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COMMENTS OF GRIMALDI E ASSOCIATI

ON THE

DRAFT COMMISSION NOTICE

on remedies acceptable under Council Regulation (EC) No. 139/2004

and under Commission Regulation (EC) No. 802/2004

29TH JUNE 2007

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I. Introduction

This paper provides some observations on the Draft Commission Notice on remedies acceptable under Council Regulation (EEC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004 (hereinafter the “Draft Notice”).

The Draft Notice shall replace the current Commission Notice on remedies of 2001¹. The experience gained by the Commission on the application of remedies to concentrations raising competition concerns has indicated some ambiguities to be clarified, in order to allow undertakings to fully comply with the relevant decision of the Commission.

In what follows, Grimaldi e Associati submits some observations on the Draft Notice and particularly on elements which might be improved in order to offer undertakings and the legal community a clearer framework in the field of merger control.

II. Elements under consideration

– *Structural remedies*

The Commission considers structural remedies more efficient and less costly than behavioral measures. However, this is not always the case since the suitability of commitments proposed by the merging parties to solve the competition problems raised by a merger strictly depends on the specific characteristics of the case at stake.

1 Commission Notice on remedies acceptable under Council Regulation (EEC) No. 4064/89 and under Commission Regulation (EC) No. 447/98, OJ C68, 2nd March 2001, pages 3–11.

The Merger Remedies Study² drafted by DG COMP concluded that structural remedies proposed by the parties to concentrations liable to raise competition problems are not always successful and that the buyer's market power often decreases in relation to that of the merging companies. Moreover, structural remedies are more risky as they are not reversible.

In this regard, we believe that, in order for a structural remedy to be effective, the following considerations should be taken into account:

- the divestiture should follow a simple procedure and should be in benefit of a suitable single buyer rather than a collection of independent buyers. It should not imply complexity in design and implementation;
- more complete information on the assets to divest should be available to the Commission and to the buyer as asymmetric information might be an incentive to sell assets of inadequate scope or unviable assets, to sabotage asset to be transferred and to collude with the buyer;
- the buyer must be a strong competitor. DG COMP should carry out a full assessment on whether the buyer is more or less likely to engage in effective competition;
- the divestiture procedure should not increase the risk of collusion in the market;
- the buyer must not have relationships with the seller of the divested assets.

The evaluation of merger remedies should follow the same twofold approach used in merger analysis, that is the evaluation of unilateral effects and of pro-collusive effects. Structural remedies should be accepted and merger should be cleared only if both tests are satisfied.

- *Removal of links with competitors*

In the event of participation in the share capital of a competitor, the Draft Notice considers as preferable solution the divestiture of such stakes. In this regard, commitments presented by merging parties should be assessed according to the principle of proportionality. National practice demonstrates that competition concerns originating by links with competitors can efficiently be overcome by waiving parts of the rights linked to such shareholding.

In most situations, such remedy is sufficient to avoid parallel behaviours between merging parties and the competitor at stake. In past decisions of the Italian Competition Authority,

2 Merger Remedies Study, public version - DG Competition, European Commission, October 2005.

the issue of links with competitors has been efficiently solved by waiving the information rights of the shareholder, thus avoiding that the shareholder could have relevant and sensitive information concerning the commercial strategy of its competitor³.

Representatives of the merging undertakings might not be members of the Board of Administrators of the competitor in order to avoid the possibility of influencing its commercial decisions.

These remedies can satisfy the scope of rendering the merging undertakings and their competitor independent and autonomous on the market and at the same time are less costly.

Only in limited cases, the structural links between merging parties and competitors might be overcome through the divestiture of the participations. This is the case of the commitments presented in the merger *Volvo / Renault RI*⁴, where one of the parties proposed to rescind a joint venture created with one of its main competitors in order to avoid the complex issues arising from the merger's effects on the relevant markets.

– *Crown jewels*

The Draft Notice foresees that in certain cases, where the implementation of the parties' preferred divestiture option might be uncertain, the parties may consider that they would be able to divest this business to a suitable purchaser within a very short time period.

From a competition point of view, *crown jewels* represent acceptance of either less-than-effective relief at the outset or a requirement to divest more than necessary to remedy competition problems. While, on occasion, *crown jewels* may be necessary to ensure assets sales in cases where the attractiveness of the assets is particularly uncertain, this should be the only reason for their use, and they should be relatively rare.

In addition, *crown jewels* impose additional costs on the parties by creating uncertainty about whether the alternative assets will stay with its current owner or be divested. This puts on hold any integration plans the parties may have in relation to those assets, potentially delaying gains which would flow from integration. It also puts in limbo the status of employee connected to those businesses or assets for an extended period of time, creating its own costs due to lost productivity and increased anxiety among employees about their future.

– *Fit it first*

Fit-it-first solutions involve pre-completion divestitures or agreements to effect divestitures concurrent with the completion of a merger. However, often transaction complexities are such that, in the majority of cases, merger parties must focus on completion of the primary

3 Decisions of the Italian Competition Authority No. 16249 of 20th December 2006, C8027 – Banca Intesa/San Paolo IMI, Bull. No. 49/2006; No. 16673 of 12th April 2007, C8277 – Banche Popolari Unite/Banca Lombarda e Piemontese, Bull. No. 13/2007.

acquisition before implementing divestitures or other remedies. This is particularly so in public market transactions where it may be difficult or impossible to initiate divestiture discussion with third parties at an early date or complete a divestiture prior to closing.

Requiring *fix-it-first* solutions can also impose substantial costs on the merging parties. The need to find and receive approval for a buyer will usually delay closing the merger. This may delay the realization of merger efficiencies and increase transaction costs or make the merger impossible to consummate. Forcing the merging parties to sell assets before closing can give potential buyers tremendous leverage where the sale of the divested assets are holding up a much larger transaction and can significantly reduce the value of the divested assets for the parties.

Therefore, *fix-it-first* solutions should be required only where they do not represent an unreasonable obstacle to the implementation of the merger.

– *Behavioural remedies*

According to the Draft Notice, the Commission accepts remedies other than divestitures and removal of links with competitors where these are equivalent in their effects to a divestiture.

However, the Draft Notice restricts to a large extent cases where behavioral commitments are admissible. In this regard, the Court of Justice in the case *Commission v. Tetra Laval* stated that “*the categorization of a proposed commitment as behavioral or structural is immaterial and that the possibility cannot automatically be ruled out that commitments which are prima facie behavioral*”⁵.

The commitments offered by the undertakings concerned must be capable of rendering the notified concentration compatible with the common market: the principle is that these must enable the Commission to conclude that the concentration at issue will not restrict competition by creating or strengthening a dominant position.

Therefore, there is a duty upon the Commission to assess the effectiveness of behavioral remedies and to take account of the implications of those commitments when it assesses the possibility that a dominant position might be created in future through abusive behavior.

According to the principle of proportionality, the Commission should consider the remedies proposed by the merging parties taking into account the efficiencies which would result from the merger and which would be impeded by the adoption of structural remedies. Moreover, in contrast to horizontal mergers, in conglomerate and vertical mergers the anticipated anti-competitive effects are behavioral and not structural. Accordingly, behavioral commitments not to leverage market power may allow the Commission to view

4 Case COMP/M-1980, Volvo/Renault RI, 1st September 2000.

5 Judgment of the Court of Justice of 15 February 2005, Commission of the European Communities v. Tetra Laval BV, case C-12/03P, ECR 2005, page I – 987.

conglomerate mergers as an opportunity to realize economies of scope, thereby reducing variable costs and leading to lower prices for consumers.

Finally, behavioural remedies should not be imposed for an indefinite time or should be reviewed after a certain period to ensure that remedies remain relevant and do not become an undue restriction on competition.

– *Trustee*

The appointment of a trustee to verify the respect of the commitments of the merged parties represents a requirement which guarantees the successful implementation of the Commission decision. However, although the trustee is appointed by the Commission to monitor the commitments, he is paid by the merging company. Sometimes the level of the trustee's fee depends on the value of the divestiture. Thus the trustee has an incentive to sell to the highest bidder, which is not always the buyer likely to be the strongest competitor *ex post*.

For this reason, it is extremely important that the Commission could verify the independence and impartiality of the proposed trustee. In this sense, the trustee should be selected among companies with knowledge in the industry concerned and with past experience in divestiture or monitoring of activities.

Trustee should be independent from the merged parties. In this regard, the trustee should not have any relationship with the parties for a reasonable period of time before taking the task.

– *Role of the Commission*

We believe that the Commission should have an active role also in the phase when the parties to a concentration have to adopt the remedies proposed to the Commission. In this regard, the Merger Remedies Study drafted by DG COMP makes it clear that one of the factors for the success of remedies undertaken by merging companies is represented by a more direct involvement of DG COMP and a closer cooperation between DG COMP and the trustee.

The role of DG COMP in the post-decision phase should be independent from the kind of commitments undertaken by the parties (structural or behavioural). DG COMP should organise meetings with the trustee already at an early stage of the process. Regular meetings should take place between DG COMP and the trustee in order to verify the full compliance of the parties to the decision of the Commission.

In other terms, the independence of the trustee should be granted by a closer cooperation with DG COMP.

III. Conclusions

In conclusion, it is the opinion of Grimaldi e Associati that the Draft Notice on remedies represents a step forward towards a more objective approach to remedies proposed by the parties to a merger.

However, it is our opinion that the Draft Notice still lacks proportionality when assessing the suitability of the different kind of remedies – being them divestitures of activities, removal of links with competitors or behavioural remedies. Assessment of the commitments proposed by the parties to a concentration, according to the case-law of the European Courts, should take into account the specificities which are inherent to transactions, which require a case by case approach.

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