

Date 16 July 2007  
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By Email & Post

Dear Sirs

**Comments on Draft revised Commission Notice on remedies acceptable under the Merger Regulation**

I am writing to submit the following comments on the Draft revised Commission Notice on remedies acceptable under the Merger Regulation<sup>1</sup> (the "draft Notice") as part of the consultation process instigated by the European Commission in late April this year. Please note that these comments do not necessarily reflect the views of SJ Berwin LLP or any of the institutions I am affiliated with. For the avoidance of doubt, these comments will remain confined to the references made in the draft Notice to the use of dispute resolution mechanisms as a monitoring device of behavioural commitments within the context of conditional merger clearance decisions.

1. First, I would like to take this opportunity to congratulate the European Commission on its initiative to formalise its by now well-established practice of using dispute resolution mechanisms, in particular arbitration clauses, to monitor the medium- to long-term implementation of behavioural remedies in EC merger control. Since 1992<sup>2</sup> to date, the Commission has accepted about 50 arbitration commitments for monitoring purposes of behavioural merger remedies. This constitutes about 20 percent of the total number of conditional merger clearance decisions since adoption of the first Merger Regulation in 1989<sup>3</sup>. The Commission has hence obtained sufficient experience to proceed to formalise its policies in this respect. It may further be useful to give future merging parties

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<sup>1</sup> Commission Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2007/), electronically accessible at [http://ec.europa.eu/comm/competition/mergers/legislation/draft\\_remedies\\_notice.pdf](http://ec.europa.eu/comm/competition/mergers/legislation/draft_remedies_notice.pdf).

<sup>2</sup> The Commission having accepted the first ever arbitration commitment in *IV/M.235 - Elf Aquitaine-Thyssen/Minol*, Commission decision of 4 September 1992, OJ C232, 10.9.1992, at 5.

<sup>3</sup> I.e. Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, at p. 1. Corrected version in OJ L 257, 21.9.1990, at p. 13. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, at p. 1). Corrigendum in OJ L 40, 13.2.1998, at p. 17), replaced by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, at p. 1) (hereinafter the "Merger Regulation"), which entered into force on 1st May 2004 and replaced the old Merger Regulation.

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appropriate guidance to ensure that the monitoring mechanisms they propose are workable and likely to receive the Commission's approval.

2. Despite the Commission's silence on the use of such arbitration commitments (or any other dispute resolution mechanisms) in its recent Merger Remedies Study<sup>4</sup>, arbitration clauses have proven a useful tool for the Commission in accepting behavioural - rather than more burdensome structural - remedies with a view to granting clearance decisions for proposed mergers. The Community Courts in Luxembourg have expressly approved of this development. Most recently in *easyJet v. Commission*<sup>5</sup>, the European Court of First Instance (the "CFI") sanctioned the use of arbitration commitments as a suitable monitoring mechanism for behavioural remedies in EC merger control. In its earlier decision of *Gencor v. Commission*<sup>6</sup>, the CFI encouraged an increased use of behavioural over structural remedies, provided that the former produce *quasi*-structural effects on the internal market and are backed up by appropriate monitoring mechanisms.<sup>7</sup> This, in turn, is likely to encourage future merging parties to propose behavioural remedies in conjunction with suitable arbitration commitments to obtain clearance of their proposed merger from the European Commission.
3. Detailed studies of the Commission's practice in this field have been made at both the professional<sup>8</sup> and academic<sup>9</sup> level. These studies confirm the use and utility of the Commission's practice to date. Most behavioural remedies incorporating arbitration commitments can be classified as access commitments, i.e. promises by merged entities to give "non-discriminatory and transparent" access to an essential facility or key technology or infrastructure they control to third-party beneficiaries/competitors. It has to be cautioned, however, that in order to ensure the effectiveness of arbitration commitments as monitoring devices in EC merger control, the Commission would be well-

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<sup>4</sup> European Commission, DG Comp, *Merger Remedies Study* (Brussels, October 2005), electronically available at [http://europa.eu.int/comm/competition/mergers/others/remedies\\_study.pdf](http://europa.eu.int/comm/competition/mergers/others/remedies_study.pdf).

<sup>5</sup> Case T-177/04 - *easyJet v Commission*, Judgment of the Court of First Instance of 4 July 2006.

<sup>6</sup> Case T-102/96 - *Gencor v Commission*, Judgment of the Court of First Instance of 25 March 1999, [1999] ECR II-753.

<sup>7</sup> For confirmation, see also Case T-87/05 - *EDF v Commission*, Judgment of the Court of First Instance of 21 September 2005, at para. 100. Importantly, this approach was previously sanctioned by the European Court of Justice in C-12/03 P - *Commission v Tetra Laval* [2005] ECR I-987, at para. 85, confirming the CFI's Judgment in Case T-5/02 - *Tetra Laval v Commission* [2002] ECR II-4381, at para. 161.

<sup>8</sup> M. Blessing, *Arbitrating Antitrust and Merger Control Issues* (Helbing & Lichtenhahn, Swiss Commercial Law Series, 2003); and G. Blanke, *The Use and Utility of International Arbitration in EC Commission Merger Remedies* (Groningen, Europa Law Publishing, 2006).

<sup>9</sup> F. Heukamp, *Schiedszusagen in der Europäischen Fusionskontrolle* (Köln/Berlin/München, Carl Heymans Verlag, 2006).

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advised to make sure that the individual arbitration clauses designed for this purpose be user-friendly and fully operable.<sup>10</sup>

#### ***Access commitments under the draft Notice***

4. In the draft Notice, the Commission summarises a number of the access commitments it has granted to date,<sup>11</sup> referring to them as “*other structural remedies*”<sup>12, 13</sup> There can, hence, be no doubt that given that most of these commitments incorporate unilateral arbitration obligations, the Commission considers behavioural remedies that are backed by suitable arbitration commitments tantamount to structural remedies<sup>14</sup>. This choice of wording is - no doubt - meant to underline the effectiveness and importance the Commission attributes to the use of arbitration commitments in the context of behavioural remedies in EC merger control.<sup>15</sup>

#### ***Purely behavioural commitments under the draft Notice***

5. For the avoidance of doubt, the draft Notice clearly distinguishes the above-mentioned access commitments from *purely behavioural* commitments, which can benefit from the Commission’s approval “*only exceptionally in specific circumstances*”<sup>16, 17</sup> Even in such cases, however, the Commission will examine the suitability of granting a clearance decision on a case-by-case basis, depending on the effectiveness of the individual behavioural remedy and in particular the workability of the arbitration commitment (or other monitoring mechanism) proposed by the parties.<sup>18</sup>

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<sup>10</sup> For a critical analysis of the Commission’s practice to date, see in particular, G. Blanke, *op. cit.*, at chapter 4.

<sup>11</sup> See paras. 61 *et seq.* of the draft Notice.

<sup>12</sup> Cf. para. 17 of the draft Notice.

<sup>13</sup> See para. 17 of the draft Notice.

<sup>14</sup> As opposed to merely behavioural remedies with *quasi-structural* effects. Cf. para. 2 *supra*.

<sup>15</sup> For confirmation outside the context of the draft Notice, see also IV/M.1185 - *Alcatel Thomson CSF-SCS*, Commission decision of 4 June 1998 (OJ C272, 1.9.1998, at p.5), at paras. 40 *et seq.*; *Comp/M.2803 - Telia/Sonera*, Commission decision of 10 July 2002 (OJ C201, 24.8.2002, at p.19), at paras. 143 *et seq.*; *Comp./M.3692 - Reuters/Telerate*, Commission decision of 23 May 2005 (OJ C154, 25.6.2005, at p.10), at para. 33; and *Comp./M.3680 - Alcatel/Finmeccanica/Alcatel Alenia Space & Telespazio*, Commission decision of 28 April 2005 (OJ C139, 8.6.2005, at p.37), at para. 118.

<sup>16</sup> See para. 69 of the draft Notice.

<sup>17</sup> See para. 17 of the draft Notice.

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**Paras. 66 and 27 of the draft Notice**

6. The draft Notice makes express reference to the use of arbitration as a private dispute resolution mechanism at paras. 66 and 127. In both instances, the draft Notice provides for the involvement of the monitoring trustee in the conduct of the arbitral proceedings. More specifically, the draft Notice provides that with respect to access commitments, *“measures to allow third parties themselves to enforce the commitments are in particular access to a fast dispute resolution mechanism via arbitration proceedings (together with trustees).”*<sup>19</sup> The draft Notice further provides that where in past cases, the Commission has required both the appointment of a trustee and an arbitration clause for monitoring purposes, *“the trustee will oversee the implementation of the commitments, but will also be able to assist in arbitral proceedings to the effect that they may be finalised in a short period of time.”*<sup>20</sup>
7. From the wording of the above provisions, it is not at all clear what the exact ambit of the trustee’s duties in carrying out or assisting in the arbitration proceedings is. Whereas the first reference appears to be more generic, the second reference specifies that the trustee’s function is meant to remain ancillary to the arbitrator’s mandate and primarily to accelerate the conduct of the arbitral proceedings. Neither the draft Notice, nor the Model Trustee Mandate make any further specifications as to the trustee’s role in the arbitral proceedings.
8. Further confusion and uncertainty is caused by references to the trustee’s mandate in the arbitration proceedings in most recent Commission decisions.

***Axalto/Gemplus***<sup>21</sup>

9. By way of example, *Axalto/Gemplus* introduces a two-tier dispute resolution mechanism combining a conciliation clause involving a monitoring trustee with a subsequent fast-track arbitration procedure in case the conciliation phase fails. More specifically, the dispute resolution mechanism provides that *“[t]he tasks of the monitoring trustee will be to ensure a smooth implementation of the commitment[s], [...] in particular to hear any dispute prior to the arbitration procedure. If the dispute cannot be resolved by the monitoring trustee during the conciliation clause [read: phase], then the third party may request a fast-track arbitration. This two steps system is designed to remove any risk that*

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<sup>18</sup> *Ibid.*

<sup>19</sup> See para. 66 of the draft Notice. Original footnote omitted.

<sup>20</sup> See para. 127 of the draft Notice.

<sup>21</sup> Comp/M.3998 - *Axalto/Gemplus*, Commission decision of 19 May 2006.

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*the parties may stall the negotiation process with third parties.*<sup>22</sup> With respect to a second commitment relating to the provision of certain interoperability information, the Commission repeats the ultimate purpose of the twin-layer dispute resolution clause, stating in slightly different words, yet to the same effect that *“the monitoring trustee and the fast-track arbitration will allow shielding the efficacy of this commitment in a timely fashion.”*<sup>23</sup>

*Trustee (settlement) proposal*

10. The further specifications of the monitoring trustee’s role in the conduct of the dispute resolution proceedings digress significantly from the Commission’s practice to date.<sup>24</sup> In fact, the monitoring trustee is required to present within eight working days his own proposal as to how the parties could best resolve the dispute and what action needs to be taken by the merged entity in order fully to comply with the commitments vis-à-vis the third-party beneficiary. The monitoring trustee further needs to *“be prepared, if requested, to facilitate the settlement of the dispute”*<sup>25</sup>. Even though not expressly so stated and despite the fact that the monitoring trustee is appointed only by the merged entity, this may amount to a fully-fledged mediation procedure. In this context, it may be recalled that the Commission has accepted the potential mediation services of a monitoring trustee in some of its previous dispute resolution mechanisms, on which more below<sup>26</sup>.

*The monitoring trustee as mediator*

11. In other words, to the extent that the parties agree to resort to mediation, the appointed monitoring trustee will act as a mediator between the parties with a view to resolving the respective dispute between them. Given that the monitoring trustee will have received a copy of the request for arbitration lodged by the third-party beneficiary and in accordance with the appointment procedure will have relevant expertise in the industry which is the subject of the merger<sup>27</sup> and be independent of the parties and the Commission, he would appear excellently placed to give a neutral third-party view and act as a catalyst between the parties for their mutual rapprochement and the final settlement of their dispute.

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<sup>22</sup> See *Axalto/Gemplus*, cited *supra*, at para. 85.

<sup>23</sup> *Ibid*, at para. 89.

<sup>24</sup> For the Commission’s practice to date, see G. Blanke, *op. cit.*

<sup>25</sup> See Section F.4 of the Commitments Letter attached to the Commission’s decision in *Axalto/Gemplus*, cited *supra*.

<sup>26</sup> See paras. 19 *et seq. infra*.

<sup>27</sup> In the present case, the arbitral tribunal shall consist of three persons having experience in intellectual property matters. See Section F.5 of the Commitments Letter attached to the Commission’s decision in *Axalto/Gemplus*, cited *supra*.

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Potential concerns on part of the third-party beneficiary as to the genuine impartiality of the monitoring trustee can be easily assuaged by the Commission's ultimate preservation of control over the correct implementation of the commitments<sup>28</sup> and its previous approval of the monitoring trustee as being suited to adopting the role of a settlement facilitator as provided for under the dispute resolution mechanism.

*Final award*

12. It is not clear to what extent the tribunal is entitled to adopt the trustee's initial proposal as the final and binding award and if this was possible, in how far this may be interpreted as compromising the decisional independence of the tribunal, especially in light of the prior refusal by both parties to accept the trustee's proposal by way of amicable settlement.

*Trustee's assistance*

13. The tribunal is further entitled to "ask for assistance by the Trustee in all stages of the procedure if the Parties to the Arbitration agree."<sup>29</sup> There can be no doubt that given the wider duties of the monitoring trustee to oversee the entire implementation process of the commitments under the merger clearance decision, he will be a resource of information and knowledge to the tribunal, especially in light of his industry acumen and his probably considerable familiarity with the remedy mechanisms underlying the commitment decision.

***Gaz de France/Suez***<sup>30</sup>

14. The novel type of dispute resolution mechanism approved by the Commission in *Axalto/Gemplus*<sup>31</sup> is also used in the later *Gaz de France* decision.<sup>32</sup> Again, the monitoring trustee plays a prominent part as the first instance dispute resolver prior to full recourse by the parties to arbitration proceedings by proposing a solution to the dispute during the consultation phase between the parties. The arbitral tribunal is also entitled to request the monitoring trustee's further assistance during the arbitration proceedings, subject to the parties' approval.

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<sup>28</sup> See *supra*. In this particular case, see also Section F.16 of the Commitments Letter.

<sup>29</sup> See Section F.8 of the Commitments Letter.

<sup>30</sup> Comp/M.4180 - *Gaz de France/Suez*, Commission decision of 14 November 2006.

<sup>31</sup> Cited *supra*.

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*The Storage Trustee*

15. For present purposes, the dispute resolution mechanism introduced in *Gaz de France* has to be distinguished from the one used in *Axalto* in one significant way: In fact, any disputes arising in relation to the so-called storage commitments are to be addressed in a first instance by a specially designated Storage Trustee<sup>33</sup>, who will have particular expertise in the Belgian gas sector and the Belgian regulatory framework for gas trade.<sup>34</sup> If the merged entity does not fully comply with the storage commitments within five working days of having been notified of any shortfalls by the third-party beneficiary, then this latter may serve a motivated request on the Storage Trustee, asking him to decide on the infringement of the commitments concerned and to order the merged entity to terminate the infringement and to take the relevant actions to comply with the commitment. The Storage Trustee is required to take a final decision within 15 working days from receipt of the request after having heard the merged entity's case.<sup>35</sup> The Storage Trustee is given wide powers to establish the facts of the case, including the appointment of experts and is entitled to ask the parties for all relevant information and to request the assistance of the monitoring trustee, provided the parties agree.<sup>36</sup> He appears to be allowed to draw adverse inference from the non-provision of relevant information.<sup>37</sup> His decisions are immediately effective and binding on the parties to the dispute.<sup>38</sup>

*Arbitration procedure*

16. Importantly, if one of the parties is not satisfied with the Storage Trustee's final decision adopted by the Storage Trustee, it is free to trigger the arbitration procedure. The final decision is said to remain final and its effect is not suspended by the commencement of the arbitration procedure.<sup>39</sup> It is not clear what exactly will happen with that decision once the arbitral tribunal has rendered an award, which is not simply confirmatory of the previous decision of the Storage Trustee. It would appear beyond doubt that the final

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<sup>32</sup> See Section E.V.2 of the Commitments Letter attached to the Commission's decision.

<sup>33</sup> "Mandataire de Stockage" in the original.

<sup>34</sup> See Section E.V.1 of the Commitments Letter attached to the Commission's decision.

<sup>35</sup> See Section E.V.1.111 of the Commitments Letter attached to the Commission's decision.

<sup>36</sup> See Section E.V.1.112 of the Commitments Letter attached to the Commission's decision.

<sup>37</sup> See Section E.V.1.114 of the Commitments Letter attached to the Commission's decision, which provides as follows: "*Le Mandataire Stockage se prononce sur la base des informations disponibles. Il prend aussi en compte la non-disponibilité de certaines informations.*"

<sup>38</sup> See Section E.V.1.115 of the Commitments Letter attached to the Commission's decision, which provides as follows: "*Les décisions écrites du Mandataire Stockage sont immédiatement obligatoires.*"

<sup>39</sup> See Section E.V.1.116 of the Commitments Letter attached to the Commission's decision, which provides as follows: "*En ce qui concerne les effets de la décision finale du Mandataire Stockage, la procédure d'arbitrage n'a pas d'effet suspensif.*"

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award rendered by the tribunal would take precedence over the previous final decision of the Storage Trustee, which - in the course of the overall procedure - would have to be considered as a preliminary decision only, which can, by its very nature, be varied or set aside by a final award on the merits provided the parties refer that decision for review to the fast-track dispute resolution. It is therefore unclear whether the correct reading of the decision is that where one of the parties does not agree with the Storage Trustee's final decision, the ensuing dispute resolution procedure, including the final arbitral proceedings, is meant to work as an appeal mechanism, allowing a review of the Storage Trustee's final decision.

### ***T-Mobile Austria/Tele.ring***<sup>40</sup>

17. In *T-Mobile Austria*, which provides for a fast-track arbitration mechanism for the resolution of any disputes arising from the divestment of UMTS frequencies and mobile telephony sites of tele.ring to operators with lower market shares than T-mobile Austria, the monitoring trustee again plays a prominent role. He is required to have particular expertise in the telecommunications sector<sup>41</sup> and can be requested by the "arbiter" to assist in the arbitration process, lending, in particular, his advice and expertise.<sup>42</sup>

### ***Mediation***

18. Despite the Commission's practice in this respect to date, the draft Notice does not make any express reference to the use of mediation as an alternative dispute resolution mechanism for the monitoring of behavioural remedies in EC merger control.
19. In two recent instances<sup>43</sup>, the Commission has accepted pure mediation commitments to resolve disputes arising in relation to the correct implementation of a gas release programme.<sup>44</sup>
20. The mediation commitments provide as follows:

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<sup>40</sup> Comp/M.3916 - *T-Mobile Austria/Tele.ring*, Commission decision of 26 April 2006.

<sup>41</sup> See Section D.2 of the Commitments Letter attached to the Commission's decision in *T-Mobile Austria*, cited *supra*.

<sup>42</sup> See Section E.2 of the Commitments Letter.

<sup>43</sup> Comp/M.3696 - *E.ON/MOL*, Commission decision of 21 December 2005 and Comp/M.3868 - *DONG/Elsam/Energi E2*, Commission decision of 14 March 2006.

<sup>44</sup> See Section E of the Commitments Letter attached to the Commission's decision in *DONG*, cited *supra*; and Section D of the Commitments to the European Commission annexed to the Commission's decision in *E.ON*, cited *supra*.

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- In the event that a third party, notably but not exclusively a bidder in an auction under the gas release programme, has reasons to believe that the merging party is failing to comply with the requirements of the commitments, the monitoring trustee may be instructed by the Commission to act as mediator to attempt to settle the dispute amicably. The monitoring trustee shall be allowed to appoint further professionals to assist him in the mediation process.
  - The mediation procedure shall be proposed by the monitoring trustee with the mutual agreement of the mediating parties and in accordance with the European Code of Conduct for Mediators<sup>45</sup> to the extent applicable.
  - The procedure shall comprise a first phase of exchange of written observations between the parties. The deadlines to reply to the observations shall be set by the monitoring trustee in a timely manner in order to accelerate the mediation process.
  - Following the exchange of written observations the monitoring trustee shall arrange for negotiations between the mediating parties with a view to reaching an amicable solution of the dispute. If such negotiations fail, the monitoring trustee is empowered to recommend a solution which shall become binding upon the mediating parties unless at least one of the mediating parties has lodged its opposition to this recommendation within one month from receiving a fully reasoned version of the recommended solution in the English language. In the latter case the monitoring trustee shall prepare a report for the Commission on the outcome of the mediation process. Nothing in the mediation procedure shall affect the powers of the Commission to take decisions in relation to the commitments in accordance with its powers under the Merger Regulation and the EC Treaty.
21. There can be no doubt that in the given context, a mediation commitment can be a useful tool to resolve a dispute arising from the gas release programme with a view to the continued commercial relationship between the merged entity and the third-party beneficiary. It would appear that a workable mediation procedure can be swiftly and effectively provided at the instigation of the monitoring trustee provided this latter has relevant mediation experience and meets the relevant requirements of competence laid down in the European Code of Conduct for Mediators<sup>46</sup>. Further, even though the mediator will ultimately be the same person as the monitoring trustee, relevant due

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<sup>45</sup> As developed by the Commission and launched on 2 July 2004. For an electronic version, see [http://ec.europa.eu/civiljustice/adr/adr\\_ec\\_code\\_conduct\\_en.pdf](http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf).

<sup>46</sup> See para. 1.1 of the European Code of Conduct for Mediators.

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- process criteria regarding his independence and impartiality will arguably be guaranteed by compliance with the European Code of Conduct for Mediators<sup>47</sup>.
22. Despite the detailed provisions on the mediation process, especially such as implied by reference to the European Code of Conduct for Mediators, it remains unclear what form the “*binding solution*” recommended by the monitoring trustee acting as mediator should take and whether, and if so, in how far that solution differs from an “*understanding [...] by all the parties through knowing and informed consent*”, resulting in an “*enforceable agreement*” as between the parties within the meaning of the European Code of Conduct for Mediators<sup>48</sup>.
23. To ensure the proper enforceability of any such solution recommended by the monitoring trustee, it would be preferable if the mediation commitment were consistent with the wording of the European Code of Conduct for Mediators. To avoid any complications at the enforcement stage, the mediation commitment should refer to the solution to be reached by the mediating parties as an “enforceable agreement” under the applicable substantive law.
24. It is further unclear what the exact consequence of the mediation process failing will be, apart from the monitoring trustee’s preparation of a “failure” report of the mediation process for the European Commission. It would appear that in case the mediation process fails, the Commission will make its own investigations into the implementation of the remedy package and pass a Commission decision with a view to rectifying the situation in due course.
25. Clarification on the above shortcomings in the mediation commitment would be desirable.

*Further mediation precedents and “mediation-cum-arbitration” commitments*

26. Rather than pure mediation commitments, the Commission has, on occasion, also accepted - what may be called - “mediation-cum-arbitration” commitments, which are based on a sequential use of mediation and arbitration procedures for the resolution of the same dispute.
27. In *Lufthansa/Swiss*<sup>49</sup>, disputes between the merged entity and new air service providers, intermodal partners or prospective new entrants “*shall be subject to mediation [...] and fast track dispute resolution [...]*”<sup>50</sup> Accordingly, the monitoring trustee has the

<sup>47</sup> See para. 2 of the European Code of Conduct for Mediators.

<sup>48</sup> See para. 3.3 of the European Code of Conduct for Mediators.

<sup>49</sup> Comp./M.3770, Commission decision of 4 July 2005 (OJ C204, 20.8.2005, at p.3). For a similar “mediation-cum-arbitration” commitment, see Comp./M.3940 - *Lufthansa/Eurowings*, Commission decision of 22 December 2005 (OJ C18, 25.1.2006, at p.22).

<sup>50</sup> See Clauses 6.4 (with respect to interline agreements), 7.2 (with respect to frequent-flyer-programme agreements), 8.4 (with respect to intermodal services agreements), 9.2 (with respect to special prorate

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responsibility to “mediate any disagreements relating to the terms of the Interline Agreement [...], the F[requent] F[lyer] P[rogramme] [...], the Intermodal Agreement [...], the Special Prorate Agreement [...], if mediation is agreed to by the other party or parties to the agreement in question, and submit a report upon the outcome of the mediation to the Commission [...]”.

28. In other words, to the extent that the parties agree to resort to mediation, the appointed monitoring trustee will act as a mediator between the parties with a view to resolving the respective dispute between them. It is a cause for concern, however, that it does not clearly emerge from the commitment decision to what degree the mediation commitment and arbitration commitment are intended to constitute alternatives or to operate as complementary provisions, to be triggered successively in case the mediation process fails. This particular concern is aggravated by the formulation of the arbitration commitment as an obligation coupled with a preliminary negotiations requirement. It is hence questionable to what extent the mediation commitment defeats the objective of the preliminary negotiations requirement and in how far an arbitration *obligation* is compatible with a parallel mediation *option*.<sup>51</sup>
29. Further, in *Honeywell/Novar*<sup>52</sup>, the arbitration commitment specifies that with respect to any complaints from Honeywell regarding damage done to the ESSER trademark by the licensee, the monitoring trustee shall “take a decision, subject to arbitration, on the matter”.<sup>53</sup> It is not clear to what extent the trustee is again supposed to act as a mediator or effectively as a first-instance arbitrator, whose decision will have to be appealed within the framework of a formal (*ad hoc*) arbitration procedure if the parties disagree with the trustee’s assessment<sup>54</sup>.
30. Given the small number and lack of clarity of any of the above “arbitration-*cum*-mediation” variations of the pure arbitration commitment, it may well be too early days to assess their use and utility within the context of EC-merger-remedy-related arbitrations. It would seem

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agreements) and 10.4 (with respect to blocked space agreements) of the “Commitment Package” annexed to the Commission’s decision).

<sup>51</sup> It must, therefore, be assumed that the arbitration obligation is meant to be triggered only if a previous mediation option - exercised with the parties’ consent - failed, either wholly or in part. In other words, (i) if the parties do not opt for mediation in the first place, or (ii) if having opted for mediation, the parties do not manage to agree the settlement of (part) of their dispute, they will be obliged to resort to arbitration to have the remainder of their dispute resolved by an arbitrator. As this mechanism combines both mediation and arbitration, the term “mediation-*cum*-arbitration commitment” would appear an appropriate generic description to distinguish it from a pure mediation or a pure arbitration commitment.

<sup>52</sup> Comp./M.3686, Commission decision of 30 March 2005 (OJ C104, 29.4.2005, at p.20).

<sup>53</sup> See Clause 46 (f) of Section H of Schedule III annexed to the Commitments appended to the Commission’s decision.

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certain, however, that an effective mediation-*cum*-arbitration commitment requires more than a mere sequential juxtaposition of mediation and arbitration procedures within the framework of one and the same arbitration commitment.

31. This, however, does not detract from the potential usefulness of inserting into the draft Notice an express reference to mediation as an alternative dispute resolution mechanism for the monitoring of behavioural remedies in EC merger control. Especially in light of the increasing interest in mediation at the EU level, such a reference may encourage the further development of mediation practice in EC merger control more specifically.

### **Conclusion**

32. To ensure the proper functioning of the dispute resolution mechanisms accepted by the European Commission for the monitoring of behavioural commitments in EC merger control to date, the Commission would be well-advised to keep procedurally separate the functions of the monitoring trustee from the arbitrator's mandate. To avoid any complications at the enforcement stage, the monitoring trustee should in no way influence and instead remain entirely ancillary to the decision-making process of the arbitral tribunal. The monitoring trustee should have no more than a supportive function, advising the tribunal to the degree necessary on the intended functioning of the remedy package and lending to the tribunal his expertise and industry knowledge necessary for the tribunal to take a commercially-relevant and sufficiently informed decision on the merged entity's performance of the behavioural remedies concerned in accordance with the intended effect of the overall remedy package.
33. To address these issues, it would be advisable carefully to delimit the monitoring trustee's intended functions in the arbitration proceedings by making express reference to the trustee's role in this respect in the Trustee Mandate. It would further be useful to provide a Model Arbitrator's Mandate and a Model Arbitration Commitment<sup>55</sup>, which can be adapted to individual requirements on a case-by-case basis, in order to ensure the proper workability of the arbitration procedure.<sup>56</sup>
34. In drafting the above-mentioned model texts, the Commission should not hesitate to involve specialist arbitration counsel.

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<sup>54</sup> On this arbitration obligation, see Clause 14 of the Commitments annexed to the Commission's decision in *Honeywell/Novar*, cited *supra*.

<sup>55</sup> For a suitable Model Arbitration Commitment, see e.g. G. Blanke, *op. cit.*, at Annex II.

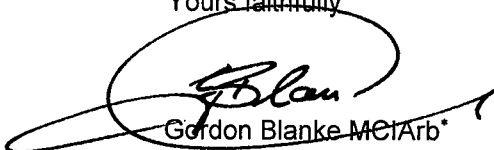
<sup>56</sup> Relevant submissions to this effect have been made to the Commission by the former ICC Task Force on Arbitrating Competition Law Issues.

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In case of any further queries, please do not hesitate to contact me.

Yours faithfully

  
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