International Chamber of Commerce
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Comments on draft European Commission Notice on Remedies under EC Merger Control Rules

Prepared by the Commission on Competition

Introduction

These comments have been drafted under the auspices of the ICC and include observations of ICC members[1].

The draft Notice concerns "remedies" in merger control. "Remedies" are modifications to a merger proposed by the parties or other commitments proposed by them with a view to eliminating competition concerns and accepted by the European Commission.

The business community attaches much importance to "remedies" as a tool allowing certain mergers to be cleared, notwithstanding the fact that those mergers initially raised the concern that they would significantly impede effective competition.

Several reasons explain why the current 2001 European Commission Notice on remedies acceptable under Council Regulation (EEC) No 4046/89 is being reviewed. ICC notes in particular that some of these reasons are the findings of the European Commission 2005 "Merger Remedies study", which examined the implementation and effectiveness of remedies accepted in the past.

ICC appreciates the opportunity to comment on the guidelines contained in this draft Notice.

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Our comments are presented under the following headings:

1. Concerns to be addressed
2. Different types of remedies
3. Divestitures
4. Review clause
5. Implementation of commitments
6. Trustee

1. Concerns to be addressed

This draft Notice is not consistent in its description of the threshold of market improvement modifications or commitments must achieve. Sometimes the draft Notice states that remedies must address "all" competitive concerns and in other instances it refers to removing "significant impediments" to effective competition in the market.

According to ICC, "all" competition concerns should not be standard, as the Merger Regulation subjects clearance to the condition that a merger does not significantly impede effective competition in the common market.

2. Types of remedies

The draft Notice states that commitments which are structural in nature are, as a rule, preferable from the point of view of the Merger Regulation's objective (para 15). It reinforces this by declaring that commitments relating to future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances (para 17).

According to ICC, the Merger Regulation's objective, i.e. preventing a merger from significantly impeding effective competition, does not warrant the considerable emphasis placed on divestments and other structural remedies. ICC is of the view that behavioural commitments are in many situations preferable, as they are less burdensome and allow competition concerns to be removed at a much lower cost. The position taken in the draft Notice is particularly inappropriate in the area of vertical mergers, where behavioural remedies may not only be appropriate, but may even be optimal: they address the competition concerns while permitting the attainment of efficiencies. Vertical mergers should at a minimum be referenced in para 69 alongside conglomerate mergers.

ICC strongly believes that the suitability of the type of a remedy should be addressed on a case-by-case basis.

The draft Notice would require commitments that are capable of being implemented effectively within a short period of time (para 9). ICC wonders why, if effectiveness of a remedy can be achieved over a longer period of time, the remedy should be rejected.

Extensive and complex remedies should not be ruled out per se to the extent that they are related to complex transactions (para 14). At any rate, the rejection of such remedies should be justified by a convincing demonstration that the implementation of such remedies cannot be monitored. This should be the only justification for rejecting extensive and complex remedies.

3. Divestitures

- *Arbitration commitments*

  Given its established practice of using arbitration commitments to monitor the medium-to long-term implementation of, especially, access remedies (para 21), the European Commission would be well-advised also to provide a model text for an arbitration commitment as well as a model arbitrator's mandate. To have some proper guidance in this respect would be crucial, as past arbitration commitments have often shown "pathological" features, which - depending on their gravity - could render the arbitration mechanism unworkable.

- *Divestiture of a viable and competitive business*

  Para 23 considers that "for a business to be viable it may also be necessary to include activities related to markets where the Commission did not identify competition concerns if this is required to create an effective competition in the affected markets". As a rule commitments should only affect the markets where the Commission has identified competition concerns. Commitments on related markets should be considered only if this is the only viable alternative to create an effective competitor in the affected markets.

- *On stand-alone business and conditions for acceptability of alternatives*

  With reference to para 34 it should be made clear that the merging parties have the flexibility to choose which assets to divest, i.e. the purchaser's assets or the target's assets, when the competition concerns result from a horizontal overlap.

- *On scope of business to be divested*

  In the view of ICC, other exclusions/carve-outs ought to be permissible, if the purchaser of the divested assets confirms that they are not necessary to ensure a viable and competitive business.

- *On divestiture of assets, in particular of brand and licenses*

  Regarding the combination of assets which previously did not form a uniform and viable business (para 37), ICC draws the attention to many examples, especially in the retail context, where a divestiture package containing stores/facilities of both the acquiring party and the target in the same merger was sufficient to deal with the perceived competition concerns.

  The test for divestiture of IP rights (para 38) appears too strict. It should be sufficient that the granting of licences to IP rights is as effective as a divestiture of the technology and/or the IP rights.

- *Non-reacquisition clause*

  The 10 year period prohibition to re-acquire (para 43) is as a rule too long. This condition should be framed as "up to 10 years".

- *Crown jewels*

  A "crown jewel" usually means assets above and beyond the assets necessary to address competition concerns but added to a package to make it more attractive to the market.

  ICC takes the view that the draft Notice (paras 44-45) should distinguish a "crown jewel" from an alternative divestiture remedy. A simple package "A" or package "B" might be acceptable as long as it is targeting the right threshold.

  Quite apart from this point, it is important that the existence of a "crown jewel" requirement be kept confidential, at least until the end of the first divestiture period.

- *Transfer to a suitable purchaser*

  It should be made clear that financing by the vendor is allowed as long as the terms do not fetter the independence of the purchaser or require disclosure of commercially sensitive information to a vendor. This could be specified in para 11.

- *Identification of a suitable purchaser*

  Para 50 is somewhat confusing. It does not explain why in the case of the up-front purchaser his identity should not be disclosed until after the authorization decision, if the European Commission's approval is required in any event.

  What incentives are there not to disclose the identity of a potential purchaser at an early stage, if known?

- *Removal of links with competitors*

  With respect to retention of minority holding and waiver of associated rights, the draft Notice would require a permanent waiver (para 59).

  ICC wonders why the waiver should be permanent, since re-acquisition is permissible after 10 years. In addition the draft Notice should clarify that rights return/waiver lapses on disposition of minority holding to a non-related third party.

4. Review clause

ICC wonders why modifications or substitutions of the commitments would normally not be accepted under the general review clause (para 72). Should the Commission maintain its position, it suggests adding "unless subsequent modifications or substitutions prove to be effective to achieve the purposes of the divestiture".

5. Implementation of commitments

Divestiture process

Three months for the divestiture sale process as contemplated in para 96 often is not sufficient. It is suggested that the following be stated: "an additional period of three to six months for the trustee divestiture period".

The draft Notice contemplates shortening the divestiture period to reduce the uncertainty for the business to be divested (para 97). ICC notes that many, if not all, transactions generate uncertainty. The draft Notice should mention specific cases of uncertainty such as: dissipation of assets, customer churn, key employee departures.

In addition, should the divestiture period not start on closing, rather than on the date of the European Commission decision?

Approval of purchaser

Para 104 deals with several hypotheses. It is however unclear what happens when the European Commission concludes that the sale and purchase agreement is defective but that the proposed purchaser is suitable. It is suggested that the European Commission set for itself a deadline to conclude on the suitability of the purchaser, upon the expiry of which, in the absence of such conclusion, the purchaser is deemed to be suitable.

Obligations of the parties in the interim period

With respect to para 108, according to ICC the draft Notice should state that extraordinary expenditure beyond a monetary level stipulated in the commitments should be subject to approval of the parties. The parties should not be obliged to sign a "blank cheque" to the hold separate managers.

With respect to para 109, ICC considers that, where some or all of the assets to be divested were already owned by the acquiring party in the main transaction, prior to that transaction that party should not be requested to hold those assets separate from its other assets and to be managed by the hold separate manager.

6. Trustee

Role of the Monitoring Trustee

The draft Notice should explain the process to be followed (a) when the Trustee proposes actions to the parties but they do not agree or consider them excessive and (b) when according to the parties the Trustee does not perform its tasks properly. Para 127 refers to dispute resolution. However, it appears not to be designed to deal with such issues.

At any rate there is a need to clarify the respective functions of the trustee, a monitoring device, and arbitration, a means of enforcing the commitments. In this connection it is suggested to delete in para 66 in the fourth sentence "(together with trustees)". To avoid any confusion between the trustee's and the arbitrator's mandates, the draft notice should spell out that these are separate in both nature and function and clearly define the limits of the trustee's assistance in the arbitral proceedings. It should be clear that the arbitrators are in no way bound by the trustee's contributions to the proceedings (whatever form these take) and that any orders and the final award are made entirely and exclusively by the arbitrators, the trustee's assistance remaining ancillary to the tribunal's decision-making process. The European Commission would be well-advised to include further precisions along these lines into the Model Trustee Mandate.

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