as they provide for rather straight-forward obligations and include a trustee as a monitoring device. In the horizontal Cisco/Tandberg case, however, the Commission considered a fully structural remedy, including the transfer to an independent body of the intellectual property rights needed to ensure interoperability with other providers of videoconferencing solutions, as appropriate and justified. The comparison of the two cases underlines that the Commission may consider remedies relating to the future behaviour only in

13 See Case COMP/M.5669 *Cisco/Tandberg*.

14 See Case COMP/M.5984 *Intel/McAfee*.

circumstances where the competition concerns themselves only arise from the future behaviour – as it may be the case in with respect of competition concerns arising in conglomerate structures.[15]

5. Do you have experience protecting the to-be-divested assets or businesses prior to divestiture? Have you required that assets or businesses be held separate or otherwise preserved? Have you employed monitoring trustees?

35. In our experience, the time period between the clearance decision and the transfer to a buyer is critical for the to-be-divested business. The parties would be in a position to withdraw assets, know-how or personnel from the divestment business or could simply neglect it. The competitive strength of the divestment business and its ability to remove the competition concerns could therefore decrease.

36. Accordingly, our system obliges the parties to preserve the business by ring-fencing it and not carrying out any acts which might have significant negative impacts on its value, management, or competitiveness. They also have to continue financing the divested business to allow ongoing development on the basis of the existing business plans and to retain key personnel by offering, if necessary, appropriate incentive schemes.

37. In general, and going further than the mere hold-separate issue, the supervision of the divestment process cannot be done by the Commission alone and trustees are therefore required. It is standard practice for the Commission to appoint a monitoring trustee which will be the "eyes and ears of the Commission" in order to hold-separate, but also oversee carve-outs, adopt interim preservation provisions, check the sale process and assess proposed purchasers. This trustee would also monitor behavioural aspects of the remedy, such as temporary supply agreements and will be the first point of call for third parties. The trustee is obliged to report to the Commission at regular intervals and can intervene in matters on our request.

38. Under the supervision of the Monitoring Trustee, the commitments normally provide for the appointment of a Hold Separate Manager who is an employee of the parties, ensuring the separation of the divestment business on a day-to-day basis. In the Commission's practice, the Hold Separate manager should be a senior manager selected from the list of key personnel that will remain at the divested business, and therefore he has an incentive to act in the interest of the divestment business. It is appointed immediately after the adoption of the Commission clearance decision and even before closing the main transaction.

39. Acting under the instructions of the Monitoring Trustee, the mandate of the HSM consists in ensuring the legal and physical separation of the assets of the business to be divested from the parties' retained businesses and the parties' influence, so that the divested business can operate on a stand-alone basis, is able to compete successfully on a lasting basis, and is independent of the divesting parties. The position of the Hold Separate Manager has been strengthened following the Commission's Remedies Study that showed that a close supervision is necessary in relation a practical problems arising during the interim period until the divestiture is completed. Those problems relate to, *e.g.*, the sharing of assets, like IT systems or IPRs or the monitoring of a necessary carve-out or the selection of "key-personnel".

6. How do you ensure an expeditious and successful divesture? Do you require divestitures be finalized before a merger close? If not, how quickly do you require divestiture? What happens if the divestiture has not timely occurred? Do you use sales trustees? Do you insist on enhanced asset packages when sales are not timely? How do you ensure that a sale to a

15 See paragraph 69 of the Remedies Notice and ECJ, judgment of 15 February 2005 in Case C-12/03 P Commission v Tetra Laval [2005] ECR I-987.

proposed divestiture buyer and the terms of the divestiture will accomplish your remedial goals?

40. There are a number of ways to ensure an expeditious and successful divestiture. The normal scenario is a sale of the divestment business within a fixed time-limit after the Commission's clearance condition subject to remedies. In this case the parties may close their transaction after having obtained the clearance decision but are required to undertake the divestment within a short period of time, failing which the clearance decision may ultimately be revoked and the transaction may need to be unwound.

41. Where the Commission does not have certainty that the parties will manage to divest within a short period of time to a suitable buyer, it may require that the parties propose an up-front buyer. Under this scenario, even after adoption of the clearance decision, the parties may only close their transaction where they have presented to the Commission a buyer of the divestment business and that buyer has been approved by the Commission.

42. A third possibility is a fix-it-first solution. This means that the parties already during the merger control procedure identify a buyer for the divestment business and enter into an agreement with it. The Commission will take the agreement with that buyer into account in its clearance decision and no further buyer approval will be required post clearance. Fix-it-first solutions are particularly appropriate where the effectiveness of a remedy (and therefore its acceptability by the Commission) will depend on the identity of the buyer. This could for example be the case where the divestment business consists of a bundle of assets contributed by both parties, i.e. where those assets did not previously constitute a stand-alone business.

43. Finally, our system also contemplates the possibility of enhanced asset packages ("crown jewels") when the sale of the divested business is not timely. If there is uncertainty as to the implementation of the divestiture due to third party rights or as to finding a suitable purchaser "crown jewel" commitments and the "up-front buyer" structure described above address the same concerns, and the parties may therefore choose between both structures.

44. As to the timing, the divestiture has to be completed within a fixed time period agreed between the parties and the Commission. This period is divided into (i) a period for entering into a final agreement and (ii) a further period for the closing of the transaction.

45. The period for entering into a binding agreement is further normally divided into a (i) first period in which the parties can look for a suitable purchaser and, if the parties do not succeed to divest the business, (ii) the second period in which the divestiture trustee obtains the mandate to divest the business at no minimum price. The Commission considers that short divestiture periods contribute largely to the success of the divestiture since, otherwise, the business to be divested will be exposed to an extended period of uncertainty. The Commission explained in the Remedies Notice that normally a period of around six months for the first divestiture period and an additional period of three months for the trustee divestiture period is appropriate.

46. In order to ensure that divestiture commitments will be effectively implemented, it is standard practice that the commitments provide for a divestiture trustee to be appointed if the parties do not succeed in finding a suitable purchaser within the first divestiture period. Then, in the subsequent trustee divestiture period, the parties have to transfer the task to the divestiture trustee who will be given an irrevocable and exclusive mandate to dispose of the business, under the supervision of the Commission, within a specific deadline at no minimum price to a suitable purchaser. The divestiture trustee to include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale, in particular customary representations, warranties and indemnities. The sale of the business by the

divestiture trustee is in the same way subject to the prior approval of the Commission as the sale by the parties.

47. The Commission's standard commitments set out that the parties shall support and inform the divestiture trustee and cooperate with the trustee in the same way as this is foreseen for the monitoring trustee. For the divestiture, the parties have to grant to the divestiture trustee comprehensive powers of attorney, covering all stages of the divestiture, in order to fulfill its role.

7. How do you ensure that parties comply with your remedy order? Do you include reporting requirements or inspection clauses in your orders? Do you have staff dedicated to enforcement of remedies?

48. In our system the remedies have to be offered by the parties. However, the Commission ensures the enforceability of commitments by making the clearance of the merger subject to compliance with the commitments.

49. A distinction must be made between conditions and obligations. The requirement for achievement of the structural change of the market is a condition — for example, that a business is to be divested. The implementing steps which are necessary to achieve this condition (e.g. appointment of a trustee, etc) are generally obligations on the parties.

50. If a condition is breached, (e.g. the business is not divested in the time-frame foreseen in the commitments or afterwards), the clearance decision is no longer applicable and the Commission may, first, take interim measures appropriate to maintain conditions of effective competition pursuant. Second, it may order any appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures. In addition, the parties may also be subject to fines of up to 10% of the aggregated turnover of the undertakings concerned.

51. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke its own clearance decisions. Here again, the parties may also be subject to fines of up to 10% of the aggregated turnover of the undertakings concerned. On top of this, the Commission can impose daily penalty payments until the parties comply with the obligation.

8. Is your experience in enforcing remedies reflected in documents describing your best practices or in other guideline documents? If not, are you planning to issue guidance in the near future?

52. Our practice in this field is reflected in the Remedies Notice, published on 22 October 2008.[16] This Remedies Notice sets out the general principles applicable to remedies acceptable to the Commission, the main types of commitments that may be accepted by the Commission in cases under the EU Merger Regulation, the specific requirements which proposals of commitments need to fulfill in both phases of the procedure, and the main requirements for the implementation of commitments.

53. The 2008 Remedies Notice replaces a prior one published in 2001 and takes into account the findings of the Commission's Merger Remedies Study[17] published in October 2005. We do not intend to amend the 2008 Remedies Notice for the time being.

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[16] See footnote 1.

[17] The study can be found at http://ec.europa.eu/competition/mergers/legislation/remedies.htm.

54. The Remedies Notice is supplemented by a Commission Model text for Divestiture Commitments and the Trustee Mandate that can be amended from time to time to reflect our practical experience.

9. What role do third parties and the public have in commenting on proposed remedies? How have your courts assessed the agencies' remedies and efforts to enforce them?

55. Under the EU Merger Regulation, remedy proposals by the parties which may be suitable to solve the competition concerns identified and which are submitted in time will normally be market-tested with customers and competitors. The importance of the market test has been confirmed by the General Court in the *General Electric* and *EDP/GDP/ENI* judgments. However, proposals that are manifestly insufficient to address the Commission's concerns can be rejected by the Commission without being market tested.

56. The market testing is carried out through a questionnaire together with a non-confidential version of the remedies proposal. Our assessment of replies is aware of a potential bias of competitors, e.g. as they may wish to enlarge the scope of the remedy.

57. Given the time constraints, the market test normally takes place immediately after the submission of the commitments by the parties. Therefore, it is necessary that the parties directly propose an appropriate remedy as, in particular in Phase I, after a market test, only limited modifications of the proposed remedies will be possible in order to address the problems indicated in the market test in clear-cut way. Normally, no further testing of such modifications is possible afterwards (particularly in Phase I procedures).

58. To date, the European Courts have analysed the Commission's practice in relation to remedies in 13 judgements[18]. This is a natural consequence of our system that provides that (i) the Commission has to publish a fully reasoned decision in every merger case notified to it; and that (ii) every third party with a "*legitimate interest*", and not only the parties to the transaction; can appeal a Commission decision.

59. Over the years, the European Courts have given useful guidance in areas such as, among others, proportionality of the remedies (*Cementbouw I* and *II*), allocation of responsibilities to the Commission (*General Electric, EDP/GDP(ENI*), modification of remedies (*Philips, My Travel),* behavioural commitments (*Tetra Laval/Sidel*) and trustee-related matters (*Odile Jacob*).

60. Naturally, all the interpretation and findings of the European Courts are immediately incorporated into the Commission's daily practice.

10. Feel free to comment on other issues that arise in relation to the assessment of merger remedies.

61. The European Commission's remedies policy is based on a clear preference for structural remedies, in particular divestitures of viable businesses. However, where other types of remedies are as

18 Case T-290/94 *Kaysersberg v Commission* [1997] ECR II-2137, *Gencor*, Case T-342/00 *Petrolessence* v Commission [2003] ECR II-1161, *Philips,* Case T-158/00 *ARD v* Commission [2003] ECR II-3825, Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987 ("*Tetra Laval/Sidel*"), *EDP/GDP/ENI*, , *General Electric*, Case T-282/02 *Cementbouw v* Commission [2006] ECR II-319 ("*Cementbouw I*"), *easyJet*, Case C-202/06 *P Cementbouw v* Commission [2007] ECR I-12129 ("*Cementbouw II*"), *My Travel*, Case T-237/05 – *Editions Odile Jacob SAS* v. Commission ("*Odile Jacob*").

effective and efficient as a clear cut divestiture, the Commission will be ready to explore their feasibility and sometimes be in a position to accept alternative solutions. Remedies related to the future behaviour may, though, only in exceptional cases be acceptable.