

26 June 2007

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Our ref C6NMGB/2100648.1

European Commission
Directorate-General for Competition
Consultation Merger Remedies Notice
Merger Registry
B-1049 Brussels
Belgium

Dear Sirs

DRAFT REVISED COMMISSION NOTICE ON REMEDIES ACCEPTABLE UNDER THE MERGER REGULATION

On behalf of the Competition and EU law practice area of Lovells LLP I am pleased to enclose our comments on the above draft Notice. We welcome the draft Notice as providing greater guidance and clarity in an area which is of critical importance for deal-making.

Please do not hesitate to contact me if you wish to discuss any of these comments.

Yours faithfully



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DRAFT COMMISSION NOTICE ON REMEDIES ACCEPTABLE UNDER COUNCIL REGULATION (EEC) NO 139/2004 AND UNDER COMMISSION REGULATION (EC) NO 802/2004 ("DRAFT NOTICE")

Comments of the Competition and EU Law Practice of Lovells LLP ("Lovells")

1. Lovells welcomes the Draft Notice as providing greater guidance and clarity in an area which is of critical importance for deal-making. It is therefore in a constructive spirit that we offer the following comments on the Draft Notice for consideration by the Commission.
2. Paragraph 17. We note that remedies such as the grant of access to key infrastructure or inputs on non-discriminatory terms are now described generally as "other *structural* remedies" (our emphasis). To the extent that this represents an upgrading of the appreciation of such remedies as compared to the current Notice (which distinguishes only 'divestiture' remedies and 'other' remedies) we welcome the recognition that it is not only divestment remedies which may have a structural impact. The Commission understandably has a clear preference for structural remedies and it is important to recognise that remedies other than divestment remedies may have a structural effect and should therefore be given serious consideration.
3. Paragraph 23. Whilst we understand and appreciate the principle which is at stake here, the requirement that in certain circumstances a divestment commitment might have to include assets related to markets in which competition concerns have not been identified will have to be exercised with discretion by the Commission. Failure to do so will risk criticism of the Commission that it is over-fixing competition concerns with the consequence of discouraging potentially efficient mergers. The Commission should be mindful of the principle of proportionality, and that the EC Merger Regulation emphasises that commitments should be "proportionate to the competition problem" (EC Merger Regulation, Recital 30).
4. Paragraph 24. As it stands this paragraph is vague and its meaning unclear. Although we recognise that this wording is carried over from paragraph 14 of the current notice it would be desirable to take the opportunity to clarify its meaning, either explicitly or by cross-reference to other parts of the Draft Notice. Failing such further explanation, there is a risk of creating the perception that divestment remedies will be disapproved based on vague concerns about "*uncertainties and risks related to the transfer of a business to a new owner*". This is obviously not the Commission's intention.
5. Paragraph 25 and footnote 34. The point which is made in footnote 34 (regarding possible need to complement a divestment business with additional assets or personnel, and the consequences - including possible revocation of the clearance decision - of failing so to do) is potentially too important to be consigned to a footnote. It should be in the main body of text.
6. Paragraph 38. We note the statement that the granting of IP rights may be acceptable to the Commission "*only if the divestiture of a business is not possible ...*". However, we would invite the Commission to consider the undertaking accepted by the OFT in its recent clearance of the Tetra Laval/Carlisle Process Systems merger (see the OFT's decision of 20 November 2006, *Tetra Laval/Carlisle Process Systems*). In that case the OFT accepted a remedy consisting of a commitment to grant a suitable licensee an irrevocable EEA-wide licence of IP rights relating to cheese-making equipment sold under the "Wincanton" brand. The OFT commented that divestment of manufacturing capacity was unnecessary because potential purchasers either had this capability already or could out-source it in a cost-effective manner. There was no suggestion in this case that

divestiture of a business was not possible, only that it was not necessary. Undoubtedly the remedy would have satisfied the Commission's requirement that such a remedy be "as effective as a divestiture" and we consider it is unnecessary to include the additional stipulation that divestiture of a business is not possible since this might limit the ability of the Commission to accept an innovative and efficient remedy such as in the Tetra Laval case above.

7. Paragraph 42. We wonder whether it was intentional to exclude an "up front" remedy and refer only to a "fix-it-first" solution regarding uncertainty as to the availability of suitable licensees. We do not see why an "upfront" remedy could not equally well address this situation.

8. Paragraph 45. We note the Commission's statement that it is indispensable that interim preservation and hold separate measures apply equally to the alternative "crown jewel" divestment business(es). However, we wonder whether it is in all cases necessary to stipulate that such obligations shall apply. Given that, almost by definition, a "crown jewel" alternative divestment business is one which the giver of the commitment would normally be seeking to retain within its own business it seems that the risk of anything being done to damage its value or viability is in reality very low. We therefore consider that it might be sufficient for the Draft Notice to refer to the *possibility* of such measures being required in relation to "crown jewel" remedies without requiring them in all cases, without specific consideration. Rendering such remedies less unattractive to the givers of commitments might have the effect of encouraging their use. We note that the Commission's practice in this respect has not been consistent, with a commitment being accepted, for example, in Case COMP/M.1813 *Industri Kapital (Nordkem)/Dyno* under which the hold separate obligation for the alternative divestment commitment applied only for the additional period of time that was required for the alternative divestment.

9. Paragraph 49. We are concerned that it is unduly restrictive in certain situations to exclude entirely and from the outset that a financial buyer may be a suitable purchaser of a divestment business. Financial buyers have, for a number of years, represented a very significant proportion of M&A activity, and financial buyers are interested in many business sales pursuant to divestment commitments. The presence of a "competitive tension" in the sale of a divestment business - ie, by having more than one interested and eligible buyer - is an important element in allowing a seller to achieve its legitimate interest in trying to secure a fair price for divested assets. Financial buyers are extremely sophisticated purchasers and have become expert both at recruiting managers and at incentivising existing management. In recent years, the Commission has moderated its attitude to financial buyers as suitable purchasers of divested businesses to reach the position reflected in the most recent Best Practice Guidelines on the model text for divestiture commitments where it is expressly stated that purchaser requirements "*can generally be met by either industrial or financial investors. The latter must demonstrate the necessary management capabilities and "proven expertise" which can in particular be met by financing a management buy-out.*" The present system contains ample opportunity for the Commission to disapprove potential buyers whether during the procedure (ie, through the seller's and trustee's regular reporting) or finally at the stage of its response to a reasoned proposal from the seller. We therefore do not see the need in the Draft Notice to exclude entirely in certain circumstances the suitability of a financial buyer as a purchaser of a divestment business. We would also welcome clarification from the Commission, whether in the Draft Notice or in supporting documents, that its attitude to the approval of financial buyers has not changed. In this latter respect we note with concern that the Best Practice Guidelines referred to above and which contain the statement about financial buyers meeting the purchaser standards currently appear on the DG Competition "Mergers" website only under the heading of "Previous legislative texts (archive)" whereas we are not aware of their status having been diminished in this

way (<http://ec.europa.eu/comm/competition/mergers/legislation/archive.htm>). If this is the case, then the present consultation should cover any proposals to amend such Guidelines which might, as in the present example, have a material bearing on the interpretation of the Draft Notice. We also note, in passing, that a sale to a financial buyer will almost always result in a lower level of market concentration than a sale to a trade buyer, which may in itself be a desirable objective provided that the purchaser standards are otherwise met.

10. Paragraph 52. We feel it would be desirable to reflect that this first category (divestment within a fixed time limit after the decision) will likely represent the majority of cases. It appears from the Draft Notice that the three categories are of equal prevalence, whereas experience suggests that up-front buyer or fix-it-first solutions will be the exception.
11. Paragraphs 53-57 generally. There is insufficient recognition that the risk of up-front buyer and fix-it-first solutions greatly lengthens the potential regulatory timetable to which trade buyers (in particular) may be subject in regular business purchase situations (ie. business sales not pursuant to a divestment commitment). Businesses are frequently sold under an auction process typically organised by the seller's investment bank. A key factor in the ultimate selection of the successful bidder is the "deliverability" of the transaction - ie not only the degree of ultimate certainty that the sale will be completed, but also the time within which completion can occur. Trade buyers in auction processes already today frequently find themselves disadvantaged versus financial buyers. Financial buyers typically face a much less difficult regulatory hurdle and sellers pressurise trade buyers to deliver comparable deliverability to offers from financial buyers. This may include sellers seeking contractual terms which oblige the buyer to offer remedies necessary to achieve merger control approvals. The risk that such remedies may increasingly include up-front or fix-it-first solutions will only increase the disadvantage felt by trade buyers in situations where proposed acquisitions may give rise to competition issues. For this reason, if no other, it would therefore be desirable for the Draft Notice to indicate that up-front buyer and fix-it-first remedies are expected to be the exception.
12. Paragraph 64. The Draft Notice refers to a possibility of combining access remedies with an up-front or fix-it-first approach. It is stated that, in specific cases, this may be necessary in order to conclude with the requisite degree of certainty that the remedy will be *implemented*. However, it seems to us that the issue with such remedies is not "implementation", which can be assured by a monitoring trustee, but actual take-up and use of the commitments by third parties. Likelihood of take-up and use can be assessed during market-testing, irrespective of whether the remedy is fix-it-first, up-front or post-decision. In all such cases the Commission can conclude whether a remedy will be taken up. It seems unduly negative for the Commission to conclude based only on fears regarding actual implementation that an access remedy should be combined with an up-front or fix-it-first approach. The more important issue possibly is the length of time that may be required to implement an access remedy post-decision and the importance for competitive market structures that the access remedy is available with minimum delay. We do not doubt that such concerns might militate in favour of combining the remedy with up-front or fix-it-first, but this should be in exceptional cases.
13. Paragraph 65. A related point is the concluding comment that the Commission will only accept such commitments if satisfied that competitors "will likely use them". There have been cases where the Commission has indicated that an access remedy is necessary to resolve lingering concerns arising from the impact of a merger (particularly in Phase 1 cases where the Commission might otherwise have sufficient serious doubts to launch a Phase 2 investigation), but where the market has in the event shown little or no interest in the remedy. This will usually be because the imagined threat to competition proves unwarranted and does not materialise, possibly because a third party competitor was

trying to use the merger control process to place obstacles in the way of its competitors' merger or seek other advantage for itself. Bearing in mind the possibility of such effects and influences the Commission should not place undue importance on the requirement of concluding that competitors will make actual use of access remedies. Instead it should base itself on a satisfactory market-testing of the remedy.

14. Paragraph 71. In relation to an application for extension of the first divestiture period we note that the Commission requires that the applicant show that it was not able to meet the deadline for reasons '*outside its responsibility*'. Whilst we understand the issues of policy and principle which require that divestment commitments be implemented in the most timely manner, and that parties be not allowed to delay, we consider that the formulation is too strict. In many cases the applicant may have run a sale process in the best way possible but may simply have been unable to reach agreement with a buyer in the period allowed. This may be for a whole range of reasons and it may be difficult to sustain that all are "*outside its responsibility*". We believe that in such cases the Commission should have due regard to the overall way in which the sale process has been run, compliance with the obligations in the commitments, and the satisfaction (or otherwise) of the monitoring trustee with that process. It is our experience in practice that this is how the Commission in fact views such requests. Further, if the Commission and/or monitoring trustee are dissatisfied with the divestment process to the extent that an application for an extension of the deadline may be refused, such should have been made clear to the parties during the procedure itself so that they may take corrective action.
15. Paragraph 87. The Commission notes that where commitments are offered within less than 55 working days of the commencement of Phase 2 (ie. with the effect that the Phase 2 deadline remains 90 working days), but where a modified version is submitted on Day 55 or thereafter, the decision deadline is extended to 105 days. This is unduly severe. The 90 day deadline will usually be an important consideration for a party offering a remedy within 55 days in Phase 2. Equally, modifications to a remedy may frequently be necessary following market-testing. If these modifications amount to fine-tuning, or do not materially alter the nature of the remedy, it is unreasonable in such circumstances to impose a further 15 day period for decision. It should be clarified that such extension will only occur where the modified version represents a material change in the remedy submitted.
16. Paragraph 92. In a similar vein, the comment that the Commission will only accept modifications to commitments after Day 65 where it can determine, without need for further market-testing, that such commitments fully and unambiguously resolve the identified competition problems, is unduly severe. Whilst it is clear that substantially modified commitments proposed at, say, Day 85 will not be acceptable, it is very different at, say, Day 66. Given that commitments can be submitted for the first time at up to Day 65, and adequately market-tested, it seems arbitrary to decide that modified commitments submitted on Day 66 have to be capable of acceptance by the Commission without any other market test. By contrast the treatment of modified commitments is more lenient in Phase I notwithstanding the shorter deadlines (see Paragraph 82 which states in relation to Phase I that "such modifications may only be accepted in circumstances where it is ensured that the Commission can carry out a proper assessment of those commitments"). In reality we would expect the Commission to apply discretion and commonsense, and while it may be correct for the Draft Notice to warn of the potential implications for late submission of modified commitments it is in our view wrong to draw a clear black and white line at Day 65.
17. Paragraph 100. The Commission indicates that it will analyse whether the underlying assumptions of the purchaser appear plausible according to the market circumstances. Although we appreciate the Commission's determination to be satisfied that a purchaser is suitable we doubt that the Commission should hold itself out as being in a position to

make an educated second guess around the business planning of a sophisticated trade or financial buyer.

18. Paragraph 104 and footnote 110. The Commission appears in footnote 110 to be saying that the sale and purchase agreement for the divested business must contain provisions that the purchaser must maintain the acquired business as a competitive force in the market and will not sell on the business within a short (unspecified) time-span. We do not consider that these are suitable provisions to be included in a contract between the seller and buyer, not least since these provisions are incapable of creating rights for the Commission (which is the only person interested to enforce them). These aspects (ability to maintain the business as a competitive force, and plans or incentives for on-sale in the short term) are of course proper matters for the Commission to investigate and satisfy itself upon in the process of approval of the buyer, but they are not appropriate to be agreed between the seller and buyer.
19. Paragraph 116. The reference to the tasks of the monitoring trustee starting immediately after the adoption of the Commission decision implies as a matter of logic that the trustee must have been appointed by the time the decision is adopted. This obviously entails the nomination and approval procedure having been completed. Experience suggests that, at least in relation to Phase 1 conditional clearances, it is unrealistic to expect that the trustee will have been appointed by the time the decision is adopted. Finding trustee candidates with previous trusteeship experience and/or relevant industry knowledge and with no conflict of interest can be challenging within a short period of time. In reality in a Phase 1 case neither the notifying parties nor the Commission can devote sufficient resources to the nomination and approval of a trustee given all the other things which are going on in the procedure of the same time - eg, market-testing, limited modification of the remedy, drafting of the decision etc - combined on some occasions with the desire of the Commission to meet with candidate Trustees.
20. Paragraph 120. A similar point arises in relation to this paragraph. The Commission states that the trustee must be in place immediately after the decision, but then confusingly states that the parties should propose a suitable trustee immediately after the decision. The Draft Notice goes on to state that the commitments themselves should foresee that the notified concentration can only be implemented once the trustee has been appointed. The Draft Notice needs to be re-thought and clarified around these issues. However, we note that the proposal that implementation of a transaction may not occur until after a trustee has been appointed will introduce further delay to the completion timetable and will also be problematic in the context of typical business sale agreements which provide that completion must take place within a short period following receipt of merger clearance.
21. Paragraph 120, footnote 113. We consider that in reality it is impractical to require or expect the appointment of the divestiture trustee "at least one month ahead of the end of the first divestiture period". At this stage of the divestment process the sale arrangements are likely to be in full swing, in confident expectation that a sale will be achieved within the deadline, and the parties will not wish to be considering appointment of a divestiture trustee (ie an expectation not only of failure to complete the sale, but also that no extension of the first divestiture period will be granted if a sale is close to being achieved). If, notwithstanding, it is the Commission's intention that such appointment will be made at that time, even if only on a "fail-safe" basis, then this point should be more emphasised (ie, not treated as a footnote) and should be impressed upon the parties during the process by eg. the monitoring trustee.
22. Paragraph 122. We welcome the clarification that no conflict of interest will arise by virtue of relations between the trustee and the appointing party if those relations will not impair the trustee's objectivity and independence in discharging its tasks. It is more and more

difficult for the party submitting a commitment to identify an organisation (particularly a Big 4 accountancy firm) competent to assume the role of trustee but with which it has had no previous relations.

23. Paragraph 126. It is only at this paragraph that the Draft Notice clarifies for the first time that the principles set out in the previous paragraphs apply for the implementation of divestiture commitments. This could have been expressed earlier in the headings used.

Comments on the Draft Commission Regulation Amending Regulation (EC) No. 802/2004

24. Annex IV, Para. 1.1(ii). It is not clear to us what is meant by "*the conditions for their implementation*". It should be clarified precisely what information the Commission is expecting in response to this question.
25. Annex IV, Para. 2. This question should refer in the alternative to "serious doubts" to reflect that in Phase 1 proceedings the Commission has not established a significant impediment to effective competition, but has only found that there are serious doubts regarding the compatibility of the notified concentration with the common market.
26. Annex IV, Para. 3. It would be useful to limit the obligation to identify deviations from the model texts to "material deviations". Alternatively or in addition the Commission could require a comparison document (electronically produced) showing deviations from the model text.
27. Annex IV, Para. 5. The proposed Form RM requires a lot of information to be provided. Whilst we do not doubt the utility of the requested information for the Commission's understanding and assessment of the remedy submitted, this represents a considerable burden on the party submitting the remedy. This is of particular relevance in Phase 1 proceedings where a serious doubt may have emerged only late in the proceedings, eg. at the first state of play meeting. We would encourage the Commission to take a flexible approach with the obligation to provide information in the form so that it does not become an additional and unnecessary burden on notifying parties. In particular, it would be helpful if the Commission, in particular in Phase 1 proceedings, would allow Form RM to be clarified or supplemented in the period following its submission, or would engage (as today) with the submitting party to resolve particular questions.
28. Annex IV, Paras. 5.10 and 5.11. This obligation should be limited to 'material' changes.

26 June 2007

Submitted on behalf of the Competition and EU law practice of Lovells LLP.