

## REMEDIES IN MERGER CASES

Wolfgang Mederer  
Head of Unit, Merger Task Force

*The Fifth Annual Competition Conference, IBA,  
Fiesole/Florence 21 September 2001*

### 1. Remedies under the EC Merger Regulation – State of Play

Remedies belong to the key elements of an effective and well-balanced merger control. Provided the underlying competition problem is identified and properly addressed, remedies allow for clearance decisions in individual cases and – more generally – do not impede the ongoing restructuring of the industry, while at the same time maintaining or restoring effective competition. It is therefore not surprising that the number of remedy cases and the European Commission's experience in assessing remedies has grown rapidly over the past couple of years. In the period 1990 – 1997, the first eight years of EC Merger Control, the Commission adopted 37 decisions with commitments, whereas this number increased to 83 in the period 1998 – 2000. As a percentage of the total number of final decisions, 5.7% of all decisions taken in the period 1990 – 1997 were decisions with commitments, however, with a significant degree of variation during that period. The figures for 1998, 1999 and 2000 are 6.7%, 10% and 11.6% and show thus a steady increase of decisions with commitments not only in terms of absolute figures, but also as a percentage of the total number of final decisions taken. The development in the current year suggests so far a decline of merger decisions involving commitments. The number remains however relatively high and, with 7.1% of all final merger decisions,<sup>1</sup> well above the 1998 level.

Hand in hand with the Commission's decision making practice, the legislative framework of EC Merger Control has been gradually refined. Within the framework of the 1994 review of the Implementing Regulation, the Commission introduced a time limit obliging parties who seek to remove the competition concerns identified by the Commission to submit their commitments within not more than three months from the date on which second phase proceedings were initiated.<sup>2</sup> The scope of the 1997 amendments to the Merger Regulation which entered into force on 1 March 1998 was wider in that it introduced a clear legal basis for submission of commitments during the first stage of proceedings as well as an automatic extension of the initial assessment period from one month to six weeks.<sup>3</sup> This reform has led to a significant reduction in the number of second phase decisions as a percentage of the total number of decisions.<sup>4</sup> Both merging parties and Commission appear to exploit the possibility of settling a case within the time frame of the extended first phase proceedings.

The other side to this certainly overall positive development is increased time pressure on all parties involved in the proceedings - including third parties and Member States. The time framework within which remedies can be discussed in both the first phase and the second phase proceedings will certainly be one of the topics in the forthcoming merger review. The discussions here will focus on the right balance between the different objectives pursued: in particular the requirement of swift proceedings and the need for sufficient time for all parties involved – the notifying

parties, the Commission, third parties and Member States – to discuss and assess remedies in a meaningful way.

## 2. Developing the Commission's practice

My contribution will leave aside the discussion on possible amendments of the legislative framework of EC merger control. I will instead concentrate on the Commission's day-to-day practice and discuss the following two questions:

- How can we in the best possible way design and implement commitments within the existing legislative framework?
- What are the challenges we face when commitments are designed, assessed and accepted?

Let me reply to these two questions in the reverse order. In the Tenth Anniversary Conference for the Merger Regulation last September in Brussels, the main challenge for remedies has been paraphrased correctly with the metaphor of “finding the right cure”. Finding the right cure – this is indeed the main test for competition authorities and notifying parties in any remedy discussion. A commitment that fails is costly. Costly for the merging parties since it prolongs uncertainty and calls for searching and negotiating alternative solutions. Ultimately, the parties to the concentration may have to unwind the deal retroactively, with all the consequences on the market value and the reputation of the enterprises involved as well as on employment. Costly also for the market and market participants since it prolongs a situation which is unsatisfactory, if not unacceptable because it impedes effective competition. Last, but not least, it is also costly for the competition authority concerned in terms of the additional resources spent on the required repair work as well as with regard to its reputation and credibility.

The Commission has responded to this challenge in a three-step approach: First, it has adopted in December 2000 a Notice on remedies acceptable under the Merger Regulation.<sup>5</sup> The notice summarises the Commission's practice and outlines the general principles and key issues to be respected in remedy cases. Second, in spring 2001 the Commission created the Enforcement Unit within the Directorate for Competition's Merger Task Force with the specific task of developing and ensuring a consistent policy for remedies in merger cases. Third, the key requirements for workable commitments are being refined in the Commission's practice in a case-to-case approach.

### 2.1. The Remedies Notice

The experience gained by the Commission as well as the – broad – guidance provided by the Court of First Instance<sup>6</sup> has allowed the Commission to issue its Notice on remedies, the first guidelines worldwide of a competition authority on this subject. The Notice sets out the general substantive and procedural principles on which the Commission bases its assessment of remedies.

As to the substance of commitments, the notice remains necessarily general and can only provide the broad guideline that a remedy has to “restore effective competition”<sup>7</sup>:

every competition concern requires a custom-made solution. Generalised solutions are not possible since a commitment has to address and eliminate a specific competition concern. The Notice therefore can only reiterate the general principle established by the Court of First Instance in *Gencor/Commission* that the remedy must be “capable of preventing the emergence or strengthening of a dominant position”.<sup>8</sup>

The Notice is much more detailed however with regard to the types of remedies acceptable to the Commission (Section III.), the specific requirements for submission of commitments (Section V.), including the important issue of timing of commitments, and the specific requirements for implementation of commitments (Section VI.), in particular the role of trustees in the implementation process. In view of the variety of issues and scenarios that can be imagined in remedy cases, the Notice cannot provide for definite solutions. It rather serves as a platform for developing and refining the decision making practice.

## 2.2. The Enforcement Unit

In order to support the overall aim of developing and ensuring a consistent policy in merger cases, the Directorate General for Competition has created earlier this year a new unit within the Merger Task Force (MTF) with specific responsibilities in remedy cases. The work of the enforcement unit forms an integral part of the MTF work and is therefore imbedded into the established working culture. Hence, case teams continue as usual to handle cases under the responsibility of a case manager. Arising remedy issues in a pending notification are responded either by the appointment of an additional case team member stemming from the remedies unit or a contact person in that unit, depending on the merits of the case and the experience of the case team with regard to remedies. At the same time, members of the enforcement unit also continue as case handlers in the “classical” way.

The basic aim of the unit is to provide, within the MTF, a structure for building up and pooling the expertise in the field of remedies, both in the negotiation phase prior to an Article 6 or Article 8 decision and in the implementation phase post decision and until full compliance of the parties with the commitments given. Beyond ensuring consistency, the most visible practical results of the unit for the “outside world” should be the development of a clear set of key elements for commitments which eventually will lead to the development of standard elements for commitments, ideally standard template texts. In addition, standard trustee agreements are being developed.

## 2.3. Key requirements for workable commitments

The key requirements for workable commitments are set out in the Remedies Notice and have been put in practice and further developed in recent cases.

As a first visible impact of the Notice, the Commission started to qualify certain provisions in the commitments as conditions and others as obligations. So far, a distinction has normally not explicitly been made in Commission decisions.<sup>9</sup> As a general rule, the core commitment, in most cases the divestiture – including the final divestiture deadline – is qualified as condition, whereas all ancillary provisions and implementing steps are qualified as obligations.<sup>10</sup> This adds to legal certainty since the

legal consequences of a breach of an obligation is different from that of a breach of a condition. With regard to the first, the Commission may revoke a clearance decision pursuant to Article 6 (3) or Article 8 (5) (b) of the Merger Regulation, whereas in the latter case the compatibility decision simply no longer stands.

- The divested business and related commitments

Almost all decisions with commitments taken so far in 2001 are commitments to divest a certain business or have as their core a commitment to divest. This is in conformity with the Remedies Notice which describes divestitures as “the most effective way to restore effective competition, apart from prohibition”.<sup>11</sup> This is also in line with the findings of the Court in *Gencor* that “commitments which are structural in nature ... are as a rule preferable from the point of view of the Regulation’s objective, inasmuch as they prevent once and for all, or at least for some time, the emergence or strengthening of the dominant position previously identified by the Commission and do not, moreover, require medium or long-term monitoring measures”.<sup>12</sup>

It can therefore be expected that commitments to divest remain the most frequent type of remedies in merger cases. The standard commitments texts will therefore be tailor-made for divestments and will have to be adapted on a case by case basis to other forms of commitments.

Experience has shown that a precise description of the intended subject of divestment, as required in the Notice,<sup>13</sup> is crucial. Absolute clarity is essential not only for the seller and the potential purchaser, but also for the Commission and for its “eyes and ears”, the Trustee, who is supervising the process and may be eventually in charge of the sale at the end of the day. We have to bear in mind that the definition of the divested business in the commitments and in the subsequent sale and purchase agreement may have to be more specific than in many commercial contracts because of the potentially adverse relationship between the seller and the purchaser. In other words: the Commission is becoming much more demanding with regard to the description of the divestment business than it has been in recent years in order to avoid surprises at a later stage. This may require in future that the business people in charge of the divestment business should be actively involved in negotiating and designing the remedy.

In the evolving practice, a detailed non-exhaustive description of the tangible and intangible assets of the divestment business is followed by an exhaustive list indicating what the divestment business will not encompass. The description of the business usually also includes a list of all independent customers with whom the divestment business did business in the last full calendar year and the current calendar year up to the closing date.<sup>14</sup> This also extends to framework agreements even where the customers have not done any business in that period. A non-compete clause for these groups of customers for an adequate period of time aims to ensure the successful transfer of the goodwill of the business.

Furthermore, the business should be divested as a going concern. This requires in particular to ensure that all personnel stays with the divested business. Normally, this will be ensured by provisions identifying the personnel necessary to operate the

business the provision of incentives for the personnel to remain with the business as well as non-solicitation clauses for an appropriate transitional period.<sup>15</sup>

The requirement that the divested activities must consist of a viable business that can operate on a stand-alone basis<sup>16</sup> will lead in appropriate cases to the addition of activities to the divestment business which are related to markets where the Commission did not raise competition concerns.<sup>17</sup>

In cases where the implementation of the parties' preferred divestiture option appears to be uncertain or difficult, the Commission will request that the commitments contains an alternative divestiture proposal.<sup>18</sup> This alternative proposal has to be at least equal if not better suited to restore effective competition and will have to be implemented if the parties fail to divest the preferred option within the stipulated timetable.<sup>19</sup>

#### - The purchaser

The Notice requires the proposed purchaser to be a "viable existing or potential competitor, independent of and unconnected to the parties, possessing the financial resources, proven expertise and having the incentive to maintain and develop the divested business as an active competitive force in competition with the parties".<sup>20</sup>

Depending on the nature of the divestment business or the characteristics of the market concerned, it may in some instances be difficult to find an appropriate purchaser. If doubts of this kind are foreseeable already when the case is being investigated by the Commission, the most obvious solution will be an "upfront buyer". In view of the short deadlines in EC merger proceedings, this will normally require that the parties undertake to suspend the implementation of the intended concentration until they have entered into a binding agreement, approved by the Commission, with a purchaser for the divested business.<sup>21</sup> This solutions has been applied successfully in two recent cases.<sup>22</sup>

#### - The divestment process

Clear and short divestiture deadlines belong to the key elements of a successful remedy. Short divestiture periods reduce the time of uncertainty for the divestment business and thus also contribute to its unaffected viability and competitiveness. In order to allow for a clear-cut and foreseeable time frame, the divestment period should start on the day of the adoption of the Commission decision.<sup>23</sup> The divestiture period is usually split into two phases: in the first stage, the parties are in charge of finding a potential purchaser. If the parties do not succeed, the trustee will, in the second stage, exercise the irrevocable mandate given to him by the parties to dispose of the business at any price and within the stipulated time period.<sup>24</sup> The trustee's mandate to sell should also be exclusive in order to avoid the risk of frustrating his efforts by parallel sales negotiations of the parties. The commitment specifies what kind of agreement is required by which date. Normally, a final sale and purchase agreement is required within the stipulated period. This agreement is only subject to the Commission's approval and to the necessary regulatory approvals. Completion of the divestiture has to take place within a stipulated period normally not exceeding three months after the sale and purchase agreement has been concluded.

The divestiture deadlines are defined in the commitments and take into account the particularities of the divested business and the sector concerned. Today, the first divestiture period is usually around six months, whereas the second period varies between three and six months. Experience in recent cases shows that even shorter periods can be met. In *Industri Kapital/Dyno*,<sup>25</sup> the parties committed themselves – and succeeded – to sell the preferred divestment business, the “Kitee Business”, within a period of four months starting with the date of adoption of the Commission decision. In the commitments, the “Kitee period” was immediately followed by another short period in which the trustee would have been in charge to sell the alternative divestiture, the “Hamina business”. In *The Post Office/TPG/SPPL*, the parties accepted not only an “upfront buyer” solution, but proposed to divest within a period of three and a half months from the date of the Commission decision. The commitment did not foresee a second stage with a selling period for a trustee. Well in advance of this short deadline, the Commission was able to approve *Swiss Post* as the proposed buyer.

- The trustee’s appointment, tasks and powers

The Commission has consistently requested the parties to appoint a trustee subject to prior approval of the Commission. The trustee usually oversees the implementation of the commitments and has an irrevocable mandate to ultimately sell the business which the parties committed to divest. The only exception in the recent past was the *Allianz/Dresdner* case<sup>26</sup> in which the monitoring and the implementation of the commitments do not seem to be particularly difficult.<sup>27</sup>

The trustee’s appointment, tasks and powers are described in the Notice in some detail.<sup>28</sup> However, practical experience has shown that the provisions surrounding the trustee’s appointment and its role need to be precisely defined in the commitments. Areas of potential conflicts between the Commission and the parties or between the trustee and the parties concern the timing of the trustee’s appointment, the role of the trustee and the scope of his powers in relation to the parties.

The trustee shall be independent of the parties, possess the necessary qualifications to carry out the job and shall not be, or become, exposed to a conflict of interest.<sup>29</sup> The divestiture trustee may or may not be the same person as the “hold separate” or monitoring trustee, depending on the circumstances of the case. Normally, the commitment requires the parties to propose one or more trustee candidates within a period of one or two weeks following the adoption of the Commission decision. The question on how to proceed in case the proposed trustee is rejected by the Commission has frequently not been dealt with in the commitments. This has led in some cases to delays in the appointment of a trustee – with all the possible negative consequences with regard to the hold separate obligations and the continued viability, marketability and competitiveness of the divested business.

One possible pragmatic and effective solution would be to require the parties to propose two or more trustee candidates within a short period not exceeding one week after adoption of the Commission decision. In case of rejection by the Commission, it would then be for the Commission to propose a trustee with whom the parties subsequently conclude the trustee agreement. A more fundamental question in this

context is: should the Commission become a party to the trustee agreement? Would a tri-lateral agreement with between the Commission, the parties and the trustee strengthen the trustee's role and facilitate his task?

In any way, the scope of the trustee's role has to be precisely defined in the commitments and subsequently in the mandate which should be submitted to the Commission together with the trustee proposals. The monitoring tasks should normally be accompanied by duties of the trustee to propose and eventually powers of the trustee to impose, in consultation with the Commission, appropriate measures on the parties in order to achieve full compliance with the commitments. Common understanding – and transparency with regard to third parties – has to be reached that the trustee acts for or on behalf of the Commission as its “eyes and ears” to ensure full compliance of the parties with the commitments.

Last, but not least, experience has shown that a frequent and regular reporting obligation of the Trustee to the Commission, with a copy of the non-confidential version of the report to the parties, has helped to smoothen the compliance process. Ideally, the first report is submitted by the Trustee to the Commission upon appointment in the form of a “work-plan” in order to lay the ground for effective and efficient co-operation between the trustee, the parties and the Commission throughout the compliance period.

#### - The review clause

The required precise description of all conditions and obligations facilitates the implementation of commitments in merger cases. However, all this needs to be completed by a safety valve for unforeseeable circumstances or events outside the control of the parties. Therefore, most of the latest commitments contain a review clause or “speaking clause” allowing the parties to ask the Commission to extend the divestment period or to waive or modify one or more of the conditions and obligations in the commitment. The parties have to show good cause and shall submit the request in good time, normally no later than one month prior to the expiring of the deadline for which an extension is requested or immediately after the occurrence of the unforeseeable event which may jeopardise compliance.

### 3. Conclusion

With the adoption of the Remedies Notice and the creation of the Enforcement Unit, the Commission's policy on remedies in merger cases has entered into its “consolidation phase”. The clear framework for remedies as set out in the Notice will be completed step by step with generally accepted standard criteria both for commitments and trustee mandates. The increased clarity and legal certainty will free time and resources for designing appropriate remedies and contribute to an effective implementation. To make it a success, a wide and open debate with the industry concerned, the legal community and trustees is as necessary as an ongoing exchange of views with other competition authorities and Member States.

---

<sup>1</sup> Period January – July 2001.

<sup>2</sup> Art. 18 (1) of Commission Regulation (EC) No 3384/94 of 21 December 1994 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ L 377, 31.12.1994, p.1, repealing Commission Regulation 2367/90.

<sup>3</sup> Arts. 6 (2) and 10 (1), second subparagraph, of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p.1; corrected version OJ L 257, 21.9.1990, p.13, as amended by Council regulation (EC) No 1310/97 of 30 June 1997, OJ L 180, 9.7.1997, p.1, corrigendum OJ L 40, 13.2.1998, p. 17.

<sup>4</sup> See *González-Díaz*, Tenth Anniversary of the Merger Regulation: the Way Forward, in: EC Merger Control: Ten Years On. Papers from the EC Merger Control 10<sup>th</sup> Anniversary Conference held in Brussels in September 2000 under the auspices of the European Commission Directorate General for Competition and the International Bar Association, 2000, p. 405 (Table 1, p. 412).

<sup>5</sup> Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, OJ 2001 C 68, 2.3.2001, p.3.

<sup>6</sup> See in particular Case T-102/96, *Gencor Ltd./Commission* [1999] ECR II-753, grounds 313 – 330.

<sup>7</sup> Point 6 of the Notice.

<sup>8</sup> *Gencor*, op. cit., ground 319.

<sup>9</sup> See also *Uhlig*, Auflagen und Bedingungen in der deutschen Fusionskontrolle, WuW 6/2000, p.574 (p. 574 f.).

<sup>10</sup> E.g., Commission Decision of 3 April 2001 in Case M.2139 *Bombardier/ADtranz* (Art. 8 (2) with commitments). Arts. 2 and 3, and Commission Decision of 11 May 2001 in Case M.2396 *Industri Kapital/Persorp (II)* (Art. 6 (1) b with commitments), paras. 86 – 88; see also point 12 of the Notice.

<sup>11</sup> Point 13 of the Notice.

<sup>12</sup> *Gencor*, op. cit., ground 319.

<sup>13</sup> Point 46 of the Notice.

<sup>14</sup> See, e.g., Commission Decision of 15 March 2001 in Case M.1915 *The Post Office/TPG/SPPL* (Art. 8 (2) with commitments), and Commission Decision of 11 April 2001 in Case M.2286 *Buhrmann/Samas Office Supplies* (Art. 6 (1) b with commitments).

<sup>15</sup> *Ibid.*

<sup>16</sup> Points 14 and 17 of the Notice.

<sup>17</sup> See recently Commission Decision of 12 March 2001 in Case M.2277 *Degussa/Laporte* (Art. 6 (1) b with commitments).

<sup>18</sup> See Commission Decision of 12 July 2000 in Case M.1813 *Industri Kapital/Dyno* (Art. 8 (2) with commitments).

<sup>19</sup> Points 22 and 23 of the Notice.

<sup>20</sup> Point 49 of the Notice. For a more detailed description of the purchaser criteria see *Rakovsky*, Remedies: a Few Lessons from Recent Experience, in: EC Merger Control: Ten Years On, op. cit., p. 135 (p. 143 f.).

<sup>21</sup> See point 20 of the Notice.

<sup>22</sup> Commission Decision of 13 December 2000 in Case M.2060 *Bosch/Rexroth* (Art. 8 (2) with commitments) and Commission Decision of 15 March 2001 in Case M.1915 *The Post Office/TPG/SPPL* (Art. 8 (2) with commitments).

<sup>23</sup> Point 48 of the Notice.

<sup>24</sup> Point 54 of the Notice.

<sup>25</sup> Commission Decision of 12 July 2000 in Case M.1813 *Industri Kapital/Dyno* (Art. 8 (2) with commitments).

<sup>26</sup> Commission Decision of 19 July 2001 in Case M.2431 *Allianz/Dresdner Bank* (Art. 6 (1) b with commitments).

<sup>27</sup> Allianz and Dresdner have committed to reduce their joint share holdings in Münchner Rück, a major competitor, to 20.5% by the end of 2003 and to exercise in the meantime not more than 20.5% of their voting rights in this company; see the Commission's press release IP/01/1040 of 19 July 2001.

<sup>28</sup> In particular points 50 to 57 of the Notice.

<sup>29</sup> Point 55 of the Notice.