Response dated 29 June 2007 to the

Commission of the European Communities
DG Competition

Consultation on the
Draft Commission Notice on remedies acceptable
under Council Regulation (EC) No 139/2004
and under Commission Regulation (EC) No 802/2004
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FRESHFIELDS BRUCKHAUS DERINGER’S COMMENTS ON THE EUROPEAN COMMISSION’S DRAFT REVISED NOTICE ON REMEDIES ACCEPTABLE UNDER THE EC MERGER REGULATION

1. INTRODUCTION


1.2 Our comments are based on our substantial experience of advising parties during European (and national) merger control proceedings. The comments contained in this paper are those of Freshfields Bruckhaus Deringer. They do not necessarily represent the views of any of our clients.

1.3 We welcome the Commission’s publication of clear, fuller, guidance on acceptable remedies. We believe that the final notice will greatly assist businesses and legal practitioners when considering suitable remedies in merger transactions and in implementing them.

1.4 Our main comments on the Draft Notice are described below. We also have a number of drafting suggestions that we consider would be helpful to clarify the text of the Draft Notice in places. For ease of reference, a marked up copy of the document is therefore attached with our drafting suggestions.

2. GENERAL PRINCIPLES - ALLOCATION OF RESPONSIBILITIES

2.1 It would clarify this section if the respective burdens in commitments cases were clearly set out at the beginning of this section before the Commission elaborates on them in subsequent paragraphs. For example, to spell out that:

(a) it is for the Commission to demonstrate that a concentration cannot be declared compatible with the common market (as it would significantly impede competition in the common market or in a substantial part of it);

(b) it is for the parties to the concentration to propose commitments that are full and effective; and

(c) it is for the Commission, if it does not wish to accept the commitments, to demonstrate that the remedies offered do not resolve the competition concerns identified: it is not for the parties to prove that the commitments eliminate the competition concerns identified.

2.2 In paragraph 6 it is stated that the Commission communicates its competition concerns to the parties ‘to allow them to formulate appropriate and corresponding remedies proposals’. We suggest that, given the Commission’s burden of proof, this statement should be modified to clarify that these must be substantiated concerns, including during phase I. Moreover, where the Commission does have preliminary competition concerns, it is essential that these are spelt out clearly at an early stage so that the parties are then able to identify any issues that may need to be remedied.
2.3 In paragraph 7, although it is for the parties to put forward commitments and the Commission may not impose conditions in an authorisation decision, we consider that the Commission should as a matter of course provide full and explicit information on what it considers would constitute an appropriate remedy to deal with competition problems identified.

2.4 The second sentence of paragraph 7 states that the parties have the relevant information for the assessment of the feasibility of the commitments proposed ‘and the viability and competitiveness of the assets proposed to divest’. We believe that this latter part of the sentence should be amended given that, as drafted, it suggests that the commitments must relate to the divestiture of assets.

2.5 The information required in Form RM appears to us as a sensible consolidation of existing practice. The Form does not appear to deal with reverse carve outs, which might be a useful addition. In the Draft Notice, the Commission’s acceptance in paragraph 7 that ‘[t]he Commission can adapt the precise requirements to the information necessary in the individual case at hand on the basis of waivers’ is to be welcomed, especially as in some cases (such as divestment of a pre-existing stand-alone business) the level of detail required is likely to be less than in others.

3. General Principles – Basic Conditions to Accept Remedies

3.1 We believe that the title of this section could perhaps be clearer. We suggest that ‘General conditions’ or ‘General principles’ applicable in commitments cases might be preferable?

3.2 This section would be much easier to follow if the general conditions applicable in all commitments cases were itemised numerically in the first paragraph. Not only would this make paragraph 9 itself clearer, but it would also facilitate understanding of the Commission’s meaning when it later refers to ‘that condition’ (paragraph 10), the ‘second condition’ (paragraph 12) and ‘these principles’ (paragraph 13).

3.3 In paragraph 9, when referring to the fact that the commitments must eliminate the competition concerns entirely, it might be useful if the particular requirements (that the modified concentration no longer raises serious doubts) in phase I cases were highlighted, either in the text or a footnote. Further, given the prospective nature of this assessment, we believe the paragraph should also be drafted so as to refer to commitments being ‘likely to eliminate the competition concerns’, in line with the drafting of paragraph 12.

3.4 The Draft Notice refers to the Court of First Instance’s (CFI’s) statement that the parties must ensure that commitments put forward are ‘comprehensive and effective from all points of view’. We believe that the Draft Notice should provide clarification on what it considers this obligation entails.

3.5 The reference to ‘that condition’ in paragraph 10 is unclear and would benefit from clarification (see paragraph 3.2 above).

3.6 In paragraph 10 (and e.g. in paragraphs 11 and 12) the Commission states that it must be able to conclude ‘with the requisite degree of certainty’ that it will be
possible to implement the structural commitments and that it will be ‘likely’ that the new structures resulting therefrom will be sufficiently workable and lasting to ensure that the significant impediment to effective competition will not materialise. The paragraph would be much more useful and helpful if the Commission were to provide further guidance and clarification on how it interprets the terms ‘requisite degree of certainty’ and ‘likely’ (e.g. balance of probabilities). Businesses will then be a position to understand more fully the hurdle to be overcome.

3.7 We believe that the Draft Notice should be amended to clarify whether paragraph 12 (like paragraphs 10 and 11) refer only to structural commitments or whether (as we understand) paragraphs 12 and onwards refer to all commitments, as this is currently ambiguous.

3.8 Paragraph 13 provides that in order to meet the conditions, ‘there has to be an effective implementation and ability to monitor the commitments.’ The meaning of the rest of the paragraph is, however, difficult to follow. Is the Commission suggesting that commitments other than divestitures cannot amount to binding conditions or obligations in the absence of monitoring provisions? Is the monitoring provision not just a mechanism, albeit an important mechanism, to monitor compliance with conditions and obligations? Given the legally binding nature of obligations, once attached to a Commission decision, it seems inaccurate to describe them as ‘mere declarations of intentions’. 3.9 We note the Commission’s concerns in paragraph 14 that it may be harder to be certain that more complex remedies are able to be monitored effectively. However, we note also that the mere fact that a remedy is complex should not mean that it is presumed less likely to maintain effective competition in the market. We therefore believe that paragraph 14 should be amended to avoid any suggestion of such a presumption.

4. **GENERAL PRINCIPLES: APPROPRIATENESS OF DIFFERENT TYPES OF REMEDIES**

4.1 Although the Commission notes in paragraph 15 that the possibility cannot automatically be ruled out that other types of commitments than structural commitments may also be capable of preventing a significant impediment to effective competition, we suggest that the tone of the Draft Notice is, in the light of the case law, too prejudiced against behavioural remedies. The CFI has been very clear that categorisation of a commitment as behavioural or structural is incidental to an assessment of the effectiveness of a commitment to remedy the competition concern identified, and that a behavioural commitment which will be effective must be accepted. It is suggested therefore that the Commission clarifies and expands on the practical significance of the Court of Justice’s rulings on this issue and when, and what

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1 Case 210/01 General Electric Company v. Commission [2005] ECR II-5575, paragraph 555 (where the CFI held that the structural commitments can be accepted only in so far as the Commission is able to conclude, with certainty, that it will be possible to implement them and that the new structures will be sufficient workable and lasting to ensure that the significant impediment to effective competition will not be likely to materialise in the near future).

type of, behavioural remedies may be appropriate in specific circumstances, given its experience to date.

4.2 The Commission seems to use the terms ‘competition problems’ (see e.g. paragraph 15) and ‘competition concerns’ interchangeably. However, the Commission has given a specific definition, in footnote 4, to the term ‘competition concerns’, although Recital 30 of the ECMR specifically refers to ‘competition problems’ (see also e.g., paragraphs 16, 17, 34, 38, 40, 48, 65, 80, 89, 92 and 99). We suggest that the Commission uses one of these two terms consistently throughout the Draft Notice.

4.3 In paragraph 17, the Commission states that ‘[o]ther structural commitments may be suitable to resolve all types of concerns if those remedies are equivalent to divestitures in their effects’. We believe that this statement is inconsistent with the general conditions expounded by the Commission earlier in the Draft Notice and the case law which make it clear that a commitment cannot be ruled out if it is capable of preventing the significant impediment to effective competition (see also paragraph 5.5, below).

4.4 The last sentence of paragraph 17 should be clarified: ‘In any case, those types of remedies can only exceptionally be accepted if their workability is fully ensured by effective implementation and monitoring in line with the considerations set out in paragraphs 13-14, 66, 69, and if they do not risk leading to distorting effects on competition.’ Is this sentence intended to indicate that the Commission takes the view that behavioural commitments will only rarely satisfy the considerations laid out in paragraphs 13-14, 66 and 69? If so, the Commission should expand on why it takes this view. Again, we reiterate that we consider that the tone of the Draft Notice is, in the light of the case law, too prejudiced against behavioural remedies (see paragraph 4.1, above).

4.5 By way of further comment, we consider that the Draft Notice should discuss the principle of proportionality upfront in this general section (or in the preceding section).

4.6 Although recital 30 of the ECMR accepts that remedies must entirely eliminate the competition problem, it also provides that commitments should be proportionate to it. Further, in *BaByliss v. Commission*, the CFI held that it would be contrary to the principle of proportionality to require certain remedies where less onerous remedies would still prevent the anticompetitive effects arising. We therefore consider that the Commission should make it clear at an early stage in the Draft Notice that it will accept the *least* onerous set of remedies, including behavioural ones, where they are likely to resolve the competition concerns.

4.7 We believe that the principle of proportionality plays a particularly important role in cases where the parties wish to ensure that any commitments offered preserve the efficiencies resulting from the transaction. Although this point is touched on specifically in paragraph 38 of the Draft Notice (in the context of IP rights), we believe that this issue should be addressed as a general point. In cases generating efficiency

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3 See e.g. Case T-114/02 *BaByliss v. Commission* [2003] ECR II-1279, paragraphs 170-171.
4 Ibid.
benefits for consumers, a more complex package of commitments may be justified to
address the competition concerns whilst at the same time preserving the positive
effects arising from the concentration.5

5. **DIFFERENT TYPES OF REMEDIES: DIVESTITURE OF A BUSINESS TO A
SUITABLE PURCHASER**

5.1 In paragraph 27 the Commission states that a divestment commitment should
contain a non-solicitation clause with regard to the key personnel. The Draft Notice
should make it clear that the clause is not be open-ended, as the sentence currently
indicates, for example, by limiting is duration to a period of one or two years.

5.2 We suggest that paragraph 31 (as the exception to the general principle) be
moved closed to paragraphs 25 and 26 (the general principle) for the sake of clarity.

5.3 We suggest that paragraph 35 (‘carve-outs’ and ‘reverse carve-outs’) be
clarified by splitting it into two parts. The first should address the fact that, instead of a
stand-alone business, the Commission might instead (not ‘also’) consider a ‘carve-out’
in certain circumstances. The second part should make it clear that, in such cases,
there may also be a ‘reverse carve-out’ of parts of the business that will remain with
the parties.

5.4 We consider that the last sentence in paragraph 36 is confusing. The
Commission suggests, when it states, ‘[i]f this should not be possible or if the carve-
out should be particularly difficult …’, that such problems will be discovered during
the divestment period. In fact, an up-front buyer solution must be offered and accepted
at the time of the approval decision and cannot subsequently be selected. The drafting
of the last sentence of this paragraph should therefore reflect these timing differences.
It should also be considered whether the concerns outlined in paragraph 36 could be
satisfactorily addressed by a fix-it-first remedy (and if so, this should be noted).

5.5 The statement in paragraph 38, that the granting of IP licences may be
acceptable to the Commission only if a divestiture of a business is not possible and the
granting of a licence is as effective as a divestiture, is inconsistent with the general
conditions expounded earlier in the Draft Notice (and the case law, see paragraph 4.3
above). In particular, the conditions and case law make it clear that a commitment
cannot be ruled out if it is capable of preventing the significant impediment to effective
competition. The wording should therefore be amended to reflect this point. Further,
the rather draconian language of the rest of this paragraph should be amended to
ensure that it does not rule out, for example, the grant of a licence of an intellectual
property right (rather than a divestiture) where a licence would be capable of
preventing the significant impediment to effective competition.

5.6 Equally, we do not believe that the apparent presumption in paragraph 38
against field-of-use and geographical restrictions is justified: the Commission is
required to accept commitments which remove the potential significant impediment to
effective competition; if this is limited to a particular product area or a particular
geographic territory, then it must be possible that – more frequently than on an

5 See e.g. Case COMP/M.3099 Areva/Urenco/ETC JV, Case COMP/M.3770 Lufthansa/Swiss.
exceptional basis - a licence limited in this way would be appropriate. While we accept that there may in principle be some circumstances which would legitimise the rejection of such restrictions, the position in the current text would appear unwarranted and disproportionate.

5.7 In paragraph 43 and footnote 47, the Commission states that ‘In order to maintain the structural effect of a remedy, the commitments have to foresee that the merged entity cannot subsequently acquire influence over the whole or parts of the divested business’ but that ‘Such influence does not have to amount to control in the sense of Art. 3 of the Merger Regulation’. Bearing in mind the potential disproportionality of prohibiting re-acquisitions of small holdings (e.g. in a company subsequently listed on a stock exchange) and the availability of Article 81 EC to regulate any restrictive effects arising from the acquisition of non-controlling stakes, it is important that the Commission gives further guidance on what it means by ‘influence’, and that this threshold is not set too low. Equally, we question the justification for a threshold lower than control in the sense of Article 3 ECMR; the general legal framework (i.e. the ECMR) sets the trigger for potential concern on a structural change to be the acquisition of decisive influence and (as mentioned above) Article 81 exists to prohibit any anticompetitive information exchange which could occur from the acquisition of non-controlling stakes. In these circumstances it is not clear why a different standard to that of the normal competition law rules should apply; businesses are bought, sold and divided on a regular basis, and (outside the context of ECMR commitments) are not subject to ‘special’ rules of this nature.

5.8 The final sentence of paragraph 43 also requires serious consideration. The notion that, absent an express clause, there is nevertheless an implicit obligation on the divesting party not to re-acquire is highly questionable. For how long would this ‘implicit obligation’ subsist?

5.9 The statement in paragraph 44 that the parties may consider that they would be able to divest to a suitable purchase within a ‘very short’ time period appears inconsistent with the Commission’s statement in the general conditions that the commitments be capable of effective implementation within a ‘short period’ (paragraph 9). We would also suggest that the first sentence of paragraph 44 be amended to read ‘might be regarded by the Commission as uncertain’.

5.10 In paragraph 45, the second sentence should be amended to read ‘implement the first commitment within a given time frame.’

5.11 In paragraph 46, it would be helpful for the Commission to clarify whether the choice between crown jewels and up-front buyers is a genuinely ‘free’ choice for parties or whether there are some situations in which only one solution is acceptable. Paragraphs 54 and 55, read together, suggest that there may be some situations in which parties are unable to choose crown-jewels in place of an up-front buyer.

5.12 We would query the value of the second sentence of paragraph 47, particularly in the context of where it is currently situated in the Draft Notice, and would suggest it is deleted. The paragraph is concerned with the suitability of a purchaser, not with the achievability of a remedy.
5.13 Paragraph 49 refers to financial purchasers. Footnote 51 cites one case (in the very specific context of an IP licensing remedy) where the Commission required that the licensee had its own trademark in the sector concerned. However, paragraph 49 appears to make a more general point, potentially evidencing a tendency on the part of the Commission to be concerned that a financial purchaser may ‘not be able or will not have the incentives’ to develop the divested business as a viable and competitive force. We do not believe that this concern should be held as a general matter. Financial purchasers now drive a significant proportion of mergers and acquisitions activity in the EU and elsewhere, and own businesses successfully across a broad spectrum of industries. If the Commission wishes to give this example of an additional purchaser requirement, we would suggest that it makes explicit that there is no general presumption against financial purchasers, as this would be unjustified.

5.14 The last sentence of paragraph 50 should be amended to read ‘The main difference between the two latter options is that in the case of an up-front buyer, the identity of the purchaser is not known to the Commission prior to the authorisation decision and in the case of a fix-it-first remedy, there is no delay in the permitted implementation of the notified transaction.’

5.15 In paragraph 53, when discussing up-front buyer cases, the Commission should address the practical difficulties faced by parties when seeking to agree an on-sale of the divestment package even though the notified concentration has not been completed (i.e. the antitrust laws apply but there will clearly need to be some co-operation / interaction between the original vendor and the notifying purchaser to arrange due diligence for the on-sale purchaser over the divestment business).

5.16 In paragraph 56, we suggest insertion of the words ‘(subject to any required regulatory approvals)’ at the end of the last sentence.

5.17 In the context of paragraph 57, and more generally, we note that the Draft Notice should spell out more clearly when up-front buyer and fix-it-first remedies are appropriate, individually or alternatively (perhaps this could be earlier on, e.g. at paragraph 50).

5.18 In paragraph 59 we consider that it is unclear what is meant by ‘competition concerns in financial respect’, and suggest that this is expanded or clarified in the Draft Notice.

5.19 The Commission should elucidate further on the last sentence of paragraph 60 (‘the termination of a distribution agreement alone will only remove the competition concerns if it is ensured that the product of a competitor will also be distributed in the future and exercise effective competitive pressure on the parties’). On whom does the burden fall of establishing that the competitor’s product will be distributed in the future and what evidence is required to be proved in this respect?

5.20 We question the meaning of the last sentence of paragraph 68 (‘such change of long-term agreements will normally only be sufficient as part of a remedies package to remove the competition concerns identified’). Is the Commission intending to exclude here the possibility that changes to a long-term agreement may be sufficient in
themselves to remedy concerns? If so, it would be useful if the Commission could explain why.

5.21 As already indicated in paragraphs 4.1 and 4.4 above, we believe that paragraph 69 suggests an inappropriate degree of unwillingness on the part of the Commission to consider behavioural commitments. Further, we consider that if the Commission intends to consider such remedies only ‘exceptionally in specific circumstances’ it is essential that the Commission provide further examples of what remedies might be appropriate and in what circumstances.

5.22 The third sentence of paragraph 71 should be modified, e.g. as follows: ‘Where parties apply for an extension for the first divestiture period, the Commission will only accept that they have shown good cause if the parties were not able to meet the deadline for reasons outside their control and if it can be expected that the parties will subsequently succeed in divesting the business within a short timeframe’. Further, we do not consider that the Commission’s statement in paragraphs 72 and 73 that it will only grant waivers or accept modifications or substitutions of commitments in ‘exceptional circumstances’ will allow for sufficient flexibility to deal with all situations where such modifications or substitutions may be necessary. The statement in paragraph 72 that no changes of market circumstances will have occurred in such a short time-frame also seems overly categorical, and we suggest it is removed.

6. ASPECTS OF PROCEDURE FOR SUBMISSIONS OF COMMITMENTS

6.1 The Commission routinely asks for a non-confidential version of the commitments for the purposes of market testing them with third parties (paragraphs 78 and 89). The Commission should ensure, however, that it carefully assesses the need to market test in each individual case and should be attentive as to how much information it discloses to third parties. In particular, we would highlight the need for crown jewel provisions to remain confidential until such time as they are triggered to preclude third parties from attempting to extract those crown jewels from the merging parties.

6.2 Paragraph 82 discusses the possibility that the Commission may accept commitments as modified by the parties. The Commission should make clear that, when accepting such modified commitments, a further round of market testing will not normally be considered necessary or appropriate.

7. REQUIREMENTS FOR IMPLEMENTATION OF COMMITMENTS

7.1 Paragraph 96 refers to the possibility that divestment periods may be modified. We suggest that the last sentence be amended to include the possibility that divestment periods might also be lengthened, e.g. where closing is dependent on circumstances outside the parties’ control, for example third party consents or the transfer of licenses or permits.

7.2 In paragraph 97 the Commission states that the deadline for the divestiture normally starts on the day of the adoption of the Commission decision but that exceptionally the Commission may accept that the periods only start running on the day of closing of the notified concentration. We question whether it is correct that the closing of the notified concentration should be the exception, rather than the rule, as in
many cases there be considerable delay between the Commission’s approval decision and closing of the transaction, during which time it would be difficult to market effectively the divestment assets.

7.3 Footnote 110 (in paragraph 104) states: ‘The parties have to ensure, for example through appropriate provisions in the purchase agreement, that the purchaser will maintain the divested business as a competitive force in the market and will not sell on the business within a short time-span.’ We do not consider it realistic for the Commission to expect a vendor to require a contractual obligation from the purchaser to this effect and then to monitor compliance with this obligation. As a matter of contract law, it would be questionable what redress the vendor would be able to obtain in the event of a breach. Moreover, a contractual obligation of this nature would seem to involve a degree of continuing influence by the vendor in the divested business, which we presume would be against the Commission’s policy in this area. As a general matter, if there is to be a requirement not to on-sell within ‘a short time-span’, this should be clearly explained and defined in the Notice; it is not obvious that there is justification for this requirement – again, businesses are bought and sold on a regular basis and nevertheless remain vibrant competitive forces (in most cases the value attributed to them by a purchaser relies on this), and the Commission’s suggestion that the ability to do this should be limited in this context risks distorting normal market forces and potentially resulting in inefficiencies which could disadvantage the divested business in question.

7.4 We suggest that the requirement in paragraph 110 for the immediate appointment of a hold separate manager following the adoption of the Commission’s decision is too broadly drafted. In some circumstances, for example, it may not be possible for an acquiring firm to appoint a hold separate manger over the target assets prior to the transaction being closed.

8. CONCLUSIONS

8.1 We would like to emphasise again that we strongly welcome the Commission’s updating of its existing guidance on merger remedies. In providing comments in this response, we are endeavouring to suggest ways in which the Commission could further clarify certain specific issues.

8.2 We would be happy to provide any further explanation of the points raised in this response, either in a meeting or otherwise. Please contact Alex Potter (+44 (0)20 7832 7541) or Alison Jones (+44 (0)20 7427 3509) if such further discussion would be helpful.

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