

**Response to the
European Commission
DG Competition**

**Consultation on the draft revised Commission Notice on remedies
acceptable under the Merger Regulation
published on 24 April 2007**

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ALLEN & OVERY

ALLEN & OVERY LLP

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INTRODUCTION

1. We appreciate the opportunity given to all interested parties to submit their observations on the draft revised Commission Notice on remedies acceptable under the EC Merger Regulation¹. In general, we consider the draft Notice to be clear, reasonable and balanced and a welcome development of the Commission's analysis in this area.
2. We can summarise our more detailed comments and suggestions as follows.

SCOPE OF THE BUSINESS TO BE DIVESTED

3. Paragraph 26 of the draft Notice aims to give guidance as to which assets and personnel that are shared between the business to be divested and the retained business should be included in the scope of the business to be divested. However, the terminology used is ambiguous; the text refers to personnel and assets "which contribute to the operation of the business or are necessary to ensure its viability and competitiveness" and then later to personnel "providing essential functions for the business".
4. The final sentence of paragraph 28 of the draft Notice provides that on-going supply/purchase arrangements will be acceptable only "if they do not affect the independence of the divested business from the parties". Clearly, if the divested business could readily obtain supplies or sales from third parties, then there would be no need for the on-going link with the parties. There is therefore *necessarily* an element of "dependence" by the divested business on the divesting party. This does not give rise to a competition concern provided that the divested business determines its commercial strategy independently (and its strategy cannot be manipulated or altered by the divesting party) and provided that there is no scope for the divesting party to damage the ability of the new owner to compete effectively through the divested business. We recommend that the drafting is tightened (perhaps through the addition of a footnote) to clarify that the understanding we are describing is correct.
5. Paragraphs 30 and 31 of the draft Notice provide that the resources of a possible or presumed future purchaser should be disregarded when structuring the remedy but that, if the vendor and purchaser agree, the Commission may be asked during the purchaser approval process to consent to the carving out of certain assets or personnel that are not needed by the purchaser. The Commission may then approve the divestiture to the proposed purchaser without those assets/personnel if it would not affect the viability and competitiveness of the business to be divested, in consideration of the proposed purchaser's resources. This exercise will in some cases create needless costs and, for the individual employees involved, uncertainty. For example, all or almost all purchasers will have a head office, an accounts department and a legal function. But even in more complex cases, such as R&D functions in pharmaceutical deals, it is almost inevitable that any suitable purchaser will have its own R&D capability. When there is evidence that the assets are readily available to the potential purchaser, these should not need to be included in the divestment package. Such an approach is in line with that in the US and Canada and with the Commission's approach in *Johnson & Johnson / Guidant*.

LICENSING OF IP AND TECHNOLOGY

6. Paragraph 38 of the draft Notice provides that the Commission may accept a licensing arrangement as an alternative to divestiture where, for instance, "a divestiture would impede efficient, on-going research or where a divestiture would be impossible due to the nature of the business". Whilst this statement is welcome, it appears to draw the relevant principles too narrowly. In particular, the

¹ Hereafter the "draft Notice".

Commission in its decisional practice has shown a willingness to adopt more innovative remedies when doing so is necessary in order to realise some or all of the efficiencies created by the merger most obviously, but not only, in vertical cases. (Indeed, the principal effect of the introduction of express reference to "efficiencies" in the EC Merger Regulation and the Form CO has been, in our view, to presage a change in approach to remedies.) Similarly, a more express reference to the principle of proportionality acting sometimes to limit the extent of the remedies that are required would be welcome (and would accord with the Commission's decisional practice).

NON-REACQUISITION CLAUSE

7. Paragraph 43 of the draft Notice provides that the commitments must foresee that the merged entity cannot generally subsequently acquire influence over the whole or parts of the divested business. Footnote 47 makes clear (interpreting section B.3 of the model divestiture commitments) that an acquisition of influence falling short of control (in the sense of Article 3 of the EC Merger Regulation) could infringe such a non-reacquisition clause. It would be useful if the guidelines went further and explained what is meant by "influence" for these purposes. For example, is it analogous to the UK concept of "material influence" (a lower threshold than decisive influence) or is it lower still, and if so, what is the criterion and what is the justification for setting it below "material influence"?

SUITABILITY OF A PURCHASER

8. The suggestion in paragraph 49 of the draft Notice that the standard purchaser requirements should in some cases specifically provide that the purchaser must be an industrial purchaser appears to us to be redundant and premature. The text is redundant because the standard purchaser requirements (that require that the purchaser possesses the incentive and ability to maintain and develop the divested business as a viable and active competitor) enable the Commission to refuse to approve a purchaser which is not suitable (whether that purchaser is an industrial or financial buyer). The text is premature because it seems to us impossible to conclude up-front, before receiving a specified proposal, that certain types of purchasers will necessarily be unsuitable. If particular assets are necessary in order for a purchaser to operate effectively (e.g. a trademark), then this should be specified, but there is a danger of "losing" suitable purchasers if the purchaser requirements are "glossed" with sweeping generalities, in particular seeking to rule out "financial purchasers". Our experience is that financial buyers (e.g. private equity houses) entering a new market will usually put together a management team with expertise in the sector, so we do not think there should be any presumption against financial buyers having the necessary relevant expertise.

REMOVAL OF LINKS WITH COMPETITORS

9. We note that this section of the draft Notice does not include reference to the elimination of interlocking directorates as an additional means of increasing incentives for competing on a market. This remedy is explicitly provided for in paragraph 25 of the current Remedies Notice. Does the omission reflect a change in the Commission's policy? If so, please could the Commission provide clarification.

REVIEW CLAUSE

10. Paragraph 74 of the draft Notice states that it may be appropriate to include a clause in the commitments enabling the Commission to trigger a limited modification of the commitments. The idea of allowing the Commission to alter the text of the commitments after it has been finalised is bound to be controversial. We can understand the Commission's concern (namely that EC consumers should not be prejudiced if the Commission accepts a more innovative remedy and that remedy turns out to be defective in some respects), but it will be important to grant procedural protections to the parties involved (e.g. that the Commission should have the right to propose

changes after hearing the parties, but, if those changes are not agreed, they cannot be implemented unless and until a third party arbitrator determines that they are required in order to achieve the objectives stated in the commitments themselves). The current text is at best unclear as to the parties' involvement. Does "agreed in advance with the parties" refer to agreement over the criteria which, once triggered, would allow the Commission to modify the commitments or to agreement over the exact scope of any modifications?

Allen & Overy LLP