

LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE  
INTERNATIONAL LEAGUE OF COMPETITION LAW  
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT

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**Comments on the draft revised Commission Notice on remedies acceptable under Council Regulation (EC) No 139 / 2004 on the control of concentrations between undertakings**

Munich, 2 July 2007

Ladies and Gentlemen,

On behalf of the International League of Competition Law I would like to send you the observations of the League on the draft Commission's notice on merger remedies drafted by the League's Adhoc Committee. The League appreciates the Commission's initiative to bring further clarification to this important issue and hopes that the League's comments will be of assistance.

Yours sincerely,



Dr. Wolfgang A. Rehm  
President

Encl.

## **Comments on the draft revised Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings**

*These comments are submitted on behalf of the International League for Competition Law (LIDC).<sup>1</sup> The League is an association that brings together national and regional associations that aim at promoting healthy and honest competition in an atmosphere of freedom and to combat unfair and unlawful practices nationally and internationally. Its objective is to study and define questions relating to competition and unfair competition and to take steps towards the implementation of reforms that the Association believes are useful, both on an international level and in specific countries.*

### **1. Preliminary remarks**

The LIDC is pleased to comment on the draft revised Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("Draft Notice"). We would like to note that the Notice seems to be the result of a commendable effort by the Commission to provide guidance on the very complex area of merger control, which is crucial in the perspective of authorizing a concentration. It is in fact of utmost importance for merging parties to understand how to deal with the Commission when dealing with merger cases, as well as to have an up-to-date document which takes account of both the recent in-depth Commission studies of the issue (such as the Merger Remedies Study of October 2005) and the most recent and complex cases<sup>2</sup>. The further level of detail will lead to a better understanding of the Commission's approach on remedies. Although the Draft Notice lists the same remedies contained in the old version, it goes into much more detail concerning implementation requirements.

The Draft Notice's focus on implementation issues is consistent with the presumption that remedies are wrightly designed to effectively eliminate competition concerns, and ineffectiveness of remedies is due mainly to implementation problems. While we welcome the clarification of the requirements which remedies need to fulfil in order to improve their implementation, it is necessary first to ensure that the increasing burden on the parties serves the objective related to the elimination of competitive problem by designing appropriate remedies, and second to take also measures

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<sup>1</sup> The members of the Ad Hoc Committee that drafted these comments are **Judit Budai** (Szecskay, Budapest), **Jean-Patrice De La Laurencie** (White & Case, Paris), **Marco Hartmann-Rüppel** (Taylor Wessing, Hamburg), **Pranvera Këllezi** (Chair of the Ad Hoc Committee, University of Geneva), **Enrico Adriano Raffaelli** (Rucellai & Raffaelli, Milan).

<sup>2</sup> Such as Piaggio/Aprilia (M.3570), Procter & Gamble/Gillette (M.3732), Kornäs/Assidomän Cartonboard (M.4057).

necessary to ensure the ex post evaluation of the remedies impact on the market, in particular measures pertaining to monitoring of the effects of the remedies. The ex post evaluation is crucial for the future Commission's action. Indeed, the intervention is justified only when remedies have with the sufficient degree of certainty positive effects on the market.

As we noticed, the Draft Notice focuses on the requirements related to the implementation of remedies. Nevertheless, we think the Draft Notice may send an inappropriate message by putting the implementation issue at the centre of the Draft Notice. We emphasise that the first requirement the remedies should fulfil is that they should be capable of resolving competition concerns. Therefore, the Commission may wish to expand and adopt an approach that clearly relates the different competition problems to different remedies. We are aware that in this area it is difficult to provide ready-made solutions for each type of competition concerns; nevertheless, it would be helpful if the Commission were to signal its overall approach in assessing remedies for non-horizontal and horizontal mergers and their expected effects on the market.

We submit these comments with the objective of focusing on those aspects of the Draft Notice which we believe could raise some concern and we believe further clarification might be beneficial. We have organised our comments to follow the organisation of the Draft Notice. In addition, the comments refer to specific paragraphs.

## **2. General principles**

Paragraphs 6 and 83 – At para. 6 of the Draft Notice the Commission discusses the scenario whereby the parties propose commitments which go further than what is necessary. The Commission adopts a rigid approach by stating that if the parties chose to propose commitments that go further than necessary, it “does not have any discretion to refuse them and to impose unilaterally other conditions”. This approach would disadvantage parties that propose from the beginning complete and effective remedies. We suggest therefore that the Commission ensures the coherence with the statement at para. 83.

Regarding this latter paragraph, which deals with cases where there are no competition concerns, we note that there exist scenarios different from “no competition concern”. While in this case the parties may withdraw the commitments, if there are competition concerns but the commitments go further than necessary, the Commission should suggest to the parties which part of the remedies is unnecessary: on that base, either the parties modify the commitments, or the Commission make binding only what is necessary for the maintaining the competitive situation existing before the concentration.

Paragraph 9 – Para. 9 of the Draft Notice gives the general principles and conditions pertaining to commitments. However it is important to better articulate the objectives of remedies by stating, e.g., that remedies or commitments aim at maintaining the competitive situation existing before the concentration (the *statu quo ante*), and not improving it (such a clarification can also be made at para. 4 or 5).

### **Complex remedies**

Paragraph 14 – Para. 14 of the Draft Notice states that the Commission may reject “extensive and complex” remedies when the Commission cannot determine that “they will be fully implemented and that they are likely to maintain effective competition in the market”. The paragraph is vague and does not add much as a general principle.

The problem in such cases is not the extent of remedies, if these clearly resolve the competition concerns. Divestitures may eliminate competition concerns even when a large number of relevant markets are concerned and therefore divestitures in several markets are necessary.

On the other hand, the impact of “complex remedies” aiming to eliminate complex competition problems may be difficult to evaluate. Presumably the Commission refers to a package of structural and behavioural measures concerning different but related markets, such as the commitments offered in the EDP/ENI/GDP case<sup>3</sup>. Arguably, the complexity of remedies in such cases relates to the difficulty in evaluating the impact of *each* measure in itself or/and the difficulty of judging on the effect of the *package of remedies* on the market, difficulties that can be exacerbated by the interdependent relationship between different relevant markets. In the above mentioned case, the parties offered commitments that were considered as insufficient and therefore inappropriate; the Commission never mentioned the “complex” nature as being determinant.

The Draft Notice stresses the implementation issue which, although important, must not be the main criteria in the process of designing remedies. In general, the implementation and monitoring problems derive from the lack of clarity, incomplete or insufficient commitments. First, the Commission should test whether the remedies proposed are adequate and sufficient to resolve competitive concerns; second, given the clarity of the commitments and the related enforcement mechanism, the Commission should evaluate the feasibility of the implementation and monitoring mechanisms.

Therefore, it would be helpful if the Commission were able to set out clearly what is meant by complex remedies and what are the criteria that these commitments should fulfil. The Draft Notice should distinguish difficulties regarding insufficient and

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<sup>3</sup> Case M.3440.

inappropriate remedies from implementation concerns. In general, if parties offer appropriate and well defined measures as well as appropriate monitoring mechanisms, the implementation and monitoring is feasible. Finally, if such criteria could not be set out with a sufficient degree of certainty, the Commission may wish to consider whether to remove this paragraph altogether.

### **Structural and non-structural remedies**

Paragraphs 10, 17, 61 and 69 – Categorisation of the remedies and clarification of their desired effect on the market. The Draft Notice distinguish between divestitures, other structural remedies, and behavioural remedies. We find other denominations such as “non-structural remedies”, “structural commitments” or remedies “structural in nature”. It would be helpful to unify the terminology and clearly define the categories of remedies used in the Draft Notice.

Concerning the effect of remedies on the market, it would be helpful to better clarify the desired effect of remedies on the market, and to be consistent throughout the Draft Notice. We think it is useless to refer to “remedies equivalent to divestitures in their effect” (para. 17): The Commission may wish to stress that other remedies should have a clear structural effect on the market, for example by reducing barriers to entry. Granting access to key infrastructure cannot have the same effect as divestiture of assets related to this infrastructure, which maintains unchanged the number of competitors in the market; but access remedies may have a structural effect in that they reduce barriers to entry and maintain therefore the competitive situation prevailing *ex ante*.

Finally, it would be helpful to clarify the requirement of a structural effect on the market. Behavioural remedies should fulfil this condition and it would be helpful if the Commission were able to clarify, by giving examples, which behavioural remedies, and under what market conditions, would be considered as having a structural effect on the market.

### **Enforceability of commitments**

Paragraphs 19-20 – Para. 19 and 20 relate to the enforceability of commitments. In order to ensure the enforcement of commitments, the Regulation 139/2004 provides for several instruments. The distinction between conditions and obligations on the one hand, and the legal consequences of a breach on the other hand, must be clear for the participating undertakings. The distinction should be clearly stated at the decision itself. In addition, it would be particularly helpful for the parties if the Commission were able to set out clearly the legal consequences of a breach of a condition and an obligation and expand on that issue by giving examples.

Formally, the Draft Notice states that when a condition is breached, “the compatibility decision is no longer applicable” (para. 20). This wording is particularly vague. The consequences of the breach of conditional decisions are even more confusing if we consider the two examples given in the Draft Notice: the first relates to a situation where the business is not divested in the time-frame foreseen in the commitments; the second example concerns the situation where the new entity re-acquires the business divested in breaching the non-reacquisition clause (para. 43). In the first example, the decision is applicable but the concentration cannot be implemented until the condition is fulfilled; on the other hand, if the time limit is reached without fulfilling the condition, the decision no longer stands (is no longer applicable). In the second example (re-acquisition) the concentration may be implemented as soon as the condition is fulfilled. In this case, a compatibility decision may not be considered inapplicable; when the re-acquisition clause is breached, the dismantling of the whole transaction may be disproportionate. We suggest that in the second example, the re-acquisition of the divested assets should be considered as a breach of an obligation.

The 31<sup>st</sup> recital of the Regulation 139/2004 states clearly that “In cases of failure to fulfil a condition attached to the decision declaring a concentration compatible with the common market, the situation rendering the concentration compatible with the common market does not materialise and the concentration, as implemented, is therefore not authorised by the Commission. As a consequence, if the concentration is implemented, it should be treated in the same way as a non-notified concentration implemented without authorisation.” This wording shows that the conditions attached to the Commission’s decision constitute suspensory conditions: the suspensory obligation of Article 7 Regulation 139/2004 continues to apply until the condition is fulfilled. In the case the condition contains a time-limit for its fulfilment, the authorisation decision itself no longer stands.

In order to clarify the distinction between conditions and obligations, it would be helpful to expand on the effect of the decision itself. In continental administrative law conditions are different of obligations attached to a decision. While the Commission’s decisions make the compatibility of the concentration *conditional* on the fulfilment of conditions and obligations (commitments), only conditions – understood as suspensory conditions as provided for at recital 31 of the Regulation 139/2004 – prevent the implementation of the concentration. When obligations are attached to the decision, the parties can proceed with the implementation of the concentration. We suggest the Commission clarifies the effect of conditions and obligations by distinguishing the legal consequences of the authorisation to implement the concentration from the legal consequences of a breach of an obligation (the compatibility decision). Nevertheless, if the Commission intends to use the concept of resolutive condition, we suggest to state it clearly on the Draft Notice; it would also be helpful to state clearly in which cases the Commission considers the conditions attached as resolutive (e.g. in presence of strict time-limits).

The distinction set out at para. 19 between measures giving rise to a structural change of the market from implementing steps is unclear and inapplicable to the vast types of measures used by the Commission. While the distinction is clear for the divestments, it would be helpful if the Commission were able to give other examples, and clarify the situation in presence of access remedies, licensing of IP, re-branding etc.

### **3. Different types of remedies**

#### **Activities non related to problematic markets**

Paragraph 23 – In this para. the Commission considers the situation where the activities related to markets where no competition concerns are identified must be included into the divestment package. Such cases are not exceptional. Given the importance of the issue, it may be helpful to state that in principle, and in accordance with the principle of proportionality, “if competition can be maintained on those markets it is not necessary for the Commission to extend the scope of the commitments to markets not affected.”<sup>4</sup> It may be also very helpful if the Commission were able to give criteria in order to give some guidance for its approach. One of the examples would be the necessity to offer a full line of products or to provide the acquirer with the minimum efficient scale in production (the necessity to assure scope or scale economies).

#### **Alternative remedies and crown jewels**

Paragraph 44 – This para. discusses the alternative measures and crown jewels. It should be stressed first that alternative remedies, which hold the positive aspect of permitting a certain flexibility to the merging parties, should at the same time not be excessively encouraged by the Commission. They could in fact lead to a great increase in costs and time to propose commitments and to a greater uncertainty on the market in the time within which the first remedy should be implemented.

At the footnote 49, the Commission states that the alternative may consist of an entirely different business or of additional assets. It may be helpful to distinguish between these situations: alternative divestiture commitments constitute different viable businesses or different measures. The commitments may also provide for the obligation for the parties to add the necessary assets in order to constitute a viable business, which is different from alternative measures.

In any case, alternative measures seem to have no relation with crown jewels, understood as particularly valuable assets of one of the undertakings. It would be helpful if the Commission were to distinguish between the possibility to propose

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<sup>4</sup> Case T-177/04, *easyJet v Commission*, para. 134.

alternative measures and the obligation made to the parties to add assets in order to ensure the divestment of overlap activities (namely the viability and the competitiveness of the business), if necessary by adding other valuable assets.

#### **4. Transfer to a suitable purchaser**

Paragraph 50 – The Commission considers the mechanisms ensuring that the business is transferred to a suitable purchaser. Nevertheless, the distinction in terms of legal consequences between these mechanisms is not clear, especially when considered together with the distinction between conditions and obligations.

#### **Sale within a fixed time-limit**

Paragraph 52 – The Commission discusses the sale of the divested business within a fixed time-limit after the decision. According to the Draft Notice, under certain conditions, “the Commission may be able to conclude that the divestiture will be implemented and there are no reasons for the implementation of the notified concentration to be suspended after the Commission decision.” In order to ensure the enforcement of remedies and a coherent decision-making practice, it may be useful to clarify whether such commitments should be enforced through formal conditions or formal obligations. Also, if the implementation is not suspended because there are sufficient interested potential purchasers, strict time-limits are not necessary.

The Commission may also wish to specify in the Draft Notice that, on request, an extension of the time-limits may be granted. Otherwise, if the transaction is implemented and the time-limits expire before the closing of an agreement, it is not clear what will be the effects of the authorisation decision: If the Commission’s decision no longer stands, this could be a severe consequence for the parties which may wish to implement the divestiture in the near future. It may be simpler to provide for a suspensory condition without time limits, which would give more time to the participating undertakings to reach a binding agreement without having strict time-limits; in this case, the suspensory condition would prevent the implementation of the operation and therefore impede the lessening of competition.

#### **Up-front buyers**

Paragraphs 53 to 55 – At these paragraphs the Commission discusses the use of up-front buyer commitments.

At para 50, the Commission defines the “up-front buyer commitments” as commitments that foresee “that the parties may not complete the notified operation before having entered into a binding agreement with a purchaser for the business, approved by the Commission”. In reality, it corresponds to the definition of a

suspensory condition attached to a Commission's decision. It is not clear why the parties should include such a commitment, where it is the responsibility of the Commission to ensure the enforcement of the commitments by attaching conditions and obligations and clarifying whether the conditions attached have a suspensory effect. The Commission states that in addition it can foresee for fixed time-limits, but it is not clear what would be the legal consequences of not reaching an agreements within these time-limits. The definition proposed by the Commission is therefore confusing.

It should be reminded that in the United-States an up-front buyer is defined as: "[...] one that has executed a final agreement with the parties before the Commission accepts the proposed order. The staff has carefully reviewed both the buyer and the agreement before the Commission considers the consent agreement. The buyer is named in the order; the agreement is attached to the order as a confidential exhibit and is incorporated into the order. An order that includes an up-front buyer typically requires that the parties divest to the up-front buyer within a very short time period and pursuant to the agreement attached to the order."<sup>5</sup> Therefore, the FTC/Bureau of Competition requires a precise buyer before deciding on the adequacy of the remedies and accepting them.

In parallel, the EC Commission should require the identification of an up-front buyer before submitting the divestiture commitments, and therefore before a decision is taken, not simply before the implementation of the decision (that is after the decision is taken). If the Commission does not attach to much importance on the proposal of an up-front buyer before the decision is taken, it may be simpler not to use the terminology of an "up-front buyer", together with "fix-it-first remedies", but to specify that the parties cannot implement the transaction before finding and notifying an agreements with a specific buyer.

Finally, at para. 54, the Commission states that up-front buyer commitments "creates greater incentives for the parties to close the divestiture in order to be able to complete their own concentration". Nevertheless, the inclusion of such commitments may lead the parties to accelerate the authorization process and finalize the merger, without previously duly evaluating the opportunity to divest in favour of the front-up buyer, without spending the necessary time and energy in due diligence, and without ascertaining the possibility for the buyer to carry out the business efficiently.

According to some Authors referring to the US case, this remedy "can delay consummation of the transaction while the parties find, and obtain approval for, a buyer. Assuming the transaction has pro-competitive components, this delay may have costs in the market. Second, an up-front buyer requirement can lead to strategic behaviour by the potential purchasers who are given greater leverage in the

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<sup>5</sup> „Negotiating Merger Remedies“, Statement of the Bureau of Competition of the Federal Trade Commission, April 2, 2003, Footnote 10.

negotiations. This may skew the bidding process in a way that is inconsistent with the agencies' goal of preserving competition in the market<sup>6</sup>. Also in this case, the Commission should duly evaluate the advisability to encourage the use this remedy and pay attention to the concrete market context in which it may be implemented.

### **Removal of links with competitors**

Paragraphs 59 and 60 – The removal of links with competitors is another “accepted” specified remedy. This essentially means the removal of structural links with main competitors and includes the removal of minority shareholdings in competitors. Overall, the “update” of the requirements should be welcomed by legal practitioners since they obviate the need to conduct research into the decisions of the Commission and the Courts.

### **Access remedies**

Paragraph 64 – The Commission discusses the commitments related to the granting of non-discriminatory access to infrastructure. While the market testing of such commitments is very important, it is not clear in what cases it would be appropriate to link such commitments with up-front or fix-it-first commitments. Also, since these latter commitments foresee that the parties may not complete the notified operation before having entered into an agreement with the purchaser, it is not clear what kind of agreement should be concluded by the parties. It may be helpful to indicate also whether such commitments constitutes obligations or conditions.

## **5. Review clause**

Paragraph 74 – The Commission discusses the possibility to modify the commitments offered by the parties after the decision is taken. It may be helpful to clearly state that these modifications can be made *only* in relation to the implementation modalities. Every extension of the scope of remedies themselves should be foreseen at the decision as a clear crown jewel provision and should be limited to exceptional circumstances. Indeed, as stated out at para. 6 of the Draft Notice, “the Commission is not in a position to impose unilaterally any conditions to an authorisation decision”.

Paragraphs 73 and 74 – It should be helpful if the Commission could clarify in what circumstances it can modify or proceed to a substitution of the commitments to the detriment of the participating undertakings. As a principle, the commitments are offered by the parties, and the Commission cannot change or impose other remedies, but should (partially) accept or refuse them. The modification of the remedies could be contrary to these well established principles in the Regulation 139/2004. Therefore, it would be helpful to indicate under what conditions the Commission has the

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<sup>6</sup> Platt Majoras D, Before The Houston Bar Association Antitrust and Trade Regulation Section Houston, Texas, April 17, 2002, available at <http://www.usdoj.gov/atr/public/speeches/11112.htm>.

competence to impose unilaterally a modification or a substitution of the commitments.

## **6. Implementation of commitments**

Paragraphs 95 to 104 – The requirements for the implementation of remedies are discussed and the process of divestiture is described in detail, for which a fixed time scale must exist. Furthermore, the Commission requires exact details and contractual documentation relating to the transfer of the business. These requirements are set out in paragraphs 95-104 in more detail than the previous old Notice and are in accordance with current case-law. There are also provisions for the interim maintenance of the business to be sold with the indication that separate administration of assets is required.

Furthermore, the role of the possible Divestiture Trustee is explained who takes care of the implementation of the divestiture. This Trustee must be nominated by the parties and then approved by the Commission. Unlike the old Notice, the new Notice fully specifies the role of the Divestiture Trustee. On this particular point, the new Notice clarifies ambiguities and misunderstandings arising from old case-law. Ultimately the provisions for the Trustee under the new Notice will bring about more transparency in the divestiture process.

### **Monitoring and divestiture trustees and hold separate agent**

Paragraphs 115 to 119 - In some national legislations, the power to represent the company can not be delegated to third persons. Where shareholders cannot directly give instructions to board members, the lack of an express legal basis pertaining to trustees might cause problems regarding company law requirements, in particular regarding the appointment, representation rights and liability rules of the hold separate managers and the monitoring trustees. Therefore, it would be desirable to incorporate at least the substantial powers and obligations of the trustees and the hold separate managers into the text of implementing regulations in order to establish a clear legal basis.

Additionally, it may also be important to duly establish the representation rights of the monitoring trustee or of the hold separate manager; otherwise, there might be a risk that minority members and /or creditors of the company to be divested may challenge the trustee's conduct. Also, it would be very helpful if the Draft Notice were to provide for a settlement procedure in relation to an eventual disagreement between the monitoring trustees and the merging parties. Finally, it would be helpful to further clarify the relationship between the monitoring trustee and the hold separate manager.

Paragraph 120 – The Remedy Study pointed out that the timing of the appointment of the monitoring trustee is very important. Nevertheless, the actual Draft Notice have not specified the commencement of such mandate. Also, it would be helpful to clarify whether it would be considered as an implementing step – and therefore an obligation – or as a condition upholding the effectiveness of the decision of the Commission.

## **7. Fast-track arbitration**

Paragraph 127 – The Commission states that it will require the involvement of trustees or fast-track arbitration. Concerning the latter possibility, it would be helpful if the Commission were to draft a model for the arbitration procedure. Also, the Draft Notice could give some clarifications on the respective role of the trustee, the arbitrator and the Commission. The role of the latter is to be clarified in particular in relation to the arbitration procedure. It would be particularly helpful to state whether third parties may challenge the arbitration award before the Commission and under what conditions. While it is clear that the Commission is the sole responsible for the enforcement of the commitments, this should also be reflected in a model template for arbitration procedure or in the Draft Notice itself.