


# The Revised Merger Remedies Notice—Some Comments

Werner Berg and Rob Lipstein\*

Crowell & Moring

 Binding commitments; EC law; Mergers; Remedies

## Introduction

On October 22, 2008, the European Commission published the long awaited revised notice on remedies acceptable under the EC Merger Regulation (“Revised Notice”),<sup>1</sup> as well as corresponding amendments to Regulation 802/2004 (“Implementing Regulation”).<sup>2</sup> The Revised Notice was motivated by numerous developments: the entry into force of the recast Regulation 139/2004 (“EC Merger Regulation”)<sup>3</sup> and the Implementing Regulation on May 1, 2004, which allow, for instance, the extension of the deadlines to assess remedies offered by the parties; case law of the European Court of Justice (ECJ) and the Court of First Instance (CFI); the conclusions drawn from the Commission’s study on the effective design and implementation of merger remedies in Commission cases (“Merger Remedies Study”)<sup>4</sup> and decisional practice of the Commission in cases involving remedies in recent years. It further follows a public consultation that was held on the basis of a draft notice in 2007. The Commission intends to apply and further refine the principles laid out in its notice in

individual cases. The amended Implementing Regulation has been published in the *Official Journal* of the European Union and entered into force on October 23, 2008.<sup>5</sup>

We highlight in this article how the Revised Notice differs from the Commission’s 2001 notice on remedies, and in particular how the Revised Notice may impact the approach of the parties to the concentration to timing and scope of remedies proposals. We conclude with some perspectives on the US experience with remedies comparable to those set out in the Revised Notice.

## Overview

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 and the legal standard to be met, more detailed guidance on the nature and scope of the business to be divested, and the suitability of the purchaser. Other important clarifications concern the requirements for the implementation of the commitments including the divestiture process and the role of trustees. Emblematic of the added complexity in Commission procedures presented by the Revised Notice, it is more than double the size of the 2001 Notice,<sup>6</sup> whilst its structure is largely maintained.<sup>7</sup>

## General principles

The Revised Notice refers to the significant impediment of effective competition (SIEC) test without commenting on any specific changes in the Commission’s remedies policy that could be triggered by this test as opposed to the previous dominance test. This is in line with the Commission’s previously declared thinking—according to which the previous dominance test did not leave any “gap” that would have had to be closed by the SIEC test but that, rather, the introduction of the SIEC test was only a clarification of the pre-existing scope of the EC Merger Regulation.

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

\* Dr Werner Berg, LL.M., is a partner in Crowell & Moring’s Antitrust Group resident in the Brussels Office. Robert A. Lipstein is a partner in and co-chair of Crowell & Moring’s Antitrust Group, resident in the Washington D.C. office.

1 Commission notice on remedies acceptable under Regulation 139/2004 and under Regulation 802/2004 (“Revised Notice”) [2008] OJ C267/1.

2 Commission Regulation (EC) 1033/2008 amending Regulation (EC) 802/2004 implementing Council Regulation (EC) 139/2004 on the control of concentrations between undertakings [2008] OJ L279/3.

3 Regulation 139/2004 on the control of concentrations between undertakings (“EC Merger Regulation”) [2004] OJ L133/1.

4 DG Comp, European Commission, “Merger Remedies Study, Public Version” (October 2005), available at [http://ec.europa.eu/competition/mergers/legislation/remedies\\_study.pdf](http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf) [Accessed March 23, 2009].

5 Commission Regulation 802/2004 implementing Regulation 139/2004 (“Implementing Regulation”) on the control of concentrations between undertakings [2004] OJ L133/1 as amended by Regulation 1033/2008 [2008] OJ L279/3.

6 Commission notice on remedies acceptable under Regulation 4064/89 and under Commission Regulation 447/98 (“2001 Notice”) [2001] OJ C68/3.

7 For example, section IV: “Situations where remedies have been considered to be difficult or impossible”; of the previous notice has now, systematically correct, been included in the General Principles section; see, inter alia, para.14 of the Revised Notice.

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."<sup>8</sup>

In light of the CFI judgment in *Energias de Portugal SA (EDP) v Commission of the European Communities*,<sup>9</sup> 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".<sup>10</sup>

The burden of proof is thus clearly on the Commission.<sup>11</sup> As a consequence, the Commission will be very anxious to obtain from the parties all information that enables it to fully assess the concentration. This, as well as abundant case practice, has led to the increased disclosure obligations for the parties to a concentration under the Revised Notice. In practice the parties seem well advised to take the Commission up on its offer to "adapt the precise requirements to the information necessary in the individual case at hand" and "to discuss the scope of the information required with the parties in advance of submission of Form RM."<sup>12</sup>

Another important clarification concerns the requisite degree of certainty.<sup>13</sup> The CFI has made it very clear that commitments have to eliminate the competition concerns entirely<sup>14</sup> and have to be comprehensive and effective from all points of view.<sup>15</sup> In addition, there has to be effective implementation and an ability to monitor the commitments.<sup>16</sup>

The Commission re-emphasises its preference for structural commitments but it clarifies that non-structural commitments may also be capable of preventing the significant impediment of effective competition and emphasises the necessity of a case-by-case assessment.<sup>17</sup> The Commission remains sceptical that

"commitments relating to the future behaviour of the merged entity" will achieve the "requisite degree of certainty" that they will be fully implemented and that they are likely to maintain effective competition in the market.<sup>18</sup> Although the Commission will thus fully assess behavioural commitments as required by the European courts,<sup>19</sup> the parties will have to introduce a monitoring mechanism that allows the market participants themselves to effectively enforce the commitments in a timely manner and which is not so complex that its effectiveness is put at risk from the outset.<sup>20</sup>

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.<sup>21</sup> These template texts have been extended and standardised over time.<sup>22</sup> 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.<sup>23</sup> Section 3 of the Annex to the Implementing Regulation 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 emphasises that the model texts are not binding, and are neither exhaustive nor always relevant, the model texts are now likely to take effect as straightjackets, even more than before. Given this increased importance, the model texts should be available in all relevant languages, not just in English.<sup>24</sup>

## Different types of remedies

As in the previous notice, the Revised Notice differentiates between the various types of remedies and uses the most common divestiture remedy as the role model. In the previous notice the Commission had already emphasised that it is the responsibility of the parties to describe precisely the business to be divested. Assets that were used within the business but that should not be divested

8 Paragraph 6 of the 2001 Notice.

9 *Energias de Portugal SA (EDP) v Commission of the European Communities* (T-87/05) [2005] E.C.R. II-3745 at [65].

10 Paragraph 8 of the Revised Notice.

11 The last sentence of para.18 of the Revised Notice, "the commitments must be sufficient to eliminate such a significant impediment to effective competition" has to be interpreted in that context.

12 Paragraph 7 of the Revised Notice.

13 See paras 9–14 of the Revised Notice.

14 *Cementbouw Handel & Industrie BV v Commission of the European Communities* (T-282/02) [2006] E.C.R. II-319 at [307].

15 *General Electric Co v Commission of the European Communities* (T-210/01) [2005] E.C.R. II-5575 at [52] and *EDP* [2005] E.C.R. II-3745 at [105].

16 *EasyJet Airline Co Ltd v Commission* (T-177/04) [2006] E.C.R. II-1931 at [189].

17 Paragraph 15 of the Revised Notice.

18 Paragraph 17 of the Revised Notice.

19 *Commission of the European Communities v Tetra Laval BV* (C-12/03 P) [2005] E.C.R. I-987 at [85]; *EDP* [2005] E.C.R. II-3745 at [100].

20 Paragraphs 14, 17 and 66 of the Revised Notice.

21 The first official set of model texts went online in May 2003 but in practice they had been used for several years before; cf. W. Berg, "Zusagen in der Europäischen Fusionskontrolle" (2003) *EuZW* 362, 363.

22 Available at <http://ec.europa.eu/competition/mergers/legislation/best-practice.html> [Accessed March 23, 2009].

23 Paragraph 21 of the Revised Notice.

24 See <http://ec.europa.eu/competition/mergers/legislation/legislation.html> [Accessed March 23, 2009] where the model texts are published since May 2003; but only in English.

had to be identified separately.<sup>25</sup> 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.”<sup>26</sup> Whilst it is the responsibility of the Commission to assess whether the concentration will lead to a significant impediment of effective competition, it rests with the parties to show that the divested business is viable and competitive.<sup>27</sup>

The Revised Notice sets out much more clearly than its predecessor that:

“... the divested business has to contain the personnel providing essential functions for the business such as, for instance, group R & D and information technology staff even where such personnel is currently employed by another business unit of the parties—at least in a sufficient proportion to meet the on-going needs of the divested business”.<sup>28</sup>

The same applies to relevant assets. The Commission also makes it very clear that it has a preference for the divestment of a standalone business.<sup>29</sup>

Due to the problems identified with carve-outs (i.e. the legal and physical separation of the assets of the divested business from the parties’ retained business) in the Merger Remedies Study, the Commission provides detailed guidance on carve-out remedies. This includes, notably, a commitment of the parties to carve-out the assets that already contribute to the divested business in the interim period between the adoption of the decision and the completion of the divestiture under the supervision of the trustee and the hold separate manager.<sup>30</sup> In addition, the Commission welcomes the proposal of an upfront-buyer solution<sup>31</sup> as one possibility to create the “requisite degree of certainty”.<sup>32</sup>

In exceptional cases the Commission has accepted re-branding commitments instead of divestitures, i.e. the right to grant an exclusive, time-limited licence for a brand with the purpose of allowing the licensee to re-brand the product in the period foreseen. On the basis of

previous practice and jurisprudence, the Revised Notice sets out clear criteria as to when re-branding remedies can be accepted. One key factor is that the potential licensee needs to have strong incentives to carry out the re-branding exercise.<sup>33</sup> Here again, an upfront-buyer solution or a “fix-it-first” remedy may be appropriate.<sup>34</sup>

In order to maintain the structural effect of a remedy, the Commission has in practice required a further commitment by the parties not to re-acquire the divested business for a certain period of time.<sup>35</sup> In the Revised Notice this is explicitly mentioned with a “general” time period of 10 years.<sup>36</sup> This time period seems very long for industries that are subject to rapid technological change and innovation, as compared to mature, stable industries with little recent history of entry or expansion. Parties to concentrations—and notably those active in such industries—should therefore make sure to include a provision in the commitments that allows the Commission to waive this obligation.<sup>37</sup> They should also be aware that the commitments will generally have to include the right of the Commission to request information from them for a period of 10 years after the adoption of the decision accepting the commitments.<sup>38</sup>

The Revised Notice explains in greater detail the requirements for alternative commitments. It is key that the alternative commitment be at least as good as the first proposed divestiture (“crown jewel”) and can be implemented quickly. It is also clarified that the interim preservation and hold separate measure also apply to the alternative commitment.<sup>39</sup> In case of uncertainties regarding the implementation of the divestiture due to third party rights or finding a suitable purchaser, the crown jewel commitment can be a suitable alternative to an up-front buyer solution and vice-versa.<sup>40</sup> The criteria for a suitable purchaser and its identification are laid out in greater detail than before and include the addition of the fix-it-first remedy.<sup>41</sup>

Access remedies have been identified as rather ineffective in the Merger Remedies Study of the

25 Paragraph 46 of the 2001 Notice.

26 Paragraph 29 of the Revised Notice.

27 In US practice, when the Federal Trade Commission (FTC) or the Department of Justice (DOJ) has concerns about whether the divested business will be viable, the agency is likely to require an upfront buyer to satisfy its concerns on this point. The Commission may, as we note, tend more in that direction in the future as well.

28 Paragraph 26 of the Revised Notice.

29 Paragraph 33 of the Revised Notice.

30 Paragraphs 36 and 113–114 of the Revised Notice.

31 “Upfront buyer” means that the parties undertake that they are not going to complete the notified operation before having entered into a binding agreement with a purchaser for the divested business, approved by the Commission; cf. para.53 of the Revised Notice.

32 Paragraphs 36 and 55 of the Revised Notice.

33 Paragraph 42 of the Revised Notice.

34 Fix-it-first remedies involve 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; cf. para.56 of the Revised Notice.

35 See, e.g. the third commitment in Decision of 17 August 2004 declaring a concentration to be compatible with the common market according to Regulation 139/2004 (COMP/M.3465-*Syngenta CP/Advanta*); the exact time period used in the cases is usually treated as a business secret and thus not published.

36 Paragraph 43 of the Revised Notice.

37 Paragraphs 71–75, notably 73, of the Revised Notice.

38 Paragraph 128 of the Revised Notice.

39 Paragraph 45 of the Revised Notice.

40 Paragraph 46 of the Revised Notice.

41 See paras 48–57 of the Revised Notice and fn.34 of this article, for the fix-it-first remedy.

Commission.<sup>42</sup> The Commission will therefore only accept such commitments:

“... if it can be concluded that these commitments will be effective and competitors will likely use them so that foreclosure concerns will be eliminated”.<sup>43</sup>

It is not surprising that the Commission further suggests linking such a commitment with an up-front buyer to provide the requisite degree of certainty that the commitment will be implemented.<sup>44</sup> In addition, the Commission is only prepared to accept such commitments where the complexity does not lead to a risk to their effectiveness from the outset and where the monitoring devices proposed ensure that those commitments will be effectively implemented and the enforcement mechanism will lead to timely results.<sup>45</sup> Nevertheless, the Commission may accept non-divestment remedies that are of limited duration.<sup>46</sup> Such remedies may be further abbreviated in duration through a review process if (and to the extent that) this is foreseen under a review clause in the commitments.<sup>47</sup>

## Aspects of procedure for submission of commitments

For commitments submitted in Phase I to be acceptable, the competition problem needs to be so straightforward and the remedies so clear-cut that it is not necessary to enter into an in-depth investigation.<sup>48</sup> The Revised Notice recognises the requirements established by the CFI, according to which:

“Phase I [commitments are], contrary to the commitments entered into during the Phase II procedure, [...] not intended to prevent the creation or strengthening of a dominant position but, rather, to dispel any serious doubts in that regard. It follows that the commitments entered into during the Phase I procedure must constitute a direct and sufficient response capable of clearly excluding the serious doubts expressed.”<sup>49</sup>

Article 18 of the Implementing Regulation<sup>50</sup> has been amended to stipulate that information submitted by the parties without having claimed confidentiality can

be deemed to be non-confidential by the Commission. Hitherto the Commission has sought permission before publishing any of the information received. Parties are therefore well advised to thoroughly identify any material which they consider to be confidential and, within the time limits set by the Commission, provide reasons for this designation and a separate non-confidential version.

## Requirements for implementation

The Revised Notice stipulates that the divestiture has to be completed within a fixed time period agreed between the parties and the Commission. It suggests time periods for the first divestiture period, i.e. the period in which the parties can look for a suitable purchaser, of normally six months, and a further time period of three months up to closing. Given that the Commission sees short divestiture periods contributing to the success of the divestiture, these time periods should be kept as short as possible and may be abbreviated in case there is a high risk of degradation of the business's viability in the interim period.<sup>51</sup> The Commission describes the approval procedure for the purchaser and of the sale and purchase agreement in detail. If the potential purchaser, in a *prima facie* assessment, threatens to create competition problems, it will be considered not to meet the purchaser requirements.<sup>52</sup>

The obligations of the parties in the interim period are laid out in greater detail and include the obligation to carry out, in the interim period, a carve-out of the assets that contribute to the divested business.<sup>53</sup> Since one result of the Merger Remedies Study has been that monitoring trustees were insufficiently clear about their role in the process and often had difficulties, notably with carve-out cases,<sup>54</sup> the Commission has laid this role and the monitoring trustee's task out in detail in the Revised Notice.<sup>55</sup> It is of practical importance, though, that the monitoring trustee can be appointed by the Commission at the expense of the parties.<sup>56</sup>

42 DG Comp, European Commission, “Merger Remedies Study, Public Version”, 2005, p.135, Table 7.

43 Paragraph 64 of the Revised Notice; repeated at the bottom of para.65.

44 Paragraph 64 of the Revised Notice.

45 Paragraph 66 of the Revised Notice with references to *EDP* [2005] E.C.R. II-3745 at [102] and *EasyJet* [2006] E.C.R. II-1931 at [189].

46 Paragraph 70 of the Revised Notice.

47 Paragraph 74 of the Revised Notice.

48 Paragraph 81 of the Revised Notice.

49 *Royal Philips Electronics NV v Commission of the European Communities* (T-119/02) [2003] E.C.R. II-1433 at [79].

50 Commission Regulation 802/2004 as amended by Regulation 1033/2008 [2008] OJ L279/3.

51 Paragraph 97 of the Revised Notice. These time periods are consistent with what the US practice used to be a few years ago. More recently, however, divestiture time periods have been shortened further by the DOJ and the FTC, and it is possible that further Commission experience will likewise lead to shorter time periods as well.

52 Paragraph 104 of the Revised Notice.

53 Paragraph 113 of the Revised Notice.

54 DG Comp, European Commission, “Merger Remedies Study, Public Version”, 2005, p.151.

55 Paragraph 117 of the Revised Notice.

56 This, again, is consistent with the US practice on trustee appointment and compensation and has been the practice as enshrined in para.17 of the Model Commitments text in the EU since several years; cf. <http://ec.europa.eu/competition/mergers/legislation/commitments.pdf> [Accessed March 23, 2009].

## Conclusion

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 it could not accept absent all the foreseen safeguards will outweigh this additional burden on the merging parties. On the other hand, the amendments hold the danger of the remedies process being further mechanised and flexibility being restricted or even lost. Nonetheless, the experience of the United States (and especially the Federal Trade Commission) with 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,

especially where certainty is provided by an upfront buyer. Particularly where the segment to be remedied is a small portion of a large—and overall acceptable—transaction, a clearer, even if complex, road map may have its advantages. Because it may not be sufficient for the parties merely to identify a particular business to be divested, parties to a concentration are well advised to undertake early and thorough planning of remedies, down to the detailed level of identifying purchasers that would be readily approved, and who would be interested in acquiring the divestiture package. Particularly given the requirements of the new Form RM, parties will now also need to seek extensive consultation and interaction with the Commission's services at an early stage in the merger control procedure.<sup>57</sup>

<sup>57</sup> See in particular the last sentence of para.7 of the Revised Notice, according to which:

“the Commission can adapt the precise requirements to the information necessary in the individual case at hand and will be available to discuss the scope of the information required with the parties in advance of submission of Form RM.”