12 July 2001

NOTICE ON MERGER REMEDIES -- COMMISSION NOTICE

In March 2001, the Commission published a notice on remedies in EC merger control (the "Notice"). The Notice sets out the Commission's existing practice on remedies to resolve competition concerns and outlines the substantive and procedural conditions that proposals for commitments must satisfy. The Notice also clarifies the Commission's practice on trustees used to implement remedies. The European Commissioner for Competition Policy, Mario Monti, recently announced that a unit with the sole responsibility of devising remedies and monitoring their effectiveness would in future assist each merger case team. That unit has been established in the Merger Task Force, under the direction of Mr. Wolfgang Mederer.

I. General principles

Remedies must:

- provide a lasting solution to the competition problem raised by the proposed concentration;
- not create a new competition problem, either in the affected market or in another market;
- be capable of being implemented speedily and effectively; and
- be specified in sufficient detail to enable the Commission to make a full assessment.

II. Structural and behavioural remedies

The Commission generally considers that structural remedies (*i.e.*, divestitures) are more likely to be effective than behavioural remedies.

Examples of behavioural remedies are undertakings: (i) not to use a trademark for a certain period; (ii) to make part of the production capacity of the merged entity available to third-party competitors; or (iii) to grant access to essential facilities on non-discriminatory terms. Behavioural remedies may be acceptable when divestiture is impossible or when the competition problem created by the concentration is either not limited to a competitive overlap or is limited in time. The Commission recognized the value of certain behavioural remedies such as the grant of access to infrastructure or the licensing of key technologies aimed at facilitating market entry, or the termination of existing exclusive agreements to avoid foreclosure on the market. However, a bare undertaking not to abuse a dominant position will not be accepted.

III. Essential features of divestiture remedies

A divestiture must normally take place within a fixed time period agreed between the parties and the Commission. To ensure the effectiveness of the remedy, the sale to a proposed purchaser is subject to the Commission's prior approval. The Commission emphasizes that the business to be divested must be viable on a stand-alone basis. To that end more may have to be divested than originally thought by the parties. Notably, there may be a risk that the business to be divested is inadequate in scale or scope to become an efficient competitor. If so, the Commission may require divestitures that go beyond a simple competitive overlap to ensure that the divested business has the assets necessary to compete effectively. The Notice expressly states that, in order to assure a viable business, it might be necessary to include in a divestiture activities that are related to markets where the Commission does not raise competition concerns.

The Commission also stresses that there are material differences in remedies at the end of Phase One and in Phase Two. In Phase One, remedies must be straightforward and clear. The implication is that remedies may be more developed in Phase Two, since the Commission will have more detailed knowledge of the case. Nevertheless, Commissioner Monti has also stressed that proposed remedies are becoming more complex, which can make them more difficult to accept.

Pending divestiture, the Commission will expect the parties to offer commitments that will maintain the independence, economic viability, marketability, and competitiveness of the assets to be divested.

IV. Appointment of trustee during divestitures

In most cases, the appointment of a trustee will be required. The trustee, often an investment bank or an accounting firm, will often have two roles: first, to ensure that the relevant business to be divested is held separate from the assets retained and/or acquired and is properly maintained and, second, when appropriate, to assist with and, if necessary, implement the divestiture itself.

V. Approval of buyer during divestiture

Importantly, the Commission confirms its new practice of requiring an "up-front buyer" for the assets to be divested in appropriate cases, notably where the identity of the purchaser is considered critical (*see WorldCom/MCI*, *Bosch/Rexroth* and *PO/TNT/Singapore*). In such cases, the parties undertake to find a buyer for the assets to be divested *before* or contemporaneously with the completion of their own acquisition or merger.