

**Response to the European Commission's
draft Remedies Notice
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1 General observations

Linklaters welcomes the opportunity to comment upon the Commission's draft Remedies Notice and the accompanying proposed changes to Regulation 802/2004.

We note the evolution in the Commission's policy on merger commitments since the original Remedies Notice was published in 2001, in particular the publication in 2003 of the Commission's Best Practice guidelines and divestiture and trustee mandate templates, followed by the in-depth remedies study in 2005. We agree that it is an appropriate time to review the Remedies Notice with a view to capturing the experience of the Commission and other relevant parties and providing clear and transparent guidance for the future.

We provide comments on a number of specific issues in the sections that follow, drawing on our experience in ECMR cases and also in other jurisdictions.

2 Burden of proof

Paragraphs 6-8 of the draft Remedies Notice provide that it is the responsibility of the parties to propose commitments sufficient to remove the competition concerns (and the necessary information to assess them); whereas it is for the Commission to establish whether or not a concentration, as modified by commitments validly submitted, must be declared incompatible with the common market because it leads, despite the commitments, to a significant impediment of competition.

In this regard, we detect some tension between the judgments of the CFI in *General Electric v Commission* and *EDP v Commission*.

In *General Electric v Commission*, the court states that "The Commission is not responsible for technical or commercial gaps in the commitments ... It was for the parties to put forward commitments which were comprehensive and effective from all points of view."

However, in *EDP v Commission*, the Court emphasised that "it is for the Commission to demonstrate that a concentration cannot be declared compatible with the common market" and that "Even on the assumption that the Commission ... intended to make the parties to a notified concentration responsible for demonstrating the effectiveness of the proposed commitments, an exercise which is consistent with the interests, the Commission could not conclude that where there is doubt it must prohibit the concentration. Quite to the contrary, in the last resort, it is for the Commission to demonstrate that that concentration, as modified, where appropriate, by commitments, must be declared incompatible with the common market because it still leads to the creation or the strengthening of a dominant position that significantly impedes effective competition."

To conclude that commitments are insufficient simply on the basis that parties have failed to provide sufficient evidence to carry out a substantive assessment, rather than assessing the commitments based on objective and verifiable criteria, would constitute an improper reversal of the burden of proof.

We would encourage the Commission to ensure that the delicate balance of these judgments is properly reflected in the revised Notice, in particular the principle that doubt operates in favour of the parties to the transaction.

3 Proportionality

The draft Remedies Notice states (at paragraph 9) that commitments “have to be comprehensive and effective from all points of view”. However, save for two brief references, the draft Notice contains no discussion of the principle of proportionality which is a fundamental principle of Community law that, based on the case law of the Community Courts, applies in all areas of Community action, including the adoption of conditional clearance decisions pursuant to the ECMR.

This principle manifests itself in two ways in the context of merger remedies. First, it is widely acknowledged that remedies should be merger-specific and not designed to improve competition in an industry in a general sense. In this regard, we note a number of supporting statements from the US Department of Justice, the OECD and the ICN, not to mention the Commission itself:

- “We must design remedies to be strictly merger specific [...]” (Dr. Herbert Ungerer, “Energy Competition Policy—Short Overview”, Stockholm Network, Brussels, 31 October 2006, page 8).
- “Carefully tailoring the remedy to the theory of the violation is the best way to ensure that the relief obtained cures the competitive harm. Before recommending a proposed remedy to an anticompetitive merger, the staff should satisfy itself that there is a close, logical nexus between the recommended remedy and the alleged violation — that the remedy fits the violation and flows from the theory of competitive harm. [...] Although the remedy should always be sufficient to redress the antitrust violation, the purpose of a remedy is not to enhance premerger competition but to restore it” (U.S. DOJ, “Antitrust Division Policy Guide to Merger Remedies”, October 2004, Section II).
- “The object of a remedy should be to restore or maintain competition, thereby preventing competitive harm that the transaction would otherwise cause. A remedy should be considered only if the agency has a sound basis to believe that the proposed transaction, if implemented, would contravene the applicable merger review law. The remedy should adequately address the potential competitive harm identified, but should not have the objective of improving premerger competition” (ICN Recommended Practice no. XI.A, comment no. 1).
- The proceedings of the 2004 OECD Roundtable on Merger Remedies warned that “remedies should not be used to make the competitive landscape better than it was before the transaction” (page 7). In its submission to this roundtable, the Commission itself fully supported (page 253) the four general principles for designing merger remedies as set out in the OECD Issues Paper, which include the principles that “remedies should be the least restrictive means to effectively eliminate the competition concerns posed by a merger” and that “competition authorities should not use merger review to engage in industrial planning”.

In addition, it is clear from the CFI’s judgment in *easyJet v Commission* that, in the event that alternative remedies are identified, the principle of proportionality

“requires measures adopted by Community institutions not to exceed the limits of what is appropriate and necessary in order to attain the objectives pursued; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.”

We would encourage the Commission to make more explicit reference to these important principles in the revised Remedies Notice.

4 Discussion and submission of proposals

We welcome the statement in the draft Remedies Notice that “the Commission is available to discuss suitable commitments well in advance of the end of the 65 working day period”. We have in the past experienced some instances in which the Commission has been unwilling to discuss a developed remedies proposal presented to it by the merging parties, or to accept the submission of remedies at an earlier stage of the process, and we are therefore pleased that this important principle has been explicitly incorporated into the draft.

We note the proposed introduction of Form RM, which is designed to replace the requirements of paragraph 34(b) and (c) of the existing Remedies Notice. This will naturally add a further material burden to the notifying parties during a critical phase of the investigation. While we understand the Commission’s desire to ensure that it receives sufficient information to assess proposals thoroughly, some of the information may be unnecessary in most cases.

We would question the necessity to provide, for example, a list of deviations from the standard templates plus an explanation why they are necessary (given the recognition in the draft Remedies Notice that the templates “leave the flexibility to adapt them to the requirements of the specific case”, and the fact that official translations of the templates are currently unavailable) (paragraph 3), or “a customer list, description of the corresponding records available, and a quantification of the importance of each of the customers” (paragraph 5.8). Equally, the financial data mentioned at para 5.9 may well be readily available and then relevant to include, but it seems unnecessary to conduct forecasted profitability analyses in cases where such do not already exist. Also, completed and planned reorganisations (paragraphs 5.10 and 5.11) could impact on viability of the divested business, and would then be relevant to consider, but otherwise this seems unnecessary to discuss in the form.

We would therefore encourage the Commission to consider whether the burdens associated with the collection the information required are proportionate to the ultimate value of such information to the assessment of a proposed remedy. As currently drafted, the form may generate the production of large volumes of information that - notwithstanding the burdens placed on the parties to compile such information - may not be easily digestible for the case team (itself under time pressure). While the draft Form RM does provide for the possibility to ask the Commission to dispense with certain requirements, we are concerned that the time pressures that surround the submission of a remedies proposal may leave little or no time for such discussions.

If Form RM is ultimately introduced, then the Commission’s availability to discuss remedy proposals as early as possible in the process becomes all the more important. We would also suggest that the Commission explicitly expresses its willingness to review Form RM in draft (in addition to draft remedies proposals) well ahead of the deadline for the submission

of remedies. As a general remark, we have observed that, in phase II proceedings, the remedies deadline frequently coincides with the preparation of the response to the statement of the objections, which has led to intense pressure both on the Commission and the involved parties and a noticeable pattern of parties not taking up their right to a hearing. With extensions of timetable tending to be routine, we would encourage the Commission in future to adopt a best practice towards the production of the statement of objections earlier in the process than is often the case at present.

5 Modification of proposals

Paragraph 82 of the draft Remedies Notice deals with the possibility of modifying a commitments proposal, and states that “only limited modifications can be accepted to the proposed commitments”. In practice, there have been cases where relatively significant modifications have been accepted by the Commission. We therefore suggest that the focus of this paragraph should be on the ability of the Commission to assess a modified proposal fully, in line with the judgment of the CFI in *Royal Philips Electronics v Commission*.

As regards the submission of modified proposals in Phase II, paragraph 92 states that the Commission will only accept modified commitments “where it can clearly determine - on the basis of its assessment of information already received in the course of the investigation, including the results of prior market testing and without the need for any other market test - that such commitments, once implemented, fully and unambiguously resolve the competition problems identified.” Again, we feel that this may be overly inflexible. In our experience there have been cases in which the Commission has had the opportunity to conduct a further market test, perhaps limited to a few key third parties, which has been a useful tool for all parties involved. Naturally there are many cases in which the timing constraints discussed elsewhere in the draft Remedies Notice will prevent further market testing, but we see no reason for excluding this possibility in such explicit terms.

6 Behavioural/non-divestiture remedies

We note that the draft Remedies Notice presents a highly conservative view (in paragraphs 17 and 69) in relation to behavioural remedies. Whilst we understand the complexities that may be associated with such remedies, we feel that they can be an effective solution in some cases.

Needless to say, the focus of the analysis of any proposed remedy is on whether it eliminates the competition concerns identified and is proportionate, in accordance with recital 30 of the ECMR and discussed above. It is clear from the *Gencor v. Commission* judgment that the characterisation of a particular commitment as structural or behavioural is immaterial.

As regards remedies that are indisputably behavioural in nature, we consider that the statement that behavioural commitments “may be acceptable only exceptionally in very specific circumstances” may be unwarranted, leading to the impression either that such remedies will be rejected outright, or that the Commission will necessarily open an in-depth investigation to give itself additional time. While we recognise that the CFI has stated that structural remedies are preferable to behavioural commitments, it has not gone so far as to create a presumption against behavioural commitments. Rather, it is clear from the judgment of the ECJ in *Commission v. Tetra Laval* that the Commission must take into

account proposed behavioural commitments when assessing the likelihood that a merged entity would act in a certain way.

Similarly, the statement in paragraph 68 that the change of long term agreements “will normally only be sufficient as part of a remedies package to remove the competition concerns identified”, without further explanation, appears unnecessarily inflexible.

In fact, there are many instances of non-divestiture remedies providing an effective yet proportionate solution, both at an EU and national level. By way of example, behavioural remedies are often considered and accepted in the UK and France. The UK Competition Commission’s review of past merger remedies, published in January 2007, concluded that “behavioural remedies are more complex and resource-intensive than divestiture remedies but ... they can work especially where the company has a compliance culture and where there are expert monitors”.

There is also a risk that such an absolutist stance against behavioural remedies in favour of structural remedies may reduce or eliminate efficiencies resulting from a particular transaction. In this respect we note the Commission’s decisions in *Lufthansa/Swiss* and *Areva/Urenco/ETC* in which the Commission made explicit reference to the importance of commitments not reducing the efficiencies or benefits flowing from the concentration.

Linklaters would therefore recommend that the Commission adjust these parts of the draft text, bearing in mind that any remedy (whether structural or behavioural) will be subject to the principles of proportionality, certainty and viability.

7 Licensing remedies

We note the statement in paragraph 38 in connection with the granting of licences to IP rights that “such licences will normally be exclusive licences and have to be without any field-of-use and any geographical restrictions on the licensee”. Similarly in paragraph 41, concerning the license of a brand name, the draft notice states that “the licence has to be exclusive and normally comprehensive, i.e. not limited to a certain range of products within a specific market.”

Linklaters recognises that remedies involving the licensing of IP rights, including brand remedies, can often involve complex assessment. However, we note that restrictions such as field-of-use or geographical limitations, which are frequently used in commercial licensing transactions, have been accepted in a number of previous cases, yet the draft Remedies Notice offers no explanation why a presumption to the contrary should apply in the future. We are concerned that an outright bias against such solutions could be disproportionate. We believe that a restricted licence is perfectly justifiable and workable in appropriate cases.

Indeed, there are circumstances in which such restrictions can in fact have a pro-competitive effect, for example by enabling licenses whereby IP rights are made available to licensees which will allow them to enter a market with sufficient certainty that they will be able to operate freely from an IP perspective (which might otherwise have been impossible), whilst still permitting the licensor to use the IP rights for other purposes, thus enhancing innovation. Moreover, in many situations, a covenant by the holder of an IP right not to sue for IP right infringements can also have an equivalent effect and would in such cases constitute a proportionate remedy.

We would therefore urge the Commission to leave such issues to be assessed on a case-by-case basis in accordance with the principles of proportionality, viability and certainty, or to

provide more specific guidance regarding the circumstances in which a restricted licence may or may not be acceptable.

8 Suitable purchaser

We note, in paragraph 49 of the draft Remedies Notice, the requirement that “where appropriate ... the purchaser should be an industrial, rather than a financial purchaser”. We suggest that this predisposition against financial purchasers, apparently on the basis that such purchasers would be inappropriate where they “will not be able or will not have the incentives to develop the business as a viable and competitive force in the market”, may be disproportionate. It is clear that financial purchasers have been accepted as suitable buyers in a number of previous cases, and the text should reflect this.

Ultimately, it is for the party who has given commitments (in full knowledge that a failure to respect the commitments could result in a clearance decision being revoked) to propose a suitable purchaser, and for the Commission to assess whether, given the case at hand, such a proposal is acceptable. This procedure is well established elsewhere in the draft Remedies Notice and in our experience tends to work well, especially with the benefit of continuous dialogue between the merging parties and the Commission via the monitoring trustee and monthly reporting on the divestiture process, during which the Commission has opportunity to express reservations regarding a potential purchaser.

Furthermore, it is unclear when - on the basis of the draft Remedies Notice as it currently stands - a financial buyer might be considered appropriate, or might not, and Linklaters would therefore request greater clarity in this regard. Our view is that there are many cases where a financial buyer is equally suitable as an industry purchaser, and may benefit from greater resources enabling it to maintain and enhance the divested business in the short term. We note also that financial purchasers are often accepted by the US agencies provided that they can demonstrate suitable management skills.

In a more general sense, it would be helpful if language were included providing assurances that the Commission is available to discuss the suitability of potential purchasers during the divestiture process and review draft approval requests (similar to the provisions regarding the submission of draft commitments).

9 Interim preservation of divested business

The ring fencing and interim preservation obligations in the draft Remedies Notice have become extremely detailed. We appreciate the importance of such obligations, but we are concerned that some may be unnecessary or impractical. For example, the requirement that the divestment business must be maintained in the same conditions as before the concentration, including “the same administrative and management functions” is too broad in scope. The fact of the matter is that, save in situations where an upfront buyer must be identified, the merging parties are likely to proceed with the closing of the concentration which will result in significant reorganisation across the merged entity. It may be disproportionate to require that general functions that are not specific to the divestment business, and that would in the normal course be altered, must remain the same for a divestment business.

Furthermore, some minimum information flow between the business to be divested and the merging parties is generally necessary to ensure that directors continue to satisfy their fiduciary duties and that the divestiture can be implemented properly and efficiently.

In our experience, a pragmatic solution can generally be achieved under the supervision of the monitoring trustee by putting in place appropriate confidentiality agreements, and it would be helpful if such practical solutions were reflected in the Notice.

We are also concerned that inadvertent or involuntary breaches of a relatively minor obligation which is very difficult to implement in practice could - in theory - result in the revocation of the clearance decision and/or fines, the only apparent recourse available to the Commission in this context. We submit that only material breaches of such obligations should be capable of rendering the clearance decision ineffective.

10 Divestiture periods

We welcome the Commission's acceptance in paragraph 97 that in some circumstances it may be more appropriate for the divestiture period to begin at the time of closing of the concentration, although we would query whether such cases are necessarily "exceptional". For example, where there is doubt whether a transaction will proceed to closing, e.g. in a public bid scenario, it would not normally be reasonable to expect the bidder to begin a divestment process prior to closing, especially if the divestment concerns assets of the target.

11 Divestiture obligations

Footnote 110 to the draft Remedies Notice requires the merging parties to include provisions in the divestiture agreement whereby (a) "the purchaser will maintain the divested business as a competitive force in the market; and (b) the purchaser "will not sell on the business within a short time-span". We are concerned that such vague obligations will be difficult to implement in practice and unlikely to be accepted by purchasers who, notwithstanding their bona fide intention to maintain the divested business, cannot fetter their future commercial behaviour in this way given their overriding duty to act in the best interests of shareholders.

Ultimately it should be for the Commission to assess whether - as already provided for in the draft Remedies Notice and the template - the purchaser has the necessary incentives and expertise to maintain the business as a competitive force, and to satisfy itself whether it is likely that the purchaser will satisfy these criteria in practice. We would urge the Commission to remove the proposed additional requirements contained in footnote 110.

12 Implementation timetable

The draft Remedies Notice and the templates provide a clear timetable for the implementation of remedies by the parties. However, we consider that it would be useful if the draft Remedies Notice and/or the best practice guidelines also provided an indicative timetable for the actions required by the Commission, for example the approval of the monitoring trustee (and mandate) and in particular the approval or refusal of a proposed purchaser. This would help avoid the risk that time is wasted in anticipation of an approval which ultimately does not materialise, or that a proposed purchaser - who is not subject to any obligations vis-à-vis the Commission or the merging parties - becomes disengaged and withdraws from the proposed divestiture transaction.

If the Commission is not prepared to commit to a binding timetable, an indicative timetable would at least be helpful.

13 Modification of commitments

Paragraph 73 of the draft Remedies Notice provides that a waiver, modification or substitution may be accepted in exceptional circumstances if parties show that market circumstances have changed significantly and on a permanent basis. However, this is followed with the statement that “For showing this, a sufficient long time-span, normally at least several years, between the Commission decision and a request by the parties is required.” This additional caveat seems unnecessary. It is quite possible for market circumstances to change significantly in a short period of time, for example pursuant to a regulatory change, and we would therefore recommend that any reference to a particular time period is removed in this context.

14 Information requests

Paragraph 125 of the draft Remedies Notice introduces a new requirement, that “the Commitments also have to foresee that for a period of 10 years after the adoption of the decision accepting the commitments the Commission may request information from the parties. This will allow the Commission to monitor the implementation of the remedy”.

The duration of the obligation and its extreme generality strike us as unnecessary to remedy the competition issues identified in the decision, and thus contrary to the principle of proportionality. Secondly, we understand that the role of the monitoring trustee is to monitor the implementation of the remedy, and that once this is complete the trustee will be discharged. We would expect that in the majority of cases the trustee would be in place for less than 10 years, and it seems odd that the Commission would at that stage re-enter the scene.

If the purpose of this provision is to leave the door open for a further Commission remedies study in the future, we believe that this could be accomplished in a more collaborative fashion on a case-by-case basis.

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