

1. The present comments are based on some of the findings from the preliminary research for a Master's thesis titled "Behavioural Remedies in EU Merger Control". The author is a LL.M. student in the programme International Economic and Business Law at Groningen University.
2. My main observation has to do with the classification of remedies and the presumption that behavioural remedies are inferior in resolving the competition concerns of the Commission.
3. It is true that clearances have to be decided on a case-by-case basis and as the Court of First Instance has noted in *Gencor*¹ that the categorization of remedies as structural and behavioural is immaterial. At the same time, such a typology has already been accepted in case-law and literature, and may be useful for practical purposes.
4. The basic distinction put forward by the Draft Notice is between divestures, other structural remedies, and behavioural remedies.² According to the Notice, the first type is clearly the preferred one; the second may be acceptable in some situation; while behavioural remedies will usually not be sufficient to resolve the competition concerns.³ Given that especially behavioural remedies are explicitly considered to be inferior, it seems important to know how to differentiate between the different types of commitments.
5. The Draft Notice however only gives two examples of "other structural remedies" – access to key infrastructure or inputs on non-discriminatory basis⁴ and change of long-term exclusive contracts.⁵ It is not certain whether this is an exhaustive or exemplary list. Based on the previous practice of the Commission, it would seem that the list is exemplary, but what other remedies could be included in it? Even more importantly, it is not clear how to differentiate between "other structural commitments" and behavioural commitments. Providing access to key technology for example may well be a commitment "relating to the future behaviour of the undertaking".
6. Arguably the distinguishing criterion is whether the remedy proposed is equivalent in its effects to a divestiture.⁶ Divestitures themselves are however also not always sufficient to resolve the competition concerns of the Commission. Having to also show that a particular commitment is equivalent in effect to a divestiture seems to be an additional burden on the parties, which does not add much value to their proposals. The attention of both the parties and the Commission needs to be concentrated on whether the particular remedy resolves the problems for competition, created by the merger, and not so much on the typology of the commitments proposed. However, the Commission has tended to exclude a remedy by just claiming it is behavioural in nature and this has been criticized by the ECJ.⁷ The Draft Notice to some extent corrects this situation, but the

¹ Case T-102/96 *Gencor Ltd. v. the Commission of the European Communities* [1999] ECR page II-00753, para 319.

² Paragraph 17 of the Draft Notice.

³ *Ibid.*; paragraph 61 of the Draft Notice.

⁴ Paragraph 62 *et seq.* of the Draft Notice.

⁵ Paragraph 67 *et seq.* of the Draft Notice.

⁶ Paragraph 61 of the Draft Notice.

⁷ Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987.

presumption against behavioural remedies is still too strong, while the differentiation of behavioural remedies is not sufficiently clear.

7. The categorization of remedies in three categories, especially where the line between the two non-divestiture types is difficult to draw, seems to be artificial, and doesn't contribute to the clarity of the Notice. The suggestion of the present author is that the Notice adopt the basic distinction between divestitures and non-divestitures, which has already been accepted in the case-law of the Court of First Instance, and the European Court of Justice, as well as in literature. It is clear that both divestiture and non-divestiture commitments may not be sufficient to resolve the competition concerns and may be unacceptable. Admittedly, non-divestitures are a diverse category, but the present distinction between "other structural remedies" and "remedies relating to the future conduct of the undertaking" does not seem to be based on objective criteria,⁸ while there is a strong presumption against the latter. This approach does not square with the case-by-case economic analysis which the Commission strives to adopt in merger control cases. Therefore, it will be more beneficial if the Notice further elaborates on guidelines, which would help the parties propose viable non-divestiture commitments, as it has already been done in respect of divestitures. The Commission has in fact accepted non-divestiture remedies in numerous cases and may draw upon this experience.

⁸ See para 6 above on the possibility to use the criterion of whether the proposed remedy has an effect equivalent to a divestiture. Another criterion that may be put forward is whether the commitment is sufficient to resolve the competition concerns. The latter however is the factor drawing the line between acceptable and non-acceptable remedies.