COMMENTS ON THE EUROPEAN COMMISSION'S DRAFT NOTICE ON REMEDIES ACCEPTABLE UNDER COUNCIL REGULATION (EEC) NO 139/2004 AND UNDER COMMISSION REGULATION (EC) NO 802/2004

submitted by

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INTRODUCTION

This paper provides Crowell & Moring's comments on the European Commission's Draft Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004 ("Draft Notice"). Crowell & Moring also took into consideration the changes suggested for the Commission Regulation amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("Draft Regulation").

We welcome the opportunity to comment on the Draft Notice and commend the Commission's efforts to engage interested parties in the discussion process for the future application of remedies in merger cases. Crowell & Moring provides these comments based on the experience of our lawyers in advising numerous clients on these issues over many years but notes that the comments are our own and do not necessarily reflect the views of any client.

Crowell & Moring does not comment exhaustively on all the suggestions in the Draft Notice but concentrates on those which, based on our experience, we find could be reconsidered or revised.

Crowell & Moring strongly supports the general initiative of the Commission to publish the Draft Notice. The Draft Notice builds on the European Courts' jurisprudence, the Merger Remedies Study Public version, DG Competition, European Commission October 2005 ("Merger Remedies Study")[1]. Furthermore, it seems that the Commission is trying to build on extensive FTC/DOJ experience in implementing merger remedies. The Draft Notice contains a significant amount of useful guidance on how the Commission intends to handle merger cases involving remedies. Crowell & Moring believes that such efforts at transparency will promote understanding and even greater compliance by companies doing business in Europe.

It is important for the Commission to bear in mind that, when assessing remedies, the whole remedies process must be guided by the principle of proportionality. Achieving this requires the Commission to treat similar cases in one way and dissimilar cases in another. To this end, the remedies must be suitable and necessary to meet the specific competition concerns identified. This means due consideration must be given to all the particularities of the individual case at hand. Furthermore, the Commission should take into account the time and expense of the parties to the merger.

The procedural framework provided by the Commission guidelines allows complex cases to reach a closing before the remedies have been implemented. This poses a significant advantage compared to jurisdictions where such sophisticated remedies frameworks do not exist and an early closing is thus not allowed. In fix-it-first and upfront-buyer situations, this advantage is considerably diminished. In complex remedies situations, the

[1] Available at http://ec.europa.eu/comm/competition/mergers/legislation/remedies_study.pdf.

obligation to provide extensive information will be to the advantage of potential beneficiaries (purchasers), as this should allow for a more reliable due diligence. Whereas this is helpful to restore effective competition in complex remedies situations, the obligation, if applied without a sense of proportion, may be excessive in less complex remedies cases.

It is important that the final version of the Notice is workable. This goal is contingent on the Commission exercising a substantial degree of flexibility when conducting the remedies procedure.

GENERAL COMMENTS ON THE OVERALL APPROACH OF THE DRAFT NOTICE

In comparison with the previous Notice from 2001[2], the Draft Notice is not only more voluminous, but also much more detailed and specific in substance. It is evident that the clear guidelines provided in the Draft Notice shall facilitate entering into negotiations about commitments and trustee mandates. In light of Section 3 of the Draft Regulation, however, which requires parties to substantially explain and justify any deviations from the Model Texts, Crowell & Moring is apprehensive that this development will lead to a considerable reduction in flexibility of the Commission to find a remedy for a specific competition concern which is suitable on the one hand and not overreaching on the other.

GENERAL PRINCIPLES

Crowell & Moring welcomes the clarification in the Draft Notice, that the burden of proof regarding the incompatibility of the concentration - as modified by the commitments - with the common market rests with the Commission, as such clarification is supported by the case law of the European Courts.[3]

For the Commission's assessment of the effectiveness of the commitments Crowell & Moring recommends keeping information requirements to the minimum necessary. In particular, we question whether the adaptation of requirements under Form RM on the basis of waivers, as suggested at the end of paragraph 7 of the Draft Notice, is compatible with the principle of proportionality.

The Merger Remedies Study contained an "effect-based" classification of remedies. As an effect-based classification is in line with the more economic approach that governs EC competition law, Crowell & Moring questions the Commission's stance in the Draft Notice regarding the classification of remedies as structural/behavioral.[4] The Community Courts have clearly stated that the Commission must take into account behavioral commitments offered by the parties[5]. In paragraph 16 of the Draft Notice the Commission states that it must examine on a case-by-case basis, which type of remedy is

[2] Commission's Notice on remedies acceptable under the Council Regulation (EEC) 4064/98 and under the Commission Regulation (EC) 447/98, OJ 2001, C 68/3.

[3] Case T-87/05 – EDP v Commission, paragraphs 62 et seq.

[4] To this end, see Case T-102/96 - Gencor v. Commission, paragraph 319: "The distinction between structural and behavioral remedies is immaterial".

[5] See Case T – 102/96 - Gencor, paragraph 319; Case C-12/03 P – Commission v Tetra Laval, paragraphs 86.

suitable to eliminate the competition problems identified. The Commission goes on, however, to declare that behavioral remedies are acceptable only in very specific circumstances.[6] This categorical statement leaves doubts as to whether the Commission is willing to make the required assessment, as mandated by the courts, of behavioral commitments in all cases.

Model Texts

The Commission has developed the practice of using Model Texts for commitments and trustee mandates. The Commission can amend, remove or entirely replace these Model Texts at its full discretion at any given time without having to follow legislative procedures. Nevertheless, through the Commission's practice, the Model Texts have developed into a kind of "soft law", deviations from which usually have to be explained explicitly by the parties. With a view to section 3 of the Draft Regulation, we are concerned that the mere Commission practice is made legally binding thereby upgrading Model Texts to "hard law". We therefore recommend that the Commission delete Section 3 of its Draft Regulation.

Should Section 3 of the Draft Regulation ever enter into force, we would find it necessary in this event that the Commission follows the normal legislative procedure to implement or amend the Model Texts.

Moreover, in this event, it would be even more important that the Commission provide the Model Texts in all Community languages. As of now, they are only available in English.

DIFFERENT TYPES OF REMEDIES

Divestiture of a business to a suitable purchaser

We support the efforts the Commission undertakes in order to ensure that a business that is to be divested is viable and not deliberately run down by the parties with the aim of preventing effective competition from the purchaser. However, we submit that the Commission should not overstretch the requirements on the parties by demanding that all assets that "contribute" to the "current operation" be included in the divestment. While this requirement may be suitable to remedy the competition concerns, it is not always necessary to achieve this and may, in fact not be a proportional measure in some situations.

Naturally, the Commission must create safeguards to ensure that remedies provide a workable framework for the future. It is necessary, however, to take into account the particularities of individual cases and sustain a flexible approach concerning remedy solutions. For example, in assessing viability in divestment cases, the Commission should not *per se* rule out taking into account the resources of possible buyers; rather, it should base its decisions on the specifics involved in the case at hand.

Crowell & Moring submits that the overall test of acceptable remedies at any stage of the remedies procedure, irrespective of the type of remedy offered by the parties, should be

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[6] Draft Notice, paragraphs 17, 69.

whether the commitment(s) remove the competition concerns identified by the Commission. For example, licensing of IP rights instead of divestitures should be acceptable as long as the competition problems would be removed, irrespective of whether a divestiture is possible or not. Another example is the application of the Crown Jewel concept. Here, the Commission should take particular care that it does not require the second alternative to be more valuable than the first alternative offered by the parties, as such a request would violate the proportionality principle. It is only important whether the second commitment sufficiently addresses the competition concerns.

Given the diversity of industries in the various markets and their unique characteristics, the uniform application of a fixed time term, be it 10 or 7 years, is not advisable. Crowell & Moring suggests that the wording be changed to "up to 10 years" to ensure flexible handling of: (i) different requirements of the different types of remedies and (ii) different characteristics of the industries involved. This also applies to the waiver of rights. We suggest that the Commission explicitly state that a waiver of rights is not permanent but rather limited to a maximum of 10 years.

Removal of links with competitors

We submit that minority shareholding does not affect the viability of a business to be divested, provided that the merging parties cannot exercise any competitively significant influence over the divested business.

Other remedies

The Commission should assess the suitability and effectiveness of a remedy on a case-by-case basis. We recommend that the Commission refrain from insisting on divestitures or measures of equivalent effect, as stipulated in paragraph 61 of the Draft Notice. Although divestitures and measures of equivalent effect are frequently suitable remedies, they may not be necessary, as there may exist other types of remedies suitable to address the competition concerns by the Commission that are less onerous on the parties to the merger. In such cases, the Commission has to accept, in accordance with the proportionality principle, the less onerous remedy offered.

REQUIREMENTS FOR IMPLEMENTATION OF COMMITMENTS

Divestiture Process

The Commission creates time-frames that it considers appropriate for the different divestiture periods. The Commission should take care to preserve flexibility in the assessment of the merits of each case.

The Monitoring and the Divestiture Trustee

We agree with the Commission that a monitoring trustee with substantial powers vis-à-vis the parties might help ensure compliance with the commitments. However, failing to give the parties any control over the expenditures effected by the monitoring trustee, goes beyond what is necessary to achieve this aim. We therefore recommend that a respective clarification be implemented in the final version of the Notice.

The merging parties should be able to influence the terms and conditions of a sales agreement drawn up by the divestiture trustee. It should not only be, as paragraph 118 of the Draft Notice states, up to the discretion of the divestiture trustee.

Obligations of the parties following implementation of the divestiture

The Commission creates a monitoring period of up to ten years in the case of divestitures. Generally, divestitures are fully implemented after a relatively short time, mostly in well under a year. Thus, a longer monitoring period does not seem necessary in these cases. Therefore, the Commission should adapt its monitoring time-frames to the requirements of the individual cases.

Given the neutrality requirement and the fact that trustees are barred from working for the merging parties for several years upon termination of the trustee mandate, it is our experience that the time-frame of one week to provide a list of proposed trustees, provided for in paragraph 18 of the Model text for Divestiture Commitments, is unworkable.

CONCLUSION

Crowell & Moring is very grateful for the Commission's Draft Notice and the opportunity to comment on it. Crowell & Moring considers the Commission's Draft Notice a step forward in the assessment of merger remedies but cautions the Commission not to dispose of all its flexibility which is necessary to find a remedy for a specific competition concern which is both suitable and proportional.