CLIENT ALERT

European Commission revises Remedies Notice and amends Merger Implementing Regulation

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On 22 October the European Commission has published the long awaited revised notice on remedies acceptable under the EC Merger Regulation ("Revised Notice") as well as corresponding amendments of the merger implementing regulation. The Revised Notice comes after a series of decisions by the European courts and an extensive study on the effective design and implementation of merger remedies in Commission cases ("Remedies Study"). It further follows a public consultation that was held on the basis of a draft notice in 2007.

The main changes of the reform include the introduction of a form for submitting information on remedies in the merger procedure ("Form RM"), clarifications on the burden of proof, detailed guidance on various kinds of remedies and several substantive criteria as well as clarification on the role of the trustee. The Revised Notice has been inflated to more than double the size of its predecessor from 2001 and added considerable complexity to the commitments procedure at the Commission level.

Some highlights of the revised remedies package:

- In the previous notice the Commission had stipulated that "*it is the responsibility of the parties to show that the proposed remedies, once implemented, eliminate the creation or strengthening of […] a dominant position identified by the Commission. To this end, the parties are required to show clearly, to the Commission's satisfaction in accordance with its obligations under the Merger Regulation, that the remedy restores conditions of effective competition in the common market on a permanent basis.*" In light of the Court of First Instance judgment in EDP (case T-87/05 - see reference below) the Commission has now acknowledged that "*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 effective competition.*" (Revised Notice, paragraph 8)

- In the previous notice the Commission had already emphasized that it is on the parties to describe precisely the business to be divested. Assets that were used within the business but that should not be divested, had to be identified separately. The Remedies Study identified serious issues with the scope of the suggested remedy in a number of cases. This may be the reason why the Commission now not only requires an explicit exclusion of the assets or personnel that shall not be divested but will only accept such exclusions "*if the parties can clearly show that this does not affect the viability and competitiveness of the business.*" (paragraph 29) It is questionable whether this allocation of burden of proof is in line with the principles laid out above.

- For several years the Commission has asked the parties to use model texts for divestiture commitments for the submission of their suggested remedies and the trustee mandates. These template texts (see references below) have been extended and standardized over time. In the new remedies package they have been upgraded to form part of the

Commission's official guidance through explicit reference in the Revised Notice (paragraph 21). Section 3 of the Form RM even requires that the parties offering commitments "*identify any deviations of the commitments offered from the pertinent Model Commitments texts published by the Commission's services, as revised from time-to-time, and explain the reasons for the deviations.*" Although the Revised Notice emphasizes that the model texts are not binding, the model texts are now likely to take effect as straightjackets even more than hitherto.

- Several provisions have been added or expanded in the Revised Notice, most of which more or less reflect developments in the remedies practice of the Commission since 2001 - partly influenced by the Remedies Study. These include detailed guidance on
    - carve-out remedies (*i.e.* the legal and physical separation of the assets of the divested business from the parties' retained business);
    - re-branding remedies (*i.e.* remedies where the exclusive licence to a brand is granted for a number of years, during which time the licensee is expected to develop its own new brand);
    - non re-acquisition (*i.e.* the prohibition on the divesting company to re-acquire the divested business within a certain time period, normally 10 years);
    - the suitability of purchasers;
    - fix-it-first remedies (*i.e.* cases where the parties identify and enter into a legally binding agreement with a buyer outlining the essentials of the purchase during the Commission procedure);
    - the duration of other remedies;
    - the review clause (*i.e.* a clause in the commitments allowing the Commission to waive certain commitments at the request of the parties);
    - the role of monitoring trustees (*i.e.* a trustee appointed by the parties to oversee the parties' compliance with the commitments, in particular with their obligations in the interim period and the divestiture process).

- According to paragraph 128 of the Revised Notice the Commitments will generally have to foresee a clause according to which the parties agree that the Commission may request information from them for a period of 10 years after the adoption of the decision accepting the commitments.

The Revised Notice and the amended merger implementing regulation have been published in the EU Official Journal yesterday and will enter into force today.

It is clear that the revised remedies package will add cost and complexity to an already difficult, tedious and expensive remedies procedure. There certainly will be circumstances in which the fact that the Commission can accept remedies which - absent all the foreseen safeguards - it could not accept will outweigh this additional burden on the merging parties. On the other hand, the amendments hold the danger of the remedies process being further mechanized and flexibility being restricted or even lost. Nonetheless, the experience of the US (and especially the Federal Trade Commission) with its merger remedies suggests that clarity of guidance to the merging parties can facilitate the crafting of even complex remedies that will be viewed as acceptable. Particularly where the segment to be remedied is a small portion of a large, and overall acceptable, transaction, a clearer, even if complex, roadmap may have its advantages.

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Other materials:

CFI judgment on EDP appeal (case T-87/05)

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