



Remedies in EU Merger Control

EUTCP AML Competition Week

Xi'An China

9 October 2012

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The views expressed are personal to the speaker

References

- **Council Regulation (EC) No 139/2004 (Merger Regulation):** Art. 6 (phase 1), 8 (phase 2), 10 (deadlines)
- **Commission Regulation (EC) No.802/2004 (Implementing Regulation):** Art. 19 (time limits), 20 (procedure)
- **Commission Notice on remedies acceptable under the Merger Regulation and the Implementing Regulation** – new Remedies Notice published on 22 October 2008
- **Standard Commitment Text and Trustee Mandate**
+ explanatory memorandum (Best Practices; see website: http://ec.europa.eu/competition/mergers/legislation/best_practice.html)
- **European Court of Justice (ECJ), case law**

Definition

Remedies Notice, para.5: "Where a concentration raises competition concerns in that it could significantly impede effective competition [...] parties may seek to modify the concentration in order to resolve the competition concerns and thereby gain clearance of their merger"

Remedies

- *modifications to a concentration*
- *offered by the parties*
- *to respond to concerns identified by Commission*
- *and resolve competition problems*

General principles: Allocation of responsibilities

COM

- to show that a concentration would significantly impede competition (Remedies Notice, para.6)

Parties

- to submit remedies and provide all relevant information necessary for the Commission's assessment (Remedies Notice, para.7) → **FORM RM**

COM

- to assess the effects of the concentration as modified by the remedies (Remedies Notice, para.8) → **MARKET TEST**

General principles

- *Acceptable remedies (Remedies Notice, para.9):*
 - have to eliminate the competition concerns **entirely**, and
 - must be capable of being implemented **effectively** within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.
- *Case law (Cementbouw):*
 - Parties can submit remedies which go further what is necessary to remove competition concerns
 - Commission's decision must satisfy the principle of **proportionality**

Procedure: Phase I

First Phase with remedies

Prenotification

*Discussions on jurisdiction, shaping of the case.
Parties may already indicate remedies options.*

Notification

Market investigation

15 WD
State of Play meeting to inform Parties on serious doubts

Market test

20 WD to propose remedies -> +10 WD

25 WD

Art. 6 Decision

Art. 6(1)(b)
(Clearance)
Art. 6(1)(c)
(Phase II)

Improved remedies' negotiations

Art. 6(2)
(Clearance + remedies)
Art. 9/22
(referral)

35 WD

WD = working days

Procedure: Phase I

Remedies Notice, para. 77 ff

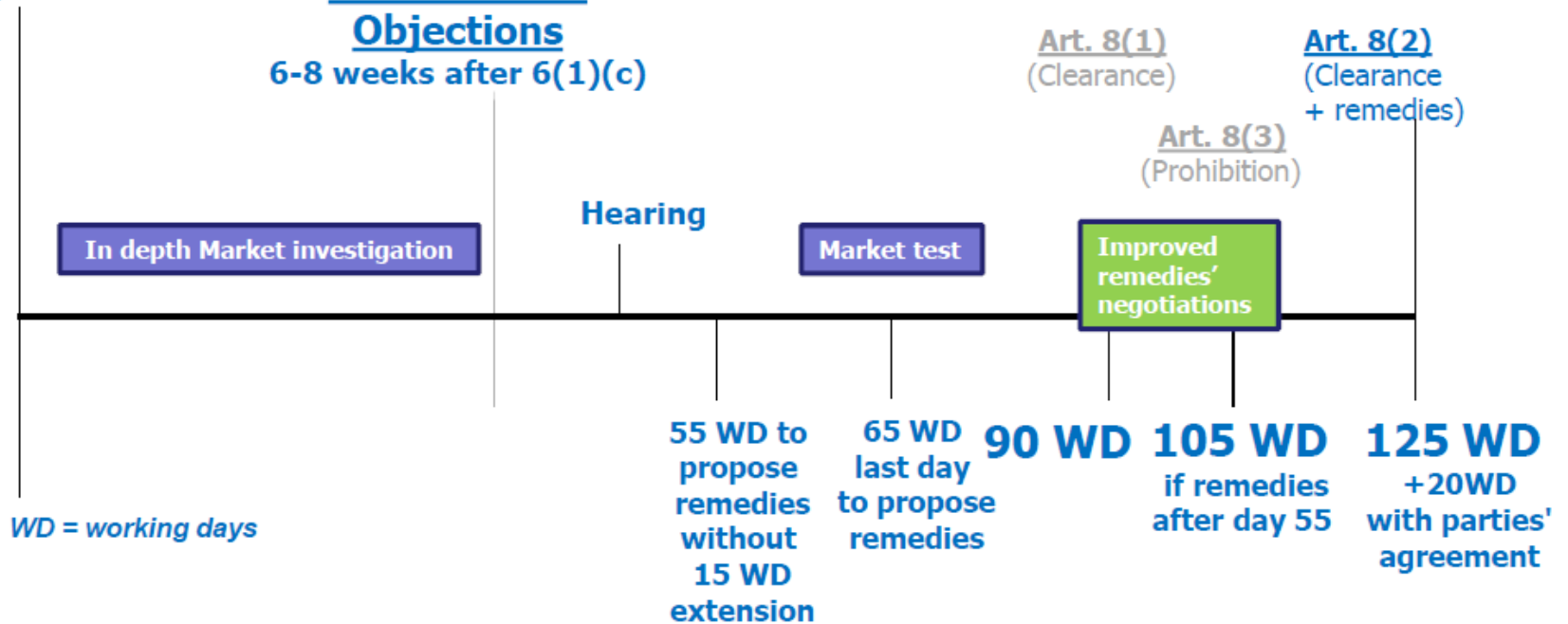
- **Test:** remedies sufficient to clearly rule out serious doubt
→ **CLEAR-CUT** (time constraint)
 - Only acceptable when competition problem is readily identifiable and can easily be remedied
- **Timing:** submission within 20WD (triggering 10WD extension)
 - Only limited modifications acceptable after deadline (ECJ, Philips), but Commission will offer opportunity to withdraw remedies if concerns ultimately do not arise in one or more markets

Procedure Phase II

Start of Phase II
6(1)(c) decision

**Statement of
Objections**
6-8 weeks after 6(1)(c)

Final Decision



Procedure: Phase II

Remedies Notice, para. 87 ff.

- **Test:**
 - Before SO:*** entirely remove serious doubts
 - After SO:*** entirely remove significant impediment to effective competition
- **Timing:** *submission before WD 65*
 - Before WD 55 → no extension
 - After WD 55 or before WD 55 but modified version submitted after → extension of 15 WD.
 - 20 WD extension possible: agreement with the Parties
 - After WD 65 Commission not obliged but allowed to accept remedies → CLEAR-CUT standard

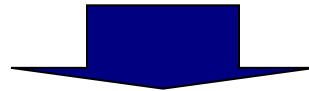
Types of remedies

Preference for **structural** over **behavioural** remedies
(Remedies Notice, para. 15 and 17)

- **Divestitures**: preferred; key is to have suitable purchaser
- **Removal of links** with competitors:
 - Divestiture of minority shareholding or, exceptionally, waiving rights related to minority stakes
 - Termination of distribution or other contractual arrangements
- **Access** commitments:
 - Granting of non-discriminatory access to infrastructure, networks, technology/IP rights or essential inputs.
- **Behavioural** / other remedies:
 - To be assessed on a case-by-case basis
 - Difficulty of monitoring and risks of effectiveness: they may only amount to mere declarations of intentions

Information necessary

- There is a clear asymmetry of information on the right scope of viable business; Commission has the burden of motivation if reject the commitments



- Therefore the parties have to provide (Form RM):
 - Nature and scope of commitments offered;
 - Conditions for their implementation; and
 - Suitability to remove any impediment to effective competition
 - Deviations from Commission's Model Texts
 - For divestitures, in particular, detailed factual description required on how the business is currently operated; to be compared with scope of Divested Business as offered in the commitments

Divestiture

Remedies Notice, para. 22 ff

- *Divestiture of a **viable and competitive business**, which could effectively compete with the merged entity on a long lasting basis*
 - Preference for stand-alone business and for separate legal entities
 - Can include tangible and intangible assets: e.g. production facilities, IP rights, brands, personnel, supply agreements, customer lists, technical assistance, etc.
 - Proportionality principle → possibility of carve-out BUT risk for viability

Divestiture - Purchaser

- Normal procedure: found/approved within a fixed time limit after the decision
- **Up-front buyer** (=no implementation prior to buyer approval)
 - Uncertainty of implementation
 - Obstacles for divestiture, e.g. third party rights (*Omya/Huber*)
 - Uncertainty that Business will attract suitable purchaser
 - Difficult interim preservation:
 - If parties cannot undertake carve-out in the interim
 - If high risk of degradation
- **Fix-it-first remedy** (=binding agreement before final decision)
 - Preferable where identity of purchaser is crucial for effectiveness of remedy
 - E.g. if viability is ensured by specific assets of the purchaser (*Inco/Falconbridge*) or where purchaser needs to have specific characteristics (*tele.ring*)

Case Study 1

M.6203 - WESTERN DIGITAL IRELAND / VIVITI TECHNOLOGIES (2011)

Competition concerns

Non-coordinated effects in the worldwide 3.5" Desktop HDD market, the worldwide 3.5" Business Critical Enterprise HDD market and the worldwide 3.5" CE HDD market as well as in the EEA wide downstream external HDD market, by removing constraint from Viviti Technologies (formerly Hitachi GST).

Structural remedy:

- Divestiture of the production assets for the manufacture of 3.5-inch HDDs:
 - a production plant,
 - the transfer or licensing of IP rights
 - the transfer of personnel and
 - Temporary supply of HDD components to the divestment business.
- Up-front buyer condition with specific conditions (expertise + experience)
- Implementation: Toshiba approved as a purchaser by the Commission

Case Study 2

M.6410 – UTC / GOODRICH (2012)

Competition concerns

Non-coordinated effects in the market for alternating current power generators, or alternatively on its possible submarkets, and to potential foreclosure concerning the vertical relationship between engine controls and small engines and the vertical relationship between fuel nozzles and aircraft engines.

Structural remedy:

- (i) to divest Goodrich's businesses in aircraft electrical power generation and distribution systems,
- (ii) to divest Goodrich's business in engine controls for small aircraft engines, and
- (iii) to offer a competing engine supplier, Rolls-Royce, an option to acquire Goodrich's lean burn fuel nozzle R&D project.

Access commitments (1)

Remedies Notice, para. 62 ff.

- *Access commitments: non-discriminatory access to infrastructure, networks, technology/IP rights or essential inputs.*
- **Test:** *Must be equivalent to a divestiture in their effects*
 - Lowering entry barriers: only if there will be actual entry of new competitors and such entry will be timely and likely
 - Foreclosure concerns: only if competitors will actually use these commitments
- *Monitoring of such commitments*
 - Via market participants: self-enforcement (arbitration clauses)
 - Via national regulators

Access commitments (2)

- Access to **infrastructure**

(Shell/Dea, Vodafone/Mannesmann, Newscorp/Telepiu, Tollcollect)

Sensitive issues:

- Terms of access must be precise but leave room for particular situations of potential beneficiaries that are yet unknown
- Provision of technical information and assistance
- Access fee levels determine incentives to compete -> formulas (cost+), published indices, past practice, comparable markets

- Access to **key technology, licensing**

(Alcan/Pechiney, Axalto/Gemplus)

- Transfer of know how is essential
- License fee levels determine incentives to compete
- Choice exclusive/non-exclusive license; co-license with parties problematic
- Foresee provisions for pass-on/license-back

Access commitments (3)

- Access to **technical interfaces**
(*GE/Instrumentarium, Siemens/Draeger, Axalto/Gemplus*)
 - Technical information and assistance
- Access to **content (media)**
(*Vivendi/Canal+, Newscorp/Telepiu*)
 - Valuable concept for different platforms (pay-TV, satellite, free)
- Access to **product liquidity**
(*gas release in EDF/EnBW, Verbund, Eon/Mol*)
 - Auction system suitable for all types of customers
- Access to **essential inputs**
(*access to raw milk in Friesland/Campina*)
 - Possibly as a means to ensure viability of a structural remedy

Behavioural/Other Remedies – What to avoid

- Long term supply contracts
 - can create links and interaction between competitors
 - information dissemination about cost structure
 - fixes existing market structures
- Price caps
 - heavy market intervention
 - risk of perverse effects
- Firewalls
 - virtually impossible to monitor