AMCHAM EU
AMERICAN CHAMBER OF COMMERCE TO THE EUROPEAN UNION

Avenue des Arts/Kunstlaan 53, B- 1000 Brussels, Belgium
Telephone 32-2-513 68 92 Fax 32-2-513 79 28
E-mail: amchameu@amchameu.be

June 29th 2007

Position Paper on the revised Commission Notice on remedies acceptable under the Merger Regulation

Introduction

1. The American Chamber of Commerce to the European Union (AmCham EU) is the voice of companies of American parentage committed to Europe towards the institutions and governments of the European Union. It aims to ensure an optimum business and investment climate in Europe. AmCham EU facilitates the resolution of EU – US issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Total US investment in Europe amounts to €702 billion, and currently supports over 4.1 million jobs.

2. AmCham EU welcomes the Commission's initiative to provide more effective guidance on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the "Draft Notice"). Transparency and predictability are of key importance in this area since companies often have to make important commercial decisions under strict timing constraints when considering potential remedies for transactions that are being reviewed by the Commission. Accordingly, AmCham EU supports the Commission's initiative to provide further guidance in relation to remedies, as this guidance should ultimately allow companies to better predict the likely final outcome of a merger control review procedure.

3. AmCham EU has only a limited number of observations on the Draft Notice, namely on the issue of non-structural remedies and implementation.

Non-structural remedies

4. AmCham EU believes the Draft Notice takes a misguided approach with respect to non-structural remedies, to the extent it suggests that behavioral remedies can only play a limited role in addressing competitive concerns in merger control. Paragraph 15 of the Draft Notice states that "*According to the case law of the Court, the basic aim of commitments is to ensure competitive market structures. Accordingly, commitments which are structural in nature, […] are preferable from the point of view of the Regulation's objective […]*". In support of that statement, the Draft Notice makes reference in particular to paragraph 86 of the ECJ judgment in Case C-12/03 Commission v. Tetra Laval. According to that paragraph:

   > "[…] *Contrary to what the Commission claims, it is not apparent from that judgment that the Court of First Instance ruled out consideration of behavioural commitments. On the contrary, in paragraph 318, the Court of First Instance laid down the principle that the commitments offered by the undertakings concerned must enable the Commission to conclude that the*

concentration at issue will not create or strengthen a dominant position within the meaning of Article 2(2) and (3) of the Regulation. Then, in paragraph 319, it inferred from that principle that the categorisation of a proposed commitment as behavioural or structural is immaterial and that the possibility cannot automatically be ruled out that commitments which are prima facie behavioural, for instance a commitment not to use a trade mark for a certain period or to make part of the production capacity of the entity arising from the concentration available to third-party competitors or, more generally, to grant access to essential facilities on non-discriminatory terms, may also be capable of preventing the emergence or strengthening of a dominant position."

In this judgment, the ECJ thus confirmed that the categorisation of a commitment as either behavioral or structural is immaterial, so long as the commitment is capable of preventing the emergence or strengthening of a dominant position.

5. Similarly, in another case quoted by the Draft Notice in support of its proposition that structural remedies are preferable to behavioural remedies, Case T-158/00 ARD v. Commission, the Court of First Instance found, in paragraph 199, that:

   "*[…] although the commitments appear to be rather behavioural in nature, they are nevertheless structural because they are aimed at resolving a structural problem, namely market access by third parties […]. It follows that the commitments cannot be categorised as mere behavioural commitments unsuitable for resolving the competition problems identified by the Commission.*"

6. Amcham EU believes therefore that the ECJ's judgments in Tetra and in ARD do not necessarily support the conclusion made in Paragraph 15 of the Draft Notice pursuant to which structural commitments would be preferable from the point of view of the Regulation's objective. Rather, Amcham EU believes that remedies should be tailored to the specific concern that is raised by the concentration. To the extent a horizontal merger eliminates a structural competitive constraint in relevant market, creating a significant likelihood that, as a result of that elimination, the transaction will impede effective competition, structural remedies may be indeed preferable to behavioral remedies. However, since a vertical or, *a fortiori*, a conglomerate merger will only raise competitive concerns as a result of the likely behaviour of the merged entity (eg. a refusal to supply in a vertical merger or the offer of package deals in a conglomerate merger), then behavioral remedies are remedies which directly address the concern. In addition, behavioral remedies in a vertical and conglomerate merger are often – if not always - a more proportionate solution than structural remedies.

7. Accordingly, Amcham EU does not believe, as provided in paragraph 17 of the Draft Notice that "*Divestiture commitments […] may also be the best means of resolving problems resulting from vertical or conglomerate concerns*." For the same reasons, Amcham EU urges the Commission not to signal in its final guidance on this topic that "*Commitments relating to the future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances*", as currently indicated in paragraph 17 of the Draft Notice. This mistaken and restrictive Commission policy approach towards behavioral remedies, according to which '*behavioural promises are in contrast with the Commission's stated policy on remedies and with the purpose of the Merger Regulation itself … and are extremely difficult if not impossible to monitor effectively*'

was precisely one of the grounds on the basis of which the ECJ upheld the CFI's decision to annul the Commission Decision in Tetra Laval/Sidel. Indeed, when the Commission relies on future conduct which it contends will be engaged in by a merged entity following a merger, according to the case law of the ECJ, the Commission has a duty to establish, on the basis of convincing evidence and with a sufficient degree of probability, that the conduct will actually occur. It is difficult to see how the Commission, in such cases, would comply with that duty if the Commission would only exceptionally and in very specific circumstances accept behavioural remedies. Accordingly, the Draft Notice should note that behavioural remedies are often preferable to structural remedies in vertical and conglomerate transactions and that only exceptionally and in very specific circumstances are structural remedies more appropriate to addressing concerns in vertical and conglomerate mergers.

Finally, AmCham EU fails to understand the first sentence of paragraph 69 of the Draft Notice, according to which "[…] non-structural types of remedies, such as promises of parties to abstain from certain commercial behaviour (e.g. bundling products), will generally not eliminate the competition concerns resulting from horizontal overlaps." Since the competition concerns resulting from horizontal overlaps do not find their source in a bundling behavior but rather by the elimination of a competitor, it seems superfluous and confusing to make that statement. A promise not to raise prices is perhaps the better example of a commercial behaviour that does not eliminate competition concerns resulting from horizontal overlaps.

Implementation

8. The Draft Notice appears to view the appointment of a monitoring trustee as a routine requirement for divestiture commitments. AmCham EU would welcome a more flexible approach with a case-by-case assessment of the need for a monitoring trustee. The appointment of such a trustee involves considerable burdens on the parties as well as the Commission. While a monitoring trustee will be appropriate in carve-out situations, the divestiture of a standalone business or the exit from a joint venture can be fairly straightforward. The draft Notice in foresees a number of additional safeguards, such as the appointment of a hold-separate manager, regular reporting requirements, and incentive systems such as upfront-buyer and crown-jewel provisions and the appointment of a divestiture trustee during the second divestiture period. The Commission should assess in each case whether such safeguards are insufficient.

9. Commission may also want to give more detailed guidance on the tasks it expects the monitoring trustee to perform. The type of remuneration scheme the Commission normally requires (hourly rates without a cap) encourages trustees to adopt the broadest possible interpretation of their mandates. Given the monitoring trustee's important advisory role to the Commission, the merging parties are typically reluctant to complain to the Commission about situations of overreaching. Some ex-ante guidance by the Commission would thus be helpful for companies.

10. AmCham EU would also welcome clarifications of the Commission's own role in the divestiture process, in particular its own commitment to ensuring speedy approval of trustee candidates, mandates and work plans, as well as proposed purchasers and sale and purchase agreements. Otherwise, the parties are left with considerable uncertainty

about the process. Ideally the Commission would commit itself to a certain time frames (for example 5-7 working days) after which the respective approvals are deemed to have been granted if the Commission has not given any indication to the contrary.

11. Last, while the Commission is to be commended for the detailed discussion of the implementation issues in divestiture commitments, the Draft Notice says little about other types of remedies. For example, commitments to exit joint ventures do not create the same kinds of implementation concerns that other divestiture commitments do.

*　　*　　*