

# THE COMMISSION'S DRAFT NOTICE ON REMEDIES ACCEPTABLE UNDER THE EC MERGER REGULATION AND PROPOSED AMENDMENTS TO THE IMPLEMENTING REGULATION

## COMMENTS OF THE SLAUGHTER AND MAY COMPETITION GROUP

This paper sets out the comments of the Slaughter and May competition group on the Commission's proposed revised Notice on remedies and amendments of the EC Merger Implementing Regulation, including the introduction of its annexed Form RM.

As a general observation, we welcome the Commission's initiative to revise the existing remedies Notice in a way that takes into account the 2004 reform of the EC Merger Regulation ("ECMR") and the adoption of the new Implementing Regulation, recent case law of the courts, the results of the 2005 Mergers Remedies Study, and the Commission's experience. Our comments on specific aspects of the proposed revised Notice and Implementing Regulation are set out below.

As a matter of policy, we would welcome the Commission's express commitment to more wide-ranging *ex post facto* review of the its decision-making, of the type proposed in the Lear report.

### 1. Different types of remedies

- 1.1 The draft Notice does clarify the different types of acceptable remedies as well as the requirements for such remedies to be acceptable. However, although we agree that the Commission is not in a position to impose conditions unilaterally, we encourage the Commission to take a more active role in assisting the parties to develop appropriate remedies to resolve competition concerns; in some cases, early feedback from the Commission would make the process more efficient.
- 1.2 The level of feedback currently given varies by case, but at times can be inadequate. For the system to work effectively, the parties need to understand clearly the nature of the Commission's concerns and how such concerns could be eliminated. This will become particularly important if the Commission retains the proposal to introduce Form RM, as this can only further compress the time available for a meaningful discussion with the Commission on substantive issues relating to remedies.
- 1.3 We question the reference to a 10-year non-reacquisition clause (at paragraph 43 of the draft Notice). We believe that the duration of the non-reacquisition clause must depend on market conditions in each individual case, and should be determined accordingly.

### 2. Procedure for the submission of commitments

#### *Form RM*

- 2.1 The Commission proposes that Form RM has to be completed when remedies are offered. We understand and support a clarification of the information that needs to be provided to the Commission to enable it to assess the remedies. However, we have some reservations concerning the use of a specific Form. In particular:

- (i) The parties are generally not in a position to submit the final remedies proposal until the last minute as the Commission has to carry out the analysis in two stages: (i) identify the concern(s); and (ii) only then assess the proposed remedies. Given that parties usually need to submit a draft before the final signed version, these are inevitably going to be late in the day. Any increased burden on collecting the information will exacerbate this.
- (ii) We are concerned that the Form RM may prove to be unduly burdensome. The parties can be expected to take all reasonable steps to ensure that all the information required to provide an appropriate factual basis for the assessment of the proposed remedies is made available to the Commission. Therefore, there is no reason for a prescriptive Form to be imposed.
- (iii) There are clear practical difficulties in collecting the information required to complete the proposed Form RM within the strict timeframe of the remedies proposal process, and such difficulties may be very onerous and out of proportion, for instance where the parties intend to offer multiple divestments of small businesses. This burden threatens the two-stage nature of the review process, where the parties have an opportunity to argue their case for unconditional clearance before any issues relating to remedies arise.
- (iv) The rigidity of Form RM fails to recognise the specifics of each remedies proposal as well as the specifics of market conditions in each individual case. For example, depending on the relevant market in question, EBITDA may prove not to be the appropriate measurement of a business's profitability; depending on the specific business(es) in question, the Commission should accept alternative ways to assess profitability.
- (v) We also believe that the information required by Form RM is not always relevant. For example, under Section 5.7 (and paragraph 27 of the draft Notice) the parties have to include a list of the key employees of the business to be divested. However, in practice it can happen that the list of key personnel initially approved by the Commission is subsequently changed in discussions with the monitoring trustee (who may effectively expand the list).
- (vi) The above concerns are accentuated by the natural reluctance of the Commission to grant waivers from these information requirements. The possibility to obtain a waiver from the strict requirements of Form RM does not address this concern: a waiver is always at the Commission's discretion and the practice on waivers with respect to Forms CO and RS is not transparent. In addition, the requirement to make waiver requests would introduce a delay into the remedies proposal process, which is highly unsatisfactory in the context of the strict timeframe of this process.
- (vii) In addition, Section 3 of Form RM requires the parties to identify any deviations from the model commitments texts published by the Commission and to explain the reasons for all the deviations. We are not convinced that such a proposal (which reflects the Commission's current practice to request a redline version of

the commitments showing changes to the model texts) is necessary or desirable. As the Commission recognises at paragraph 21 of the draft Notice, the model texts are not legally binding and “can” be used by the parties. Form RM should thus state that the commitments model text serves only as an indicative outline, to be shaped to reflect the specifics of each case and should not require the parties to explain all deviations from the model text.

2.2 In summary, we consider that the rigidity of a Form should be relaxed in favour of a more flexible approach, recognising that the parties have the keenest incentives to ensure that the level of information provided is sufficient for the intended purpose. A guidance/indicative list of the information typically required would be sufficient to ensure that the merging parties know from the start of the proceedings the type of information that would be needed if remedies proved to be necessary.

2.3 We also invite the Commission to increase transparency on the remedies by introducing a register of commitments (similar to the OFT Register of Undertakings) with information on details, process, timing, actual purchaser(s) and any other relevant aspects about the implementation of the commitments.

*Market test of remedies*

2.4 The proposed revised Notice provides (as does the current Notice) that if the parties modify their original remedies proposal during Phase II, after the deadline of 65 working days, the Commission will only accept these modified remedies if, *inter alia*, it can determine that they address fully the identified competition issues on the basis of the assessment made during the investigation, including the results of prior market testing, and without the need for any further market test. Such conditions for accepting revised remedies are very vague and leave room for uncertainty about the extent of the possible remedies modifications. It would be helpful if the Commission could indicate in more detail the scale of modifications to Phase II commitments permissible without a further market test.

*Co-ordination with other competition authorities*

2.5 We would welcome clarification of how the Commission expects to co-operate with other competition agencies in relation to remedies, in particular in relation to circumstances where the concerns identified by the Commission would be addressed satisfactorily by remedies approved by a different competition agency. We understand that the current practice in such circumstances is to require the parties to give separate, although effectively identical, remedies to the Commission. This raises a number of practical issues, including:

- (i) the possible application of different time periods for the divestment implementation;
- (ii) the need to appoint different monitoring trustees for the same business in the different jurisdictions – leading to an unnecessary cost to the parties;

- (iii) difficulties arising from the different roles of the monitoring trustees in each jurisdiction;
- (iv) potentially different deadlines for appointing a divestiture trustee (and potentially different trustees trying to sell the same business);
- (v) potentially different compliance reporting requirements; and
- (vi) separate purchaser approval requirements, which may lead to a breach of the divestment implementation deadline in one of the jurisdictions involved.

2.6 We therefore encourage the Commission to take into account legally binding commitments already submitted by the parties to the other competition agency: in some cases, if such commitments fully address the competition issues identified under the ECMR, the Commission should not require a separate remedy package; the Commission's final decision could simply refer to the remedies approved in the other jurisdictions.

### **3. Implementation of commitments**

#### *Timing*

3.1 In terms of timing, the deadlines for securing the implementation of the remedies is relatively short, especially if the deadline starts to run from the date of the decision. We therefore encourage the deadline to start running from the date of closing the transaction. This would provide the parties with a longer period of time to find, appoint, and instruct a trustee, and also to deal with all the issues surrounding the approval of the prospective purchaser and the divestment agreement. This would have the additional advantage of being in line with the practice in other important jurisdictions (notably the U.S.).

3.2 The Commission will issue a decision where it considers that a proposed purchaser is not suitable. We encourage the Commission to clarify that its review of the parties' purchaser proposal stops the clock on the period for the implementation of the remedies. This is particularly relevant if one considers that the process for the approval of the purchaser may take a significant time, in our experience one and a half months.

#### *Trustees*

3.3 We welcome the proposal to publish the identity of trustees, which will help to introduce more transparency in relation to the identification of those with experience in this field. In practice, the Commission's requirements in relation to the capabilities expected of trustees and its position in relation to conflicts of interest and remuneration unnecessarily restrict the potential field of trustee candidates. We believe the risk of a distortion of incentives arising from fixed fee arrangements is overstated. These are now common in relationships between service providers and clients, without giving rise to the quality of service issues the Commission identifies as a risk factor. It would also be helpful if the Commission could clarify that an auditing relationship with a non-key

subsidiary within a multi-national group or a non-auditing relationship with an accounting firm will not be deemed to give rise to a conflict of interest.

#### **4. Contacts**

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