European Union

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The European Commission (the "Commission") has the power to authorise or prohibit proposed mergers and acquisitions of undertakings where the transaction (usually called a 'concentration') has a European Union dimension. During a Commission investigation the parties may offer commitments or remedies to seek to resolve competition issues identified by the Commission. The Commission has accepted remedies at Phase I in order to avoid a lengthy Phase I investigation, as well as at Phase II to allow for clearance of the modified concentration. The Commission's 2005 Remedies Study[1] received a great deal of attention and led to a revised Remedies Notice in 2008[2] which draws on the study. The Commission has a developed practice of accepting remedies, and the legal framework for merger control and remedies will be familiar to practitioners who advise on multi-jurisdictional mergers. This article reviews recent trends in the Commission's approach to remedies. In particular, in recent years there has been a toughening of its stance and the remedies that the Commission will consider are sufficient to alleviate its concerns can be extensive.

PROCEDURAL ISSUES

Under the EU Merger Regulation (the "EUMR")[3], the Commission must reach a decision at Phase I within 25 working days from the effective date of the notification. This can be extended by 10 working days where the parties submit remedies to resolve competition issues. If the Commission decides as a result of the Phase I review that the transaction raises 'serious doubts' about whether it may give rise to a 'significant impediment to effective competition', it will initiate a Phase II investigation. The standard period for a Phase II investigation is 90 working days which may be extended to 105 working days if remedies are offered on or after the 55th working day of Phase II. An extension of 20 working days may be sought in certain circumstances. The maximum length of Phase II can therefore be 125 working days.

The Commission has published Best Practice Guidelines on merger control proceedings and on divestiture commitments as well as model texts for divestiture commitments and trustee mandates. It has also amended the EUMR to provide by way of Form RM, the information and documents to be submitted by undertakings offering commitments (whether at Phase I or at Phase II)[4].

Form RM requires the parties to provide information about the aim of the commitments that they have offered and the terms and conditions of implementation. The parties must also demonstrate how the commitments remove the significant impediment to effective competition identified by the Commission. On the whole, Form RM requires more detail and supporting information to be submitted where a business is to be divested, including in relation to the activities of the business that is to be divested and its relationship to the group that it is to be divested from. The parties are also required to provide information about why they consider that a suitable purchaser will be found within the relevant timeframe set out in the commitments. This may be useful in cases where there are doubts about whether a suitable purchaser will be found. As explained below, the

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1 Merger Remedies Study, October 2005.

2 Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004. Official Journal C 267, 22.10.2008, p. 1-27 (Remedies Notice).

3 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. Official Journal L 24, 29.01.2004, p. 1-22.

4 For further details see: http://ec.europa.eu/competition/mergers/legislation/notices_on_substance.html#remedies

Commission may in those circumstances require a purchaser to be identified in advance of the clearance decision.

While Form RM is useful in consolidating pre-existing practice in relation to the submission of remedies, it can produce an additional burden to the parties, particularly in the tight-frame at Phase I and where serious doubts emerge relatively late in the proceedings. Therefore, merging parties who anticipate the submission of remedies need to factor in to their timing and strategy the preparation of Form RM in draft for review by the Commission before submission in final form.

THE PREFERENCE FOR DIVESTITURE REMEDIES

The Commission's Remedies Study drew a distinction between divestiture and non-divestiture remedies. This corresponds to the distinction between structural and behavioural remedies that is familiar in other jurisdictions. Interestingly, the Remedies Notice refers to access remedies as structural remedies.

Structural or divestiture remedies remain the Commission's favoured approach to dealing with competition concerns. The Remedies Notice emphasises the Commission's preference for divestiture remedies:

"*...non-structural types of remedies, such as promises by the parties to abstain from certain commercial behaviour (e.g. bundling products), will generally not eliminate the competition concerns resulting from horizontal overlaps. In any case, it may be difficult to achieve the required degree of effectiveness of such a remedy due to the absence of effective monitoring of its implementation.... Therefore, the Commission may examine other types of non-divestiture remedies, such as behavioural promises, only exceptionally in specific circumstances, such as in respect of competition concerns arising in conglomerate structures*"[5]

The Remedies Study provided some support for this view, finding that 60 per cent of divestiture remedies were effective.

MECHANISMS TO ENSURE EFFECTIVENESS OF REMEDIES

The Remedies Notice draws on the 2005 Merger Remedies Study. Two particular mechanisms which are intended to support the effectiveness of remedies are worth contrasting: fix-it-first remedies in divestiture cases and the use of compliance monitoring.

Fix-it-first and upfront buyer

The Commission considers that in some cases it will be necessary for the parties to identify a purchaser for the business to be divested and to enter into a binding agreement with the purchaser (a so-called 'fix-it-first' remedy). Such a remedy tends to be useful in cases where the identity of the purchaser is critical for the effectiveness of the remedy, for example where the purchaser has certain characteristics that are needed to address the competition concerns or where assets from the divested business need to be combined with assets that are already owned by the purchaser in order to create a viable competitor to the merged entity. An upfront buyer differs in that the purchaser's identity will not be known to the Commission before the clearance. In both cases, the merger cannot be implemented until a purchaser that is acceptable to the Commission has been identified. The Commission has used upfront buyer remedies in a number of cases including *Post Office/TPG/SSPL* (2001)[6], *Nestlé/Ralston Purina* (2001)[7] and *Hexion/Huntsman* (2008)[8].

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5 Remedies Notice, paragraph 69.
6 Case IV/M.1915.
7 Case COMP.M.2337.
8 Case COMP/M.4835.

Remedies compliance monitoring

The Commission will also use compliance monitoring and specifically monitoring or divestiture trustees in order to ensure the practical efficacy of remedies and their implementation.

The Commission uses hold-separate managers to ensure that the business operates independently of the retained business prior to its sale. The Commission will typically require the appointment of a monitoring trustee to assist with the supervision of hold-separate obligations. The monitoring trustee typically acts as a contact point for third parties in relation to the commitments and also reports to the Commission on the process. A divestiture trustee will be appointed where the parties fail to find a suitable purchase within a specified period following conditional clearance. The divestiture trustee has an irrevocable mandate to sell the business within a specific deadline at no minimum price.

The Remedies Study found that trustees were used in all except two of 69 divestiture cases reviewed. In cases where trustees were not appointed the Commission found that had they been appointed this would have reduced the risk of inadequate implementation of remedies arising from ineffective preservation of assets or communication problems with third parties. In its Remedies Notice the Commission has taken into account the lessons in the Remedies Study including the emphasis that trustees should have the necessary qualification to carry out their role and be clear as to their mandate.

Remedies at Phase I

It is understandable that the types of remedies that will typically be acceptable to the Commission at Phase I will tend to be structural remedies. The time constraints at Phase I noted above will typically mean that there is limited if any opportunity to negotiate more complex remedies unless this is done at the pre-notification stage. Even where the parties have engaged in extensive pre-notification with the Commission and on the basis of a proposed remedies package, in practice divestiture remedies tend to be the preferred route at Phase I. However, the Commission has been prepared to accept a range of structural remedies at Phase I where it is satisfied that these are sufficient to restore competition by creating the conditions for new competitive entry or strengthen existing competitors. In *Hutchison 3G Austria/Orange Austria* (2012)[9] in addition to a divestiture remedy Hutchison committed to grant wholesale access to up to 30 per cent of its network. to mobile virtual network operators for a period of up to 10 years.

The Commission's approval of the *T-Mobile/Orange* (2010)[10] merger at Phase I also involved a divestiture remedy which was supplemented by a behavioural commitment in the form of a modified network sharing agreement with a competitor to ensure its viability post-merger. The case provides a good illustration of the Commission finding a mid-ground between a divestiture remedy and a behavioural remedy through a package of mutually reinforcing commitments. This case involved extensive coordination with the UK competition authority (then the Office of Fair Trading (OFT)) and the communications sector regulator (Ofcom) over the impact of the merger on the UK market. The regulators coordinated their reviews and specifically over the types of remedies that would be needed to resolve competition concerns. In view of the commitments accepted by the Commission, the OFT withdrew its request under Article 9 of the EUMR to review the specific UK aspects of the transaction.[11] The active engagement between the parties and

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9 Case M.6497.

10 Case M.5650.

11 Article 9 EUMR provides a mechanism whereby concentrations with a Union dimension may be referred to a relevant Member State, in whole or in part. Article 9 may be invoked where a transaction (a) threatens to affect significantly competition in a distinct market in a Member State; or (b) affects competition in a market within a Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the internal market.

the Commission contributed to achieving clearance at Phase I and avoiding a referral back which is noteworthy given the issues involved.

The use of remedies at Phase I in cases involving a referral back to a national authority has also occurred in other cases. For example, the French energy group EDF offered remedies to the Commission in relation to its proposed purchase of Centrica's Segebel that owned a majority interest in SPE of Belgium. To seek to address competition concerns relating to reduced incentives of EDF to build additional generation capacity, EDF offered to divest the assets of one of EDF's power companies. The offer of remedies by EDF followed a referral request by Belgium for a referral back of the Belgian aspects of the merger (*EDF/Segebel* (2009))[12].

In practice, there has been a trend in recent years to increasing complexity in the types of remedies packages that have been accepted by the Commission.

The US$25 billion merger between Holcim and Lafarge provides an example of a Phase I clearance subject to extensive divestiture commitments spanning multiple Member States (*Holcim/Lafarge* (2014)[13]. The Commission approved the transaction subject to commitments whereby the parties agreed to a significant divestment package, including ready-mix concrete plants, aggregates quarries, integrated cement plants, grinding stations and cement terminals in Germany, Romania, UK, France, Hungary, Slovakia, Spain and the Czech Republic. The Commission also required that the divestments be made to an upfront purchaser approved by the Commission. The Phase I clearance follows expectations by former EU Competition Commissioner Almunia that a Phase II procedure was practically a certainty. It appears that extensive pre-notification coupled with the wide divestments provided the basis for the Commission to allay any serious doubts. The current EU Competition Commissioner Margrethe Vestager has described these remedies as "*very substantial*" noting "*that was necessary to allow a clear cut decision already in first phase*"[14].

REMEDIES AT PHASE II

An in-depth investigation at Phase II allows the parties to introduce and develop substantive arguments as to why the merger should be cleared without remedies or to offer the Commission commitments in return for clearance. Some recent cases nevertheless demonstrate a hardening of the Commission's attitude to Phase II remedies.

For example, *INEOS/Solvay/JV* (2014)[15] involved the merger of the European chlorovinyls businesses of INEOS and Solvay to create a new joint venture. In two narrow markets in the North West of Europe and the Benelux the Commission raised concerns that the concentration would combine the two largest suppliers. At Phase I the parties had offered to divest production plants in Germany and in the UK but these commitments were not accepted by the Commission. The final remedies package at Phase II was far more extensive and comprised divestiture of INEOS's S-PVC plants in France, Germany and the Netherlands as well as production assets in Belgium and the UK. The parties also committed to enter into an agreement with the purchaser of the divested business for the production of chlorine. The remedies package was accepted only after the submission of two remedies proposals at Phase II. Another feature of this package was the requirement to identify an upfront buyer for the divested business. As discussed above this is becoming a prevalent feature of remedies involving the divestment of assets where there are concerns over the viability of the divested business.

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12 Case M.5549.

13 Case M.7252.

14 European Commission press release, Mergers: Commission approves acquisition of Lafarge by Holcim, subject to conditions, 15 December 2014 (IP/14/2683).

15 Case M./6905.

Syniverse/Mach (2013)[16] is another example of a tough approach to Phase I remedies. The merger involved the two biggest providers of data clearing and near trade roaming data exchange services (NTRDE) at the EEA and worldwide level. According to the Commission the transaction would have had "*virtual monopoly shares*". The Commission did not consider that competition was likely to develop to provide an effective constraint on the merged group. Syniverse committed to divest Mach's DC and NRTDE activities comprising infrastructure, operational assets, software, key staff and customer contracts. The aim of this remedies package was to create a competitor with sufficient scale to rival the merge entity.

PRACTICAL CONSIDERATIONS FOR MERGER REMEDIES STRATEGY AND LOOKING AHEAD

The legal framework for remedies in EUMR is familiar. When developing merger regulatory strategy parties whose transactions are subject to mandatory review by the Commission have considerable case law experience and published guidance on which to draw.

The Commission will continue to make wide use of trustees during the remedies procedure, a feature which, at least historically, contrasts with the position in most of the Member States.

It is possible to identify a trend towards a stricter approach in the Commission's attitude to remedies. The need for an upfront buyer for a divested business in appropriate cases is likely to remain a requirement in the coming years. Further, the Commission will look for supplementary remedies including access agreements which ensure the viability of the new purchaser or competitors where it is not satisfied that divestiture alone will be sufficient to restore pre-merger competition.

The focus of the Commission's wider merger control reform agenda remains on its jurisdictional and procedural reforms[17]. The proposal to extend the scope of the EUMR to the acquisition of non-controlling minority interests that have cross-border effects in the EU and the reforms to the system of referral of merger cases between the Commission and Member States have implications for merger remedies practice. First, the ability of the Commission to review the acquisition of a non-controlling minority interest throws up interesting issues for the scope of a remedy, if required, given that the acquiring shareholder will not have complete control over the target business. Second, the possibility of a national authority to take jurisdiction in whole or in part over a transaction subject to the EUMR will have implications in cases where competition issues are not limited to one EU Member State. On the whole the Commission will tend to be the preferred forum for the review of transactions which might require pan-European remedies such as the divestment of a business with a footprint in more than one country but where there is a common brand. As yet the future jurisdictional and procedural landscape is not settled on these issues.

16 Case M.6690.

17 Commission press release IP/14/801, MEMO/14/471, White Paper "Towards more effective EU merger control", Staff Working Document.