Concurrences
Revue des droits de la concurrence
Competition Law Journal

Post-clearance modification and waiver of EU merger remedies: When the hardest may be yet to come

Doctrines | Concurrences N° 3-2014 – pp. 54-67

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Abstract

A company obtaining merger clearance subject to commitments is not necessarily set for smooth sailing: implementing these commitments may prove to be challenging, particularly in light of shifting market circumstances. In the face of such changes, competition authorities have agreed to extend divestiture deadlines, or to modify, substitute or waive commitments, on a case-by-case basis. The Commission's decisional practice, however, lacks transparency and the procedural framework applicable to the review of commitments is far from clear, which raises numerous issues. This article sets out practical recommendations for companies in view of facilitating the implementation process and, if necessary, taking specific procedural actions vis-à-vis the authorities. The focus is on the European Commission, with some insights on the French practice.

Une entreprise ayant soumis des engagements afin d'obtenir l'autorisation de réaliser une opération de concentration n'est pas nécessairement au bout de ses peines : la mise en œuvre des engagements peut s'avérer délicate, notamment en raison de circonstances économiques changeantes. Les autorités de concurrence peuvent accepter de modifier, substituer ou lever des engagements, au cas par cas. La pratique décisionnelle de la Commission manque cependant de transparence et le cadre procédural du réexamen des engagements est peu clair, ce qui suscite de nombreuses questions. Le présent article s'attache à donner quelques conseils pratiques aux entreprises, en vue d'assurer une mise en œuvre fluide des engagements et, si nécessaire, d'exercer certaines voies procédurales vis-à-vis des autorités. Le propos se concentre sur la Commission européenne, avec quelques éclairages français.

I. Introduction

1. Could clearance create more problems than a prohibition for the parties to a concentration? This is a real question for companies faced with considerable difficulties in implementing the merger remedies that conditioned a clearance.

2. Under the EU Merger Regulation ("EUMR"),[1] where the European Commission considers that a concentration would significantly impede effective competition in the common market, in particular as a result of the creation or strengthening of a dominant position, it must prohibit the transaction, unless the parties submit remedies rendering the concentration compatible with the common market.[2]

3. Remedies are not a rare instance in EU merger control. As of 31 May 2014, approximately 6% of all cases notified to the Commission since 1990 had involved merger remedies, and approximately two-thirds of the merger clearances subject to remedies occurred in Phase 1.

4. To be acceptable to the Commission, the commitments proposed by the parties must meet strict basic conditions. They must be capable of rendering the concentration compatible with the common market, notably by entirely eliminating competition concerns.[3] The Commission also requires that commitments "*be capable of being implemented within a short period of time*," which means that "*there has to be an effective implementation and ability to monitor the commitments.*"[4]

5. Although these conditions can theoretically be satisfied by either behavioural or structural (typically divestiture) remedies, the Commission traditionally favours structural remedies, which not only prevent on a lasting basis the anticipated competition concerns, but also "*do not require (...) medium or long-term monitoring measures.*"[5] Indeed, DG COMP has limited internal resources for monitoring the numerous concentrations already cleared subject to commitments. While the implementation of merger remedies was entrusted to a specific "Enforcement Unit" within the DG Competition between 2001 and 2002, this task is now decentralized to sector-specific units, and the merger remedies policy lies with a general merger policy unit.[6]

1 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, *OJ* L 24, 29.01.2004, p. 1.

2 Articles 6(2), 8(2) and 8(3) of the EUMR.

3 Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, *OJ* C 267, 22.10.2008 ("Remedies Notice"), p. 1, §§ 9-12.

4 Ibid., § 13.

5 Ibid., §§ 15-17.

6 Unit A/2 for Merger Case Support and Policy.

6. "*As the Commission cannot, on a daily basis, be directly involved in overseeing the implementation of the commitments*,"[7] the parties must propose the appointment of trustees, who are considered as the Commission's "*eyes and ears*" and play a very prominent role in monitoring the parties' compliance with EU merger remedies.[8]

7. As identified in e.g. the Commission's Merger Remedies Study of October 2005,[9] the parties may face substantial challenges when implementing EU merger remedies. In particular, these may be problems of interpretation of the remedies, difficulties in finding a suitable purchaser or in relation to third party rights concerning the business to be divested, or dealing with substantial changes in the legal, economic or technological context, etc.

8. These difficulties may have severe consequences if the parties are found in breach of the merger remedies (conditions and/or obligations) that conditioned a clearance decision.[10] This could even lead to the automatic voiding of the clearance decision if the parties fail to fulfil a condition. Thus, the decision would no longer be applicable, and the Commission may, among others measures, order that the parties dissolve the concentration (de-merger) and/or impose a fine of up to 10 % of the parties' turnover. While the Commission has never taken such drastic steps to date in the merger control field,[11] the French Competition Authority ("FCA") has done so in recent years.[12] In addition, damage claims from third parties, alleging that the parties to a concentration have breached their merger remedies, cannot be excluded.

9. To avoid such sanctions, parties may find it necessary to request the modification or waiver of EU merger remedies, albeit under strict conditions. This has led to the development of a so-called "Phase 3" before the Commission and of case-law before the European courts. As this article will explore, it reflects that parties may still face troubles, even after obtaining clearance subject to remedies.[13] Cautious steps are thus needed to prevent remedies from becoming a source of unanticipated difficulties.

10. This article will set out the Commission's practice in relation to modifying and waiving EU merger remedies (II.), and provide practical recommendations for merging parties on what they should know before committing and what they should do post-clearance in order to avoid risks of breach (III.).

II. The Commission's approach to modifying and waiving EU merger remedies

11. The now automatic inclusion of a review clause in remedies (1.) reflects the potential need for parties to seek an extension of remedies deadlines (2.) or the modification, substitution or waiver of remedies (3.). The Commission's current practice raises a number of legal and practical issues (4.).

1. The review clause

12. The negotiation and submission of remedies are inherently based on a prospective analysis. Several years may elapse before the impact of competition concerns and remedies materializes. Projections may prove inaccurate, and market evolutions may render the remedies obsolete.

13. Such difficulties prompted the Commission to introduce a general review clause in the Best Practice Remedies Guidelines in 2003[14]. The Remedies Notice, furthermore, now encourages parties to insert a review clause in all kind of commitments: "*irrespective of the type of remedy, commitments will usually include a review clause.*"[15] Such a clause can be an efficient tool to adapt remedies to shifting market circumstances. Upon request by the parties showing good cause, it allows the Commission to grant an extension of deadlines or, in exceptional circumstances, to waive, modify or substitute the commitments. The Commission particularly recommends the inclusion of a review clause in all access commitments.[16]

14. In practice, irrespective of the type of remedy, a review clause is nearly systematically used, following the standard drafting offered in the Model Text for Divestiture Commitments.[17] While the Commission's offer of a standard

7 *See* Remedies Notice, §§ 15-17.

8 As discussed in: G. Drauz and C. Jones, *EU Competition Law – Mergers and Acquisitions*, Vol. I, Claeys & Casteels, 2nd ed., at § 3.2.1; P. de Bonnières, in the roundtable Le respect des engagements pris devant les autorités de concurrences, *Concurrences* nº 1-2012, pp. 12-31.

9 European Commission, Merger Remedies Study, October 2005, available at: http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf.

10 As explained by the Remedies Notice, "*a distinction must be made between conditions and obligations. The requirement for achievement of the structural change of the market is a condition—for example, that a business is to be divested. The implementing steps which are necessary to achieve this result are generally obligations on the parties, e.g. such as the appointment of a trustee with an irrevocable mandate to sell the business*" (§ 19).

11 The EUR 561 million fine imposed on Microsoft for failing to comply with its commitments to offer users a browser choice screen enabling them to easily choose their preferred web browser (IP/13/196) was in the antitrust field.

12 *See* in particular: déc. nº 11-D-12 du 20 septembre 2011 relative au respect des engagements figurant dans la décision autorisant l'acquisition de TPS et CanalSatellite par Vivendi Universal et Groupe Canal Plus (the FCA found that Canal Plus Group had not complied with several key commitments undertaken when it acquired TPS and consequently withdrew the decision authorizing the merger, thus requiring the parties to renotify the transaction within one month, and also imposed a fine on Canal Plus Group); déc. nº 12-D-15 du 9 juillet 2012 relative au respect des engagements figurant dans la décision autorisant l'acquisition de Socopa Viandes par Groupe Bigard (the FCA fined the Bigard Group for breaching an important commitment conditioning the takeover of Socopa).

13 This is discussed in particular in the roundtable Remèdes et contrôles des concentrations, organized by CompetitionRx in Paris on 20 April 2012 (http://www.competitionrx.fr/Evenement-Remedes-2012.php).

14 Before 2003, there was no standard practice and the few merger cases with commitments containing review clauses generally imposed stricter requirements than those in the subsequent standard provisions.

15 Remedies Notice, § 71.

16 Ibid., fn 3: "(…) *the review clause is of particular relevance for access remedies, which systematically should include such a clause.*"

17 European Commission Standard Model for Divestiture Commitments, Section F, available at: http://ec.europa.eu/competition/mergers/legislation/template_commitments_en.pdf.

clause is welcome, it appears very difficult, in practice, to depart from such model clause. Moreover, as will be seen below, the Commission has very narrowly interpreted the review clause.

15. The Remedies Notice also foresees the possibility of a more targeted review clause in specific situations.[18] However, in practice, the Commission has appeared reluctant to allow such targeted review clauses.

16. The insertion of a review clause, although not conclusive in itself, will at least provide the parties with a basis for seeking the extension of deadlines or the suspension, modification, or waiver of the commitments.

17. Finally, it must be noted that in some cases, the commitments may also contain a "rendez-vous clause," whereby the parties agree to see the competition authority again a few months/years after the adoption of the clearance decision in order to re-assess the appropriateness and effectiveness of the commitments in light of anticipated new market circumstances.[19]

2. Extension of commitment deadlines

18. The most common way of seeking a variation in commitments is to request an extension of deadlines. As acknowledged in the Remedies Notice, this is particularly relevant for divestiture commitments (i.e., in relation to the vast majority of commitments over the past ten years).

19. The deadline to effect a divestiture (which is often kept confidential, in view of preserving the value of the assets to be divested) is considered by the Commission as a condition rather than an obligation.[20] This means that should the divestiture not take place within the deadline, the conditional clearance decision is no longer applicable and the Commission may order the parties to dissolve the concentration and/or impose fines.[21] This interpretation is unsurprising, since the effectiveness of such kind of remedy partly depends on the speed of their implementation. Thus, a delayed divestiture will in principle impact the expected effect of the divestiture on competition.

18 Remedies Notice, § 73. For example, it states that the Commission "*may approve a purchaser without some of the assets or personnel foreseen if this does not affect the competitiveness and viability of the divested business.*"

19 For example, in *Électricité de Strasbourg/Enerest* in 2012, the FCA stressed the importance of such a "rendez-vous clause": "(…) *the pertinence of the commitments and their possible renewal will be examined before 31 December 2015, the date on which the regulated tariffs for electricity supply must be established 'taking into account the historical nuclear energy regulated access price, supplementary costs associated with the supply of electricity which include the performance guarantee, electricity transmission and distribution costs, marketing costs and a normal rate of return' in accordance with the provisions of the law relating to the new organization of the electricity markets (the 'NOME' law). As previously highlighted by the* [FCA], *the implementation of these provisions should modify the competitive conditions between regulated tariff electricity suppliers and alternative suppliers*," FCA's press release dated 8 February 2012 pertaining to déc. nº 12-DCC-20 du 7 février 2012 relative à la prise de contrôle exclusif d'Enerest par Électricité de Strasbourg; *see* also Min. Éco., 28 octobre 2005, *Ouest France/Socpresse*, aff. C2005-18, *BOCCRF* nº 11 du 16 décembre 2005.

20 Remedies Notice, § 20.

21 Articles 8(4) and 14(2) EUMR.

20. The divestiture must be completed within a fixed time period agreed between the parties and the Commission. The Commission's general practice is to allow the parties six months to proceed with divestiture (the "first divestiture period"), and in case of failure to do so, to grant a divestiture trustee an additional period of three months to divest the business at no minimum price (the "trustee divestiture period"). Then, a further period of three months is normally foreseen for closing the transaction with the chosen purchaser. These periods, which have been considered as a reduction in the time-frame as compared to deadlines granted by the Commission in the past,[22] may be modified on a case-by-case basis.

21. The Remedies Notice foresees an extension only for the "first divestiture period," i.e. the period during which the divestiture is the parties' task. No extension appears to be possible regarding the "trustee divestiture period," i.e. when a trustee is in charge of implementing the divestiture.[23]

22. Remedies deadlines can be extended upon request by parties showing "*good cause.*"[24] The request will be considered as sufficiently reasoned if the parties demonstrate their inability to meet the deadline for reasons that are beyond their responsibility, and if it can be expected that they will subsequently manage to divest the business within a short time-frame.[25] What constitutes good cause will be assessed on a case-by-case basis, resulting in an overall reasonable approach, whereby the Commission considers the input from the monitoring trustee and assesses all relevant factors influencing the implementation process. The parties must submit their request for an extension "*within the deadline*"[26] (i.e., pursuant to the general review clause, no later than one month before the expiry of the initial implementation period and, only in exceptional circumstances, within the last month of this period).

23. The Commission's case-by-case approach is illustrated in particular by the following cases:

→ *GDF/Suez* (M.4180):[27] clearance was subject to several remedies, including a commitment from the merged entity to develop gas storage capacity in France, with the excess capacity to be offered on the market. In 2009 and 2011, GDF Suez sent three letters to the Commission, informing it of difficulties in implementing this commitment, and suggesting ways to amend the latter in order to ensure maximum success in the future sale of storage capacity. The Commission found that there were "*legitimate grounds*" for delaying the sale of storage capacity (but not the date by which the capacity would

22 D. Hoeg, *European Merger remedies*, Hart, 2013, p. 124.

23 § 72 of the Remedies Notice : "[w]*here parties apply for an extension in the first divestiture period, the Commission will only accept that they have shown good cause if the parties were not able to meet the deadline for reasons outside their responsibility and if it can be expected that the parties subsequently will succeed in divesting the business within a short time-frame. Otherwise, the divestiture trustee may be better placed to undertake the divestiture and to fulfil the commitments for the parties.*"

24 Remedies Notice, § 72.

25 Ibid.

26 Ibid.

27 Summary of the Commission Decision of 28 October 2011 amending commitments nº 73 and 84 set out in the decision in case COMP/M.4180 – *Gaz de France/Suez*, *OJ* C 51, 22.2.2013, p. 5.

be made available to the market) and accepted GDF Suez's proposed modifications. Unfortunately, only a summary of the decision is available to date. [28]

→ *EDF/Segebel* (M.5549):[29] EDF's acquisition of Segebel was authorised, but subject in particular to a hybrid "invest or divest" commitment, whereby EDF was to divest a project in case it decided against investing in the project by a specific date (i.e. 2.5 years after the clearance decision). Some six weeks prior to the deadline, EDF told the Commission that it would be impossible for it or for any other market player to make a final investment decision regarding the concerned project within that deadline. While EDF sought a 2.5-year extension, the Commission only allowed an additional 3.5 months. EDF's appeal against that decision will be addressed later in this article.

→ *Volvo/Renault V.I.* (M.1980):[30] this is a rare case where the Commission publicly disclosed its refusal to extend a divestiture deadline. In 2000, Volvo's acquisition of Renault's truck division (Renault Véhicules Industriels) was approved subject to various commitments designed to prevent the creation of dominant positions on the truck and bus markets. In particular, Volvo was to divest its stake in Scania by a date agreed with the Commission. In 2003, Volvo requested that the Commission further extend that deadline. In 2004, the Commission informed the company that it failed to show good cause in support of an extension of the deadline and rejected company's request, since disposal within the agreed deadline "*would not impact noticeably on Volvo's ability to borrow and invest, nor would it reduce its ability to compete in the marketplace. In any event, under the original undertaking, Volvo could not have any legitimate expectation to achieve a minimum price after the original deadline was extended beyond 23 April 2003.*"[31]

→ Other EU cases of deadline extensions include *Carrefour/Promodes* (M.1684)[32] and *Fortis/ABN AMRO* (M.4844).[33]

24. The French Competition Authority (FCA) is also regularly faced with requests for extension. According to the French merger guidelines, a deadline may be extended where the parties can demonstrate that their inability to meet such deadline is due to reasons beyond their control, but that the parties are still in a position to divest the assets within a short extended time-frame.[34] The FCA does not publish decisions on extension requests, since it considers that such decisions do not modify the substance of the remedies.[35] Furthermore, if deadline extensions are made public, this may impact the value of the assets to be divested.[36] The FCA's annual reports indicate that the FCA granted several deadline extensions in 2012, particularly in view of a deteriorated market situation, or financial difficulties faced by companies.[37]

3. Modification, substitution and waiver of remedies

25. Remedies are usually modified, substituted or waived at the parties' request (3.1.). The Commission may theoretically also review remedies on its own initiative (3.2.).

3.1. At the parties' request

26. The Commission may grant waivers or accept modifications or substitutions of commitments only where the parties show good cause and establish the existence of exceptional circumstances.[38]

27. According to the Remedies Notice, this should very rarely be relevant for divestiture commitments. This is because it is unlikely that market circumstances will have changed within a short time-frame following the decision.[39] In the Commission's view, modification, substitution or waiver should be more pertinent to commitments other than divestiture, such as access remedies, which may be ongoing for several years and "*for which not all contingencies can be predicted at the time of the adoption of the Commission decision.*"[40] As discussed below, the Commission nevertheless sometimes accepts the modification or waiver of divestiture commitments.

28. The Remedies Notice foresees two types of "exceptional circumstances" that can justify modification, substitution or waiver of commitments. Either the market circumstances changed in a significant and lasting way (at least several years) or the objective pursued by the remedy would be better achieved by changing the modalities of the commitment.[41] Although not stated in the Remedies Notice, it has been suggested that exceptional circumstances may also arise where it becomes evident that there was an inadvertent and/or unintentional shortcoming in the remedies.[42]

28 The summary states that a non-confidential version of the decision would be published on its website; however, to date, none is available.

29 Commission decision of 12 November 2009, Case No COMP/M.5549 – *EDF/Segebel*.

30 *See* Commission's press release IP/04/484, *Commission accepts divestiture proposals submitted by AB Volvo*, 14 April 2004.

31 Ibid.

32 Carrefour was granted an extension for the sale of its shares in Cora, subsequent to the *Carrefour/Promodes* decision (M.1684). As Carrefour had been unable to sell its shares in Cora within the deadline as a result of "*actions of third parties*," the Commission granted an extension of the deadline, and the shares were eventually sold to a financial investor. The Commission indicated that this case "*has contributed significantly to the Commission's work on preparing a standard mandate for the trustee.*" *See* Thirty-First Report on Competition Policy, 2001, § 313.

33 This is a very unusual case, where the deadline was extended three times: first for 17 days (IP/09/433), then for an additional 24 hours (IP/09/464), and lastly for an unknown period (MEMO/09/471).

34 Lignes directrices de l'Autorité de la concurrence relatives au contrôle des concentrations ("French Merger Control Guidelines"), § 307.

35 Ibid., § 310.

36 Divestiture deadlines themselves are generally not published either but we understand that in practice, they generally vary between 6 and 18 months (according to V. Beaumeunier's oral presentation at the Concurrences roundtable held in Paris on 9 April 2014, L'exécution des engagements souscrits par les entreprises).

37 Autorité de la concurrence, Rapport 2012, pp. 317-318. The 2013 annual report was not yet published at the time of submission of the present article.

38 Remedies Notice, § 73.

39 Ibid.

40 Remedies Notice, § 74.

41 Ibid.

42 *See* D . Hoeg, op.cit., p. 158. *See* also G. Drauz and C. Jones (eds.), op. cit., pp. 799-800. These authors cite the *Vodafone Airtouch/Mannesmann* decision (M.1795), where the Commission, through the adoption of a decision of 26 July 2002 (not publicly available), corrected an inadvertent deficiency in the fast track dispute resolution mechanism.

29. Based on the Commission's decisional practice and the authors' experience, the applicable legal test appears to be as follows. First, in order to qualify as exceptional circumstances, subsequent changes in market conditions must be "*significant, permanent and unforeseeable.*" Second, market circumstances must have changed to such an extent that either the objective of the remedy has been effectively achieved on a lasting basis, i.e. independently of the remedy (in case of a request for a complete waiver), or that such objective will be better achieved following modification of the commitment.

30. For any modification, substitution or waiver request, the burden of proof lies on the requesting parties and the Commission tends to interpret the terms of the Remedies Notice restrictively. In addition, the Commission also takes into account the impact a modification may have on the position of third parties and, in particular, whether it may affect the rights already acquired by third parties after (a partial) implementation of the remedy. In addition, it should be noted that a modification, substitution or waiver request shall not have the effect of suspending the application of the commitment and, in particular, of suspending the expiry of any time period during which the commitment must be complied with.

31. In spite of the high threshold described above, the Commission has in the past granted waivers for divestiture remedies as well as non-divestiture remedies.

3.1.1. Modification and waiver of EU merger remedies by the Commission

32. The following cases illustrate the Commission's practice regarding the modification and waiver of "behavioural remedies."

33. The *Bombardier/ADtranz* case (M.2139)[43] is worth mentioning. In 2001, Bombardier's acquisition of sole control over ADtranz was cleared on the condition that Bombardier would divest ETR, one of its subsidiaries, and maintain a minimum supply level for that company, which was economically dependent on Bombardier.[44] In 2005, Siemens acquired VA Tech (case M.3653)[45], which itself controlled ETR. Since ETR thereby became economically autonomous from Bombardier, the minimum supply commitment lacked its original *rationale*. The Commission thus lifted the commitment on the same day that it cleared Siemens' acquisition of VA Tech.

34. A second important case is *Hoffmann-La Roche/Boehringer Mannheim* (M.950).[46] The Commission cleared Hoffmann-La Roche's ("Roche") acquisition of Boehringer Mannheim in 1998 under the condition that Roche, which had a strong market position on the market for DNA probes, commit to grant licences for that technology on non-discriminatory terms.[47] The commitments were not limited by any duration and no review clause was provided for. In 2008 (i.e., 10 years after the commitments were submitted), Roche sought a waiver from the Commission in view of the following: (i) Roche's patent portfolio was no longer a barrier to entry, since these patents were about to expire; (ii) the commitments had reached their goal; and (iii) the licensing system actually had an anticompetitive effect, since the cost and scope of these licenses did not match the needs of the market. In 2011, the Commission accepted to waive the commitments. It considered that the situation in the DNA probes market had significantly changed since clearance, noting that: (i) Roche's market share had decreased and the number of competitors on the market had increased; (ii) third parties agreed to the waiver of commitments; (iii) the waiver would not impact the effectiveness of commitments, since these had met their purpose; and (iv) the waiver would not have any adverse effect on licence holders.

35. Another case worth mentioning is *Newscorp/Telepiù* (M.2876)[48]. In 2003, Newscorp acquired control over Telepiù, which gave rise to a new channel, Sky Italia. The Commission cleared the acquisition subject to commitments aiming at limiting the merged entity's power on the Italian pay TV market.[49] More specifically, the merged entity undertook not to be active in Italy as a digital terrestrial television (DTT) broadcaster. The commitments contained a review clause. In 2009, Sky Italia wished to apply for the acquisition of DTT spectrum in Italy, and requested that the Commission "*waive or review*" the commitments so as to allow it to participate in the upcoming tender for the allocation of such spectrum. Following an in-depth review of the market, and a thorough market test, the Commission accepted Sky Italia's request. It noted in particular that Sky Italia sought to participate in a tender that precisely aimed at allowing access to DTT spectrum for operators lacking access until then, in order to counterbalance the weight of the two largest DTT operators.

36. More recently, commitments were also reviewed in the *GDF/Suez* case (M.4180):[50] five years after the 2006 clearance, the Commission waived a commitment regarding the construction of a gas deodorisation plant, in view of the fact that (i) the construction had been seriously jeopardised by factors over which the parties had no influence, and (ii) the plant construction would have no longer met market demand.

37. Although not explicitly foreseen in the Remedies Notice, the Commission may also waive commitments following a de-merger, as it did after EDF sold its stake in EnBW.[51]

43 Commission Decision of 13 July 2005 amending the Decision 2002/191/EC declaring a concentration to be compatible with the common market and the EEA Agreement (Case COMP/M.2139 – *Bombardier/ADtranz*), *OJ* L 329, 16.12.2005, p. 35. The decision does not indicate whether this modification was made upon Bombardier's or ETR's request, or by the Commission's own initiative. The initial clearance decision did not mention any review clause.

44 Commission Decision of 3 April 2001, Case No COMP/M.2139 – *Bombardier/ADtranz*.

45 Commission Decision of 13 July 2005, Case No COMP/M.3653 – *Siemens/VA Tech*.

46 Commission Decision of 3 May 2011 waiving certain commitments in Decision 98/526/EC in Case No COMP/M.950 – *Hoffmann-La Roche/Boehringer Mannheim* with respect to the DNA probes market; commented by D. Tayar, *Concurrences* n° 4-2011, pp. 134-135.

47 Commission Decision of 4 February 1998, Case No IV/M.950 – *Hoffmann La Roche/Boehringer Mannheim*.

48 Commission Decision of 20 July 2010, modifying the application of the Commitments attached to a decision declaring a concentration compatible with the common market and the EEA Agreement (Case No COMP/M.2876).

49 Commission Decision of 2 April 2004, Case No COMP/M.2876 – *Newscorp/Telepiù*.

50 Summary of the Commission Decision of 28 October 2011 amending commitments n° 73 and 84 set out in the decision in case COMP/M.4180 – *Gaz de France/Suez*, *OJ* C 51, 22.2.2013, p. 5.

51 Commission Decision of 30 November 2011 amending Decision 2002/164/EC in Case COMP/M.1853 – *EDF/EnBW* as regards the EnBW commitments. The decision was not published by the Commission; however EDF made it available it on http://capacityauctions.edf.fr/fichiers/fckeditor/File/Encheres/DecisionCE_Fin_VPP_301111.pdf.

38. Even if the Commission, in principle, is not in favour of waiving "divestiture commitments," it has done so in practice on various occasions.

39. The most prominent case is *Hoechst/Rhône-Poulenc* (M.1378).[52] The merger between Hoechst and Rhône-Poulenc raised horizontal issues, due to Hoechst's holding of over 50% of Wacker Chemie, and Rhône-Poulenc's holding of 67.3% of Rhodia. In order to resolve these concerns, Rhône-Poulenc committed to divest its 67.3% stake in Rhodia, by way of divestiture of 42.3% of shares, and transformation of the remaining 25% into exchangeable bonds, by 22 October 2003. [53] Despite the absence of a review clause in the clearance decision, Aventis (the merged entity) requested that the Commission substitute the original commitment with a commitment to divest its stake in Wacker Chemie, due to serious difficulties encountered by Rhodia, in particular a drop in its share value. The Commission granted this request, finding that, in view of the exceptional circumstances of the case, the substitution of commitments was "*the most proportionate way forward.*" This was challenged (unsuccessfully) before the CFI,[54] and also attracted stark criticism from a Member of the European Parliament.[55]

40. The Commission also agreed to review divestiture commitments in the case of *Shell/Montecatini* (M.269).[56] Since the parties had already complied with a divestiture ordered by the US Federal Trade Commission, the divestiture ordered by the Commission was devoid of purpose, because the competition concerns were already resolved. The Commission thus agreed to waive the commitment.

41. A divestiture commitment was also reviewed (and replaced by an amended divestiture commitment) in *TIM/Pirelli/Edizione* (M.2574), due to the impossibility to find a suitable purchaser.[57]

52 Commission Decision of 30 January 2004, Case No COMP/M.1378 – *Hoechst/Rhône-Poulenc*.

53 Commission Decision of 9 August 1999, Case No COMP/M.1378 – *Hoechst/Rhône-Poulenc*.

54 Mr. Lebard, a former chairman of a company owned by Rhodia, sought in particular the annulment of the Commission's decision to close the investigation and of the Commission's decision of 30 January 2004 accepting the modified commitments in Case M.1378 – *Hoechst/Rhône-Poulenc*. The Court of First Instance (CFI) found the action to be inadmissible (Case T-89/06, *Daniel Lebard v. Commission* [2009] ECR II-00201 [pub. somm.]).

55 European Parliament, Report on the Commission Report on Competition Policy 2004, Committee on Economic and Monetary Affairs, 20 March 2006, PE.362.754v02-00. A. Lipietz, the rapporteur, devoted a specific section of the report to the *Rhodia* case (p. 8, section 4). It was in particular pointed out that the "*case tarnishes the Commission's reputation for a rigorous approach to mergers*," and the report recommended that "*Parliament should decide to set up a committee of inquiry into the way in which the Commission took Decisions 1378 and 1517 and has handled them*." To our knowledge, no such committee was ever set up.

56 Commission Decision of 24 April 1996 amending Decision 94/811/EC declaring the compatibility of a concentration with the common market (Case No. IV/M. 269 – *Shell/Montecatini*).

57 Commission decision of 20 September 2001, Case No COMP/M.2574 – *Pirelli/Edizione/Olivetti/Telecom Italia* (only available in Italian), and Commission's press release IP/01/1299.

3.1.2. National practice of modifying and waiving merger remedies

42. National competition authorities ("NCAs") have modified and waived remedies in a number of cases. This section shall only deal with the cases of France, Belgium, Italy, the UK, and Germany.

France

43. French merger control guidelines, while not mentioning the requirement of "exceptional circumstances," indicate that behavioural remedies may be modified under two scenarios: (i) if the objectives pursued would be better achieved through different measures, or (ii) if the evolution of competition on the markets concerned has rendered the remedies obsolete.[58]

44. The first scenario (i.e., the objective is better pursued through different means) is illustrated in the *Bigard/Socopa Viandes* decision (C2008-100).[59] The clearance of Bigard's acquisition of Socopa Viandes was subject to a commitment to licence a brand.[60] This commitment contained a revision clause. The parties then asked the FCA to substitute this licence commitment with a commitment to divest the brand to an upfront buyer, which the FCA accepted. However, the latter expressly noted that this was without prejudice to the ongoing investigation regarding Bigard's alleged breach of the licensing commitment, for which Bigard was eventually fined.[61]

45. The second scenario, concerning commitments found to be obsolete, arose in the *LVMH/Les Échos* case (C2007-97).[62] LVMH's acquisition of *Les Échos*, the French leading daily economic newspaper, was approved by the French Ministry of Economy in 2007, subject to a number of conditions[63]. First, LVMH committed to divest *La Tribune*, a competing economic newspaper. Second, LVMH committed to a number of behavioural commitments regarding its advertising policy in relation to *La Tribune*, *Les Échos* and *Investir* (another newspaper owned by LVMH). Some of the commitments had no time limitations. In 2012, LVMH asked for a waiver of the commitments, given significant economic changes on the French market for daily economic newspapers. In particular, *La Tribune* had gone from a daily to a weekly publication, and no longer existed in paper version. The FCA acceded to this request without expressly setting out the reasons for its decision.

58 French Merger Control Guidelines, § 308.

59 Lettre du 23 mai 2011 du Président de l'Autorité de la concurrence à Bigard; commented by A. Ronzano, *Concurrences* n° 4-2011, art. n° 54128.

60 C2008-100/Lettre du ministre de l'économie, de l'industrie et de l'emploi du 17 février 2009, au conseil de la société BIGARD, relative à une concentration dans le secteur de la viande, *BOCCRF* n° 2 bis du 2 avril 2009; commented by S. Martin, *Concurrences* n° 2-2009, art. n° 25943.

61 Aut. conc., déc. n° 12-D-15 du 9 juillet 2012 relative au respect des engagements figurant dans la décision autorisant l'acquisition de Socopa Viandes par Groupe Bigard; commented by J.-M. Cot, A. Blanchet, *Concurrences* n° 4-2012, art. n° 49550, pp. 125-128.

62 Lettre du 19 juillet 2012 du Président de l'Autorité de la concurrence à LVMH.

63 Lettre du ministre de l'économie, des finances et de l'emploi du 19 décembre 2007, aux conseils du groupe LVMH-Moët Hennessy – Louis Vuitton SA, relative à une concentration dans le secteur de la presse écrite (decision C2007-97).

46. A further scenario, not foreseen in the French merger guidelines, occurred in the *Novatrans* case.[64] In 2009, the FCA cleared Transport et Logistique Partenaires' (TLP) acquisition of Novatrans, subject to the commitment that SNCF (TLP's parent company) would establish open capital operating companies in which competitors could acquire a stake.[65] In 2012, SNCF sought to sell Novatrans, which was in financial difficulty, and asked the FCA for a suspension of the commitment until Novatrans was sold. The FCA suspended the commitments twice, until the time when an acquirer could be expected to be found. Novatrans was subsequently sold.[66]

47. Finally, it may be further noted that the FCA also agreed to modify divestiture commitments in the *H Distribution/Louis Delhaize* case (10-DCC-25)[67], the *Veolia/Transdev* case (10-DCC-198),[68] and the *Passerelle/Mr Bricolage* case (10-DCC-01).[69]

Other NCAs

48. Among the NCAs, it appears that the Italian,[70] Belgian[71] and British[72] competition authorities have already modified remedies in the past, regarding either divestiture remedies or other remedies. However, the German competition authority seems generally more reluctant to do so.[73]

3.2. On the Commission's own initiative

49. Paragraph 75 of the Remedies Notice contemplates the possibility to include a clause in the remedies, whereby the Commission would be allowed to "*trigger limited modifications*" if the original remedies failed to achieve their expected results, and therefore do not effectively remove the competition concerns[74]. This type of clause is "*typically* (...) *limited to cases where specific modalities risk to jeopardise effective implementation of the commitments.*"[75] Procedurally, the Remedies Notice provides that the parties may be obliged in such cases to propose a change to the commitments in order to achieve the results defined in those commitments, or the Commission may itself, after hearing the parties, modify the conditions and obligations to this end.

50. Unsurprisingly, the introduction of this possibility in the Remedies Notice triggered numerous negative comments from practitioners.[76] Indeed, this potentially gives the Commission power to make remedies more stringent, and may run counter to the parties' legitimate expectations and to the principle of legal certainty.

51. Such clause was included, for example, in the *DONG/Elsam/Energi E2* case (M.3868), in relation to the modalities of a commitment to release gas capacities.[77] However, we are not aware of cases where the Commission actually exercised this power.

4. Legal and practical issues raised by the Commission's decisional practice

4.1. Lack of transparency

52. According to the Remedies Notice, the Commission may either "*adopt a formal decision for any waiver, modification or substitution of commitments or simply take note of the satisfactory amendments of the remedy by the parties, where such amendments improve the effectiveness of the remedy and result in legally binding obligations of the parties.*"[78] No further details are provided as to how the Commission should express its position on the parties' requests.

64 Lettre du Président de l'Autorité de la concurrence en date du 3 juillet 2012.

65 Aut. conc., déc. nº 09-DCC-54 du 16 octobre 2009 relative à la prise de contrôle exclusif de la société Novatrans SA par la société Transport et Logistique Partenaires SA.

66 Déc. nº 13-DCC-34 du 14 mars 2013 relative à la prise de contrôle exclusif de la société Novatrans par le Groupe Charles André; commented by S. Sorinas, E Jégou, *Concurrences* nº 3-2013, p. 121.

67 The FCA accepted to substitute one point of sale for the point of sale originally to be divested by the acquiring party. *See* Lettre du Président de l'Autorité de la concurrence du 15 octobre 2012, available on the FCA's website.

68 The parties' commitments to divest assets were revised, as provided for in the commitments, because local authorities (in charge of managing transport) opposed the transfer of contracts held by the merged entity's subsidiaries (p. 318 of the FCA 2012 report; decision not published on the FCA's website).

69 The initial divestiture of a shop was no longer required because, in the area concerned, a competing shop had changed ownership (p. 318 of the FCA 2012 report; decision not published on the FCA's website).

70 A notable case of the total waiver of previously imposed remedies is in the field of horserace betting (C2309 – *Snai Servizi-San Siro/Trenno* – Resolution 12618). The concentration was authorized subject to Snai Servizi transferring (through a lease) certain TV rights to a third independent party. In light of a change of the AGCM's turnover calculation method in the sector and a legislative intervention that changed the structure of the market, AGCM agreed to revoke the remedies previously imposed. Another type of decision adopted by AGCM in this context (albeit the sole case to date) is the clarification of remedies previously imposed (C11205 – *Elettronica Industriale/Digital Multimedia Technologies* – Resolution 23138).

71 In 1997, the creation of Kinepolis was authorised by the Belgian Competition Council (BCC) subject to behavioural commitments intended to alleviate Kinepolis' dominant position in the cinema sector. The commitments were originally submitted for a 10-year period, to be reviewed at the end of that period. The BCC agreed in 2007 to release Kinepolis from these commitments. That decision was annulled by the Brussels Court of Appeals in 2008, and the BCC issued another decision, whereby it upheld the commitments for a further 3-year period (Belgian Competition Council, 1 October 2008, Decision No 2008-C/C-52, commented by M. Peeters, Belgian Competition Council's second decision on Kinepolis merger conditions offers a more elaborate motivation and different outcome (*Kinepolis*), *e-Competitions* No 22895). A similar set of circumstances occurred in the *Telenet/Canal+* case. *See* P. Elliott, The Belgian Competition Council amends condition imposed on an acquisition in the audiovisual sector (*Telenet's/Canal+*), *e-Competitions* No 41261.

72 In the *Coloplast* case, the OFT replaced an unimplemented divestiture remedy with a remedy consisting of (i) a price control and (ii) an undertaking not to renew an exclusive distribution agreement (summary available at pp. 44-49 of the Competition Commission 2012 report, Understanding past merger remedies: report on case study research).

73 The Bundeskartellamt ("BKartA") cleared Globus' acquisition of the building supplies store business of the Distributa group, under the resolutory condition (*auflösende Bedingung*) that Globus sell four specific building supplies stores within ten months. After this time period lapsed without Globus achieving the required divestiture, the BKartA ordered the concentration to be unwound. Globus in particular requested the modification of the resolutory condition into an obligation (*Auflage*). On 22 December 2008, the Higher Regional Court of Düsseldorf (OLG Düsseldorf) dismissed Globus' request, in particular considering that Globus should have assessed its selling opportunities before implementing the transaction (Case No. VI-Kart 12/08 (V)). Eventually, Globus managed to sell the building supplies stores, and the BKartA ended the unwinding proceedings.

74 Remedies Notice, § 75.

75 Ibid.

76 D. Hoeg, p. 162, fn. 281.

77 Commission Decision of 14 March 2006, Case No COMP/M.3868 – *DONG/Elsam/Energi E2*.

78 Remedies Notice, § 76.

53. It has been suggested that the Commission distinguishes between the review of conditions, on the one hand, and the review of obligations, on the other hand. In this regard, while the review of conditions may require a formal ancillary decision, the review of obligations could be treated in a more informal way.[79] However, the Commission seems to retain full discretionary power as to the form of the review.

54. In any event, the Commission is generally reluctant to publish information about requests for and grants of extensions, modifications, substitutions or waivers of commitments. Based on the authors' research, a very small number of decisions are published, and decisions are not always accessible on DG COMP's website within a reasonable period of time.[80] The amount of published decisions may therefore just be the "tip of the iceberg."

55. Numerous reasons may be behind the Commission's opaque decisional practice: a desire to avoid setting precedents and/or to avoid challenges by interested third parties. Veiled transparency may be justified in certain circumstances, e.g. modifications of minor implementation modalities, amendment of confidential conditions such as divestiture deadlines or crown jewels, etc. However, opacity can be detrimental to an accurate understanding of the Commission's practice. By publishing certain decisions, while keeping confidential other (potentially informal) decisions, the Commission may give companies a distorted image of its practice, and thus affect a company's ability to adequately prepare for negotiating commitments and then, if necessary, for requesting the modification or waiver of commitments. It may also affect interested third parties rights.

56. By way of comparison at the national level, the FCA may *prima facie* appear more transparent by dedicating a section of its annual reports to the review of commitments. Nevertheless, this remains a limited transparency, since not all decisions mentioned in the report are published on the FCA's website, and the FCA is not required to adopt formal decisions or even to issue notices.

57. As suggested by a commentator, the Commission may seek inspiration from the practice of the former OFT, whose website contained easily accessible and transparent registers of ongoing reviews and implementation.[81]

4.2. Lack of a clearly established procedural framework and legal certainty

58. Parties requesting the review of their commitments are not protected by a clearly established procedural framework. While the merger control procedure is constrained by specific procedural rules, EU law is remarkably silent as to the details of the procedure for the modification/waiver of merger remedies. In the absence of a clear framework for modifying/waiving remedies, the following issues could arise.

79 D. Hoeg, p. 163.

80 For example, the Commission's decision to amend commitments in the *GDF/Suez* case was adopted on 23 October 2011, and a summary of it was published in the *Official Journal* only on 22 February 2013. At the time of publishing this article, the full decision was still yet to be made available on the Commission's website.

81 D. Hoeg, p. 194. It remains to be seen whether the newly-established Competition and Markets Authority (CMA) will follow the same practice.

59. The first issue relates to the lack of deadlines binding on the Commission. In a number of cases, this has resulted in parties waiting a lengthy period before the Commission took action. For example, in the *GDF/Suez* case (M.4180), the Commission acted only after receiving three letters over a period of 1.5 years asking for a modification of the commitments.[82] In another instance, when EDF sold its stake in EnBW, it sought from the Commission the waiver of behavioural commitments contained in the clearance decision of EDF's acquisition of that stake (*EDF/EnBW* – M.1853);[83] the Commission waived the commitments nine months after the de-merger.[84]

60. While these delays may result from the lack of enforcement resources within DG COMP, they are nonetheless problematic in view of the potentially significant costs of the continued application of commitments, as well as possible heavy sanctions in case of a commitment breach. It would be helpful for the Commission to provide at least an indicative time-frame for the review procedure. This should be by way of either a general soft law instrument, or even informally, when the parties request a review of commitments. Such approach would appear to be in line with the principle of good administration, as enshrined in Article 41 of the Charter of Fundamental Rights of the EU.

61. A second issue relates to access to the Commission's file, as it would be useful for the parties to understand who can apply for access and which documents are concerned. Possibly applicable texts are:

→ The Notice on access to the file, which expressly states that it applies before the Commission issues decisions in the context of the EUMR (and more specifically of a Phase 2), and "*does not cover the possibility of the provision of documents in the context of other proceedings.*"[85] The Merger Best Practices also foresee that in Phase 1, parties may have access to certain documents.[86] The Commission, however, could draw inspiration from that Notice in the context of requests to review commitments.

→ Regulation (EC) No 1049/2001 on the right of the public to have access to documents,[87] which theoretically applies to documents held by the Commission. While recent case-law would tend to narrow the possibility for applicants to use the regulation to access Commission's competition documents,[88] that regulation still provides a theoretical avenue.

82 According to the Commission's decision, the letters were sent on 9 November 2009, 24 June 2011 and 18 July 2011.

83 Commission Decision of 7 February 2002, Case No COMP/M.1853 – *EDF/EnBW*.

84 D. Crevel-Sander, Quand une déconcentration rend sans cause les engagements souscrits lors de la concentration, *Revue juridique de l'économie publique*, mars 2013, p. 12.

85 Commission notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, *OJ* C 325, 22.12.2005, p. 7.

86 DG Competition Best Practices on the conduct of EC merger control proceedings, 2004 available at http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf.

87 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ* L 145, 31.5.2001, p. 43.

88 G. Goddin, Access to Documents in Competition Files: Where do we Stand, Two years after TGI? *Journal of European Competition Law & Practice*, 2013, Vol. 4, No 2, p. 112.

62. A third issue relates to the use of market tests: Is the Commission required to organise a market test, and if so, which third parties should be contacted? According to the Remedies Notice, the Commission consults third parties after the submission of commitments by the parties to the concentration and before issuing its decision on the case, "*when considered appropriate*" in the form of a market test in Phase 1 and/or Phase 2[89]. "*For any waiver, modification or substitution of commitments, the Commission will also take into account the view of third parties.*"[90] One would expect that the Commission would at least market test the review of commitments with third parties whom it considered appropriate to consult in the initial market test

63. The last issue relates to the right to be heard. In particular, this concerns whether an oral hearing should be held, whether submissions are to be made in writing, whether State of Play meetings are held, and what role the Hearing Officer plays. On this last point, the revised Terms of Reference of the Hearing Officer now provide that he may "*present observations on any matter arising out of any Commission competition proceeding to the competent member of the Commission.*"[91] While the proceedings concerned should be limited to those foreseen in the EUMR, it remains to be seen whether the Hearing Officer could rely on this provision to provide recommendations to the Commission in the context of the review of commitments—although these recommendations would in any event not be made public.

64. Absent any guidance in the legislation, during a review of commitments, it would also be welcome if the parties—and third parties—enjoyed rights similar to those available when submitting commitments.

65. The aforementioned questions could equally apply to the procedure before the FCA, which is as opaque as the Commission procedure.

III. Practical recommendations for merging parties: What should they know before committing and what should they do post-clearance in order to avoid risks of breach?

66. In order to minimise post-clearance difficulties, parties should carefully craft remedies at the time of their submission and negotiation (1.). The implementation of remedies should also be well-monitored (2.). These precautions should place the parties in a better position to request an eventual extension, modification, substitution or waiver of remedies (3.). In case of conflict with the Commission, available responses depend on whether the Commission takes a formal refusal position, or remains silent (4.).

89 Remedies Notice, § 80 (Phase 1) and § 92 (Phase 2).

90 Ibid., § 74.

91 Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, *OJ* L 275, 20.10.2011, p. 29, Article 3 (5).

1. When submitting and negotiating merger remedies

67. The Commission's approval of remedies is by no means the end of the story for companies. Remedies must also be capable of being implemented within a short period of time after clearance, as required in the Remedies Notice. The design, submission and negotiation of remedies is a crucial step in view of the subsequent implementation phase, which can take up to several years, in a potentially changing environment. This is of particular importance in the context of behavioural remedies.

68. The Commission is not empowered to unilaterally impose commitments.[92] However, in practice, the Commission often suggests (directly or indirectly) the type of commitments to be used, leaving parties with little room for manoeuvre. Third-party reactions may also exert a significant constraint on parties.

69. Other issues at stake include the time factor, which is particularly sensitive. In order to meet industrial, employee, or financial demands, the parties may wish to submit stronger remedies in Phase 1 in order to avoid Phase 2 proceedings and to secure a clearance decision as quickly as possible.

70. Moreover, the Commission's analysis is of a prospective nature, potentially resulting in projections that later prove to be inaccurate. This may result in the parties offering remedies that are potentially disproportionate to the actual competition concerns.[93] In order to reach more proportionate commitments, parties may have to either go through a long pre-notification stage or prepare for Phase 2 proceedings.

71. On the other hand, parties possess intimate knowledge of the intended transaction and the concerned sector, and thus may be tempted to exploit information asymmetries with the Commission and offer weaker commitments, in the hope that these will go unnoticed by the Commission. However, the parties may also be unaware of crucial information in the hands of the Commission. Transparency is thus likely advisable, in order to avoid unpleasant surprises for both the Commission and parties at a later stage.[94]

72. Before submitting remedies, parties should conduct a cost-benefit analysis, including the cost of the remedies themselves and their implementation (especially if implementation may take several years), as well as potential costs in case of a breach.[95] This should ideally be done with the assistance of both an outside counsel and a monitoring trustee.

92 Remedies Notice, § 6.

93 On this issue, *see* M. De Valois Turk, Merger Remedies Beyond the Competition Concern: When Could You End up Giving More? *Journal of European Competition Law & Practice*, 2012, Vol. 3, No 5, p. 495.

94 As suggested by M. Gaved, Bonnes pratiques dans le suivi des engagements, CompetitionRx roundtable, Paris, 20 April 2012, http://www.competitionrx.fr/documents/Remedes2012Conference/Remedes-2012-8-Matthew_Gaved-Article.pdf.

95 As suggested in particular by P. Hubert, in the Concurrences roundtable held in Paris on 9 April 2014, L'exécution des engagements souscrits par les enterprises; *see* also P. Wilhelm, Respect des engagements : un casse-tête pour les entreprises ?", CompetitionRx roundtable, Paris, 20April 2012, http://www.competitionrx.fr/documents/Remedes2012Conference/Remedes-2012-7-Pascal_Wilhelm-Presentation.pdf.

73. Remedies should not be overly complex (in terms of their number, object, implementation mechanism, or the negotiations with third parties that these would entail), since complexity may significantly increase risks of prohibition of the transaction by the Commission, implementation difficulties and risks of breach by the parties. In this respect, the Remedies Notice stresses that "*where* (...) *the parties submit remedies proposals that are so extensive and complex that it is not possible for the Commission to determine with the requisite degree of certainty* (...) *that they will be fully implemented and that they are likely to maintain effective competition in the market, an authorisation cannot be granted.*"[96] As stated by former Competition Commissioner, Mario Monti, "*the solution cannot be more complex than the problem it is trying to solve.*"[97]

74. The drafting of commitments should be as clear and specific as possible, in order to avoid post-clearance conflicts between the parties and the Commission as to the interpretation of specific remedies clauses.

75. In addition, the parties should try to anticipate at the earliest possible stage the difficulties they may face in implementing the proposed remedies after clearance. Where appropriate, they should adapt the general review clause accordingly, e.g. by suggesting the insertion of a specific review clause that would take into account the specificities of the given case and provide greater flexibility for a future potential review. However, such adaptations may prove a difficult exercise, given the Commission's typical resistance to deviating from the terms of the general review clause.

76. Lastly, in the context of divestitures, the parties should seek to identify potential buyers and engage in preliminary negotiations as soon as possible. Especially during a time of economic crisis, it may prove difficult to find a suitable purchaser within the agreed deadline, which can in turn place the parties at risk of breaching their commitments, since the Commission would not necessarily agree to extend the divestiture deadline.

77. Therefore, in some cases, the parties may have an interest in proactively suggesting an "up-front buyer" solution, whereby they undertake not to complete the transaction before entering into a binding agreement with an approved purchaser for the divested business.[98] A "fix-it-first" solution may also be envisaged, whereby during the administrative proceedings before the Commission, the parties identify and enter into a legally binding agreement with a purchaser, setting out the essentials of the purchase.[99] As the *UPS/TNT* case (M.6570) illustrates, the absence of an upfront-buyer or fix-it-first solution may sometimes lead the Commission to block a transaction.[100]

78. Where implementation of the parties' preferred divestiture option may be uncertain, parties may also offer/accept an alternative (and confidential) divestiture that is at least as good as the preferred option ("*crown jewels*" commitment), to be implemented in case the preferred option is not implemented within the time-frame. Crown jewels remedies should not involve any uncertainty as to their implementation and should be capable of being implemented quickly.[101] Parties should therefore carefully weigh various options before offering/accepting such remedies.

2. When implementing merger remedies

79. Difficulties may arise in the interpretation of remedies, especially if the market context is shifting and competition authorities, such as the FCA, resort to a "purposive" rather than literal interpretation, which may mean departing from the remedies' exact wording.[102] While such approach may give more flexibility to both the authorities and the parties, it also reduces legal certainty for companies.

80. Since the drafting of remedies may not foresee all potential circumstances, choices are to be made in the course of implementation: e.g. questions may arise as to the exact scope of the divested assets, or details of the implementation of a "Chinese wall."[103] The monitoring trustee may help in this regard, in suggesting ways to interpret remedies, based on its own experience of other cases. It must be recalled, however, that the monitoring trustee does not have the last word, as his interpretation is not binding on the Commission.

81. In any case, competition authorities will expect parties to implement remedies in a very proactive way. Within the company, internal communication between teams (in particular between the legal department and business units) and organization are thus key to securing the effective implementation of remedies and real-time feedback in case of difficulties, particularly with regard to behavioural commitments.[104]

96 Remedies Notice, § 14. *See*, as an example for such a complex remedy, case COMP/M.3440 – *ENI/EDP/GDP* of 9 December 2004.

97 M. Monti, The main challenges for a new decade of EC Merger Control, EC Merger Control 10th Anniversary Conference, Brussels, 14-15 September 2000, SPEECH/00/311; *see* also A. Italianer, To commit or not to commit, that is the question, CRA Competition Conference, Brussels, 11 December 2013: with respect to the antitrust field, Mr. Italianer indicated that "*Commitments should also be sensible. The advantage of speed may also be lost if the commitments are difficult to carry out, which will require close monitoring and lead to extensive delays in implementation. We learned this lesson in the* Repsol *case, in which it took six years to implement the commitment decision. Repsol had concluded hundreds of long terms fuel distribution contracts with landowners and petrol station operators, which bound them to exclusively use Repsol as a supplier for 20, 30 and even 40 years. Repsol committed to allow petrol stations to terminate their contracts. But the need to examine a large number of contracts in great detail caused delays. In many cases, Repsol had constructed or refurbished petrol stations. Repsol was entitled to compensation, which was complicated to calculate. All of the contracts also had to be examined on an individual basis for other competition concerns—for instance resale price maintenance. The implementation of these commitments required a significant investment of Commission resources over a period of years. We do not intend to repeat this exercise.*"

98 Remedies Notice, § § 54-55 for the conditions in which the Commission considers upfront buyer provisions relevant.

99 Remedies Notice, §§ 56-57.

100 Summary of Commission Decision of 30 January 2013, Case COMP/M.6570 – UPS/TNT Express, *OJ* C 137, 7.5.2014, pp. 8-17, at § 89: "[o]n the one hand, UPS was unable to offer a fix-it-first or upfront-buyer solution, and on the other hand the Commitments [...] were insufficient".

101 Remedies Notice, §§ 44-46.

102 This was discussed in the roundtable "Le respect des engagements pris devant les autorités de concurrence", *Concurrences* N° 1-2012, pp. 12-31. The discussion focussed on the FCA's decision to sanction Canal + for a breach of several key commitments undertaken when it acquired TPS (decision n° 11-D-12, op.cit.).

103 P. de Bonnières, op.cit.

104 As emphasised by E. Thomas and D. Crevel-Sander, La mise en œuvre d'engagements envers des autorités de concurrence à l'épreuve du temps : l'expérience du Groupe EDF, *Revue juridique de l'économie publique*, novembre 2013, n° 713, p. 1.

82. The following steps should be considered. First, remedies should be "translated" and disseminated within the company, including the relevant hierarchy. This can involve drawing up best practices/manuals as well as training being given by in-house or outside lawyers, if possible in the presence of the monitoring trustee. Training should be continuous, and take into account staff turnover. As people come and go, new employees should be trained to bring them quickly up to speed. Second, constant interaction should be ensured between in-house lawyers and relevant members of staff, so as to ensure real-time monitoring of the implementation process. Third, any difficulty in implementing remedies, as well as the *rationale* for taking certain interpretation of remedies, should be documented by the company's in-house lawyers. Such documentation proves useful when it comes to submitting a request to waive or modify commitments, but also in order to be ready to answer questions from the authorities regarding the actual implementation of remedies.[105] In addition to internal company documents, it may be useful to collect documents emanating from third parties (e.g. regulatory authorities, independent consultants, third parties, the Press) that can provide an objective background to the situation.

83. Lastly, a sound relationship with the monitoring trustee is crucial. The trustee must be kept informed by the parties at all times of any developments and—as the case may be—difficulties in the implementation of remedies. Through regular reports, the trustee serves as the "eyes and the ears" of the Commission. But he can also become a valuable ally in case of implementation difficulties, e.g. by emphasising the parties' best efforts, with relevant documentation, or by supporting a request by the parties to modify or waive a commitment. While management teams may change within the company, the monitoring trustee remains and has invaluable knowledge of the case—although he is in most cases not involved at the time when commitments are offered.[106]

3. When requesting an extension, modification, substitution or waiver of remedies

84. Should difficulties arise at the implementation stage, and where the Commission has not already reached out to the parties with questions, the parties may have an interest in engaging in preliminary contacts with the Commission. While such early contacts do not guarantee a positive outcome regarding eventual changes to the remedies, they build a more constructive relationship with the Commission, and open up more room for discussion.

85. In the absence of a clear procedural framework for changes to remedies (see above), the parties are often left in the dark as to the appropriate moment for contacting the Commission in order to request the modification or waiver of commitments. As a starting point, however, the parties should refrain from contacting the Commission until they can substantiate their "*good cause*" and, where applicable, the existence of "*exceptional circumstances.*" Parties should rely on objective and precise facts, as corroborated by the trustee and/or third parties. Supporting documentation should shed light not only on the difficulties encountered, but also on the parties' best efforts to resolve those difficulties.

86. In addition, the potential reaction of third parties and national competition/regulation authorities should be anticipated, in particular by tracking their comments to the Commission during the course of the clearance decision—to the extent that the parties have access to details concerning these. Companies must be prepared to receive comments from at least the parties who were already consulted in the context of the initial market test, and comments from national regulatory authorities can weigh very heavily. The Commission's practice shows that due regard is paid to third parties' comments. In *Newscorp/Telepiù*, the Commission waived commitments but requested that Newscorp submit a new commitment "*in order to assuage the concerns expressed*" by third parties,[107] and in *Hoffmann-La Roche/Boehringer Mannheim*, the Commission emphasised that third parties did not oppose the waiver of the commitment.[108]

87. Lastly, parties must always bear in mind that in principle, a change in commitments will only be effective *ex nunc*, and will not retroactively cure any breach of commitments occurring prior to the modification. The French *Bigard* case illustrates this risk. While the FCA accepted to replace the brand licensing commitment with a brand divestiture commitment, it nonetheless sanctioned Bigard for breach of the initial commitment.[109]

105 In the *GDF/Suez* case, the Commission asked questions to the parties regarding the implementation of remedies; at a later stage, the parties asked for certain remedies to be waived or modified.

106 For further insights, please refer to P. de Bonnières, op.cit.

107 Commission Decision of 6 August 2010, *Newscorp/Telepiù* (M.2876), §§ 68 and 71.

108 Commission Decision of 3 May 2011, *Hoffmann-La Roche/Boehringer Mannheim* (M.950), §§ 23-24, 36-37.

109 *See* déc. nº 12-D-15.

4. In case of conflict with the Commission

4.1. Potential avenues in case the Commission refuses to grant the requested extension, modification or waiver

88. Although the Commission gives little public exposure to refusal decisions,[110] these do arise. These decisions can be the object of an action for annulment under Article 263 TFEU. To the best of our knowledge, the *EDF* case is the only one where this occurred.

89. In 2009, when examining the proposed acquisition by EDF of exclusive control over Segebel (the parent company of SPE, which then became EDF Luminus), the Commission expressed concerns relating to the disappearance of EDF as the most ambitious new entrant on the Belgian electricity market. The Commission was particularly concerned that the transaction would limit EDF's incentive to develop two power plant projects in Belgium. By Decision of 12 November 2009, the Commission cleared the concentration, but on condition that EDF fulfil two commitments in order to dispel doubts as to the compatibility of the concentration with the common market.[111]

90. By the divestment in July 2011 of the Dils-Energie project relating to the development of a power plant, EDF fulfilled its first commitment. The second commitment provided that EDF was required to divest another project relating to the development of a power plant, the Nest-Energie project, to a suitable purchaser, in the event that it did not come to a final decision, by 30 June 2012, to itself invest in that project. According to EDF, construction of the plant would last approximately 3 years, at a cost of EUR 800 million.

91. EDF anticipated that it would not be in a position to reach an investment decision by the cut-off date and contacted the Commission by letter on 14 May 2009 to request an extension of the time-limit until 31 December 2014, *i.e.* 2.5 years after the initial date. Relying on significant and permanent changes in the conditions on the electricity market in Belgium since the adoption of the clearance decision, and which could not have been anticipated in 2009, EDF claimed that it was impossible for it, or for any other market player, to make a final investment decision regarding the Nest-Energie project by the deadline initially fixed for 30 June 2012. On 28 June 2012, the Commission decided (in a non-published decision) that it could not accede to EDF's request, but granted EDF an additional period of 3.5 months, i.e. until 15 October 2012. According to commentators, the Commission declined to take into account the evolution of circumstances on the market.[112]

92. EDF challenged this decision before the General Court of the European Union (the "General Court") and applied for the case to be decided under an expedited procedure. EDF also asked the General Court to order, by way of interim measures, to postpone the divestiture deadline.

93. The General Court dismissed the request,[113] in substance because it found that urgency had not been shown, as EDF had failed to demonstrate that the alleged financial harm was sufficiently serious to justify the granting of the interim measures sought. According to the General Court, EDF should have demonstrated that absent the interim measures, "*it would be in a position that could imperil its very existence or affect its market share substantially.*"[114]

94. The Court of Justice of the European Union (the "Court of Justice") annulled the General Court order, and admonished the General Court for assessing the notion of harm based on a comparison between the amount of financial harm and the size of the EDF group. Information on the size of the EDF group was not indispensable to assessing harm. However, the Court eventually dismissed EDF's appeal, on the ground that EDF had not established that the harm was irreparable[115]. In January 2014, EDF's application for annulment was eventually withdrawn.[116]

95. The *EDF* case raises doubts as to the usefulness of interim measures in the context of the review of commitments. However, it does not signal the end of actions in annulment on the merits. Indeed, when reviewing merger control decisions, the General Court is required to exert a potentially far-reaching review of the Commission's interpretation of information of an economic nature.[117] Although this standard has yet to be tested in the context of commitment-related decisions, it may provide ample room for contesting a Commission refusal to modify commitments.

110 The *Volvo/Renault V.I.* case (M.1980) is a rare exception.

111 Case COMP/M.5549 – *EDF/Segebel*.

112 A. Creus and D. Crevel-Sander, Quelle place pour les mesures conservatoires en matière de contentieux relatifs à la mise en œuvre d'engagements ? *RLC* 2013 nº 36 p. 8.

113 Order of the President of General Court of 11 October 2012 in Case T-389/12 R – *EDF v. Commission*; commented by A. Creus and D. Crevel-Sander, Quelle place pour les mesures conservatoires en matière de contentieux relatifs à la mise en œuvre d'engagements?, op.cit; *see* also: L. Bary, Pas de délai pour EDF : le Tribunal de l'Union européenne impose à la société française de respecter ses engagements… en temps et en heure, *RLC* 2013 nº 34 p. 16; D. Berlin, *Concurrences* nº 1-2013, art. nº 50584, pp. 133-134; D. Berlin, *Concurrences* nº 3-2013, art. nº 53924, p. 111.

114 § 22 of the General Court order.

115 Order of the Vice-President of the Court of Justice of 7 March 2013, Case C-551/12 P(R) – *EDF v. Commission*.

116 Order of the President of the Seventh Chamber of the General Court of 22 January 2014 in Case T-389/12.

117 As recently recalled: "(…) *irrespective of whether decisions are adopted under Article 6 or on the basis of Article 8 of Regulation No 139/2004, the case-law provides for an identical standard of judicial review. In both cases, (…) the review by the European Union judicature of complex economic assessments made by the Commission is limited to checking compliance with the rules governing procedure and the statement of reasons, the substantive accuracy of the facts as well as the absence of manifest errors of assessment or misuse of powers. In that respect, it should be borne in mind that the European Union judicature must not only ascertain whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it*" (GCEU, 11 December 2013, *Cisco Systems v. Commission*, n.y.r., § 50 and cited case-law); *see* also Case C-12/03 P – *Commission v. Tetra Laval* [2005] ECR I-987§ 39: "*Whilst the Court recognizes that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.*"

96. The main obstacle to the development of such actions lies in the time taken by the General Court to review cases. The average time-frame to obtain a judgement in competition cases (including merger control) amounted to 46.4 months in 2013.[118] This time-frame, however, may be shortened in two ways:

→ Parties may request the expedited procedure, which the court may grant in view of (i) the urgency and particular circumstances of the case; and (ii) the complexity of the matter and whether it is suitable to an essentially oral procedure.[119] The expedited procedure, however, is very rarely used in competition cases.

→ A second option is to request that the case be given priority within the meaning of Article 55(2) of Rules of procedure of the General Court, provided that "*exceptional circumstances*" may be established.[120] To the best of our knowledge, however, the priority procedure is also little used, including in competition cases.

97. Overall, while the judicial review of the modification of commitments remains a largely unexplored field of law, it can be expected to develop in the coming years with actions for annulment brought not only by parties to concentrations but also by interested third parties who may wish to contest the modification or waiver of commitments having an effect on their market position.

4.2. Available avenues in case the Commission fails to reply

98. The Commission may also refrain from responding when faced with a request to modify or waive commitments, seemingly due to the lack of a clear procedural framework. This can take the form of either complete silence or (more likely) of an informal (oral) reply that is not formally confirmed by letter or formal decision. In such situation, two responses may be appropriate: first, soliciting the European Ombudsman; and second, acting against the Commission for failure to act.

99. First, the requesting party may bring before the European Ombudsman a claim of maladministration, in breach of Article 41 of the Charter of Fundamental Rights of the EU, on the basis of Article 228 TFEU.[121] While the Ombudsman has already been quite active in the field of competition procedures,[122] it has not, to the best of our knowledge, dealt with merger commitment procedures. The Commission's lack of response to a request for the modification or waiver of a remedy could qualify as an instance of maladministration. This is because it deprives the requesting party of the possibility to have certain knowledge of the Commission's position and of potentially lodging an action in annulment (which is problematic given the potentially significant costs of the continued application of commitments).

100. As set out in its Statutes, the Ombudsman must first cooperate with the institution in view of resolving the maladministration issue. Failing a resolution, the Ombudsman may either (i) issue a "*draft recommendation*" if the maladministration may still be eliminated, or (ii) make a "*critical remark*" in case the institution can no longer eliminate the maladministration. Should the institution not follow the draft recommendation, the Ombudsman may draw up a special report to the European Parliament.

101. Although its decisions are not legally binding, the Ombudsman's intervention can influence the Commission, as no institution desires public exposure of its alleged maladministration. Moreover, this may induce other companies to bring similar complaints before the Ombudsman. More generally, an Ombudsman decision can impact the Commission's soft law instruments. For example, some sections of the Commission's Best Practices and of the Manual of Procedures reflect the Ombudsman's comments in the *Intel* case.[123]

102. Second, the viability of an action for failure to act, under Article 265 TFEU, would also be worth examining. Such action can be brought under the following conditions: the Commission was under a duty to act; it was called upon to act; but within two months of being called upon, the Commission had not defined its position. In such case, an action may be brought within a further period of two months.

103. Such kind of action faces a first hurdle concerning whether the Commission was in fact under a duty to act. Moreover, it must be determined whether the request sent to the Commission has met the formal criteria set out in the case-law, i.e. "*it must be sufficiently clear and precise to enable the Commission to ascertain in specific terms the content of the decision which it is being asked to adopt.*"[124] A company requesting the Commission to modify or waive commitments must therefore send a clear, detailed and very well-documented request, failing which it will be inadmissible to act before the General Court.

118 Annual Report of the Court of Justice of 2013, p. 184. This figure embraces all types of competition proceedings, including appeals against antitrust Commission's decisions but excluding state aid cases.

119 Article 76(a) of the Rules of procedure of the General Court.

120 This provision reads as follows: "*The President* [of the General Court] *may in special circumstances order that a case be given priority over the others.*.

121 Under Article 228 TFEU, any person located in the EU may bring a complaint before the Ombudsman for acts of maladministration of any institution (except the Court of Justice), even when the procedure before that institution is still ongoing.

122 For a more detailed account of the Ombudsman's role in antitrust matters : B. Amory and Y. Desmedt, The European Ombudsman's First Scrutiny of the EC Commission in Antitrust Matters, *ECLR* 2009 Issue 5; N. Nikiforos Diamandouros, Improving EU Competition law Procedures by Applying Principles of Good Administration: The role of the Ombudsman, *Journal of European Competition Law and Practice*, 2010, Vol. 1, No. 5, p. 379; A. Scordamaglia-Toussis, The Role of the European Ombudsman in Competition Proceedings: A Second Guardian of Procedural Guarantees? *Journal of European Competition Law and Economics*, 2012, Vol. 3, No 1, p. 29.

123 European Ombudsman decision of 14 July 2009, Case No 1935/2008/FOR.

124 ECJ, 10 June 1986, *Usinor v. Commission*, Joined Cases 81 and 119/85, *ECR* 1792, § 15.

104. This may explain why, to date, no action for failure to act has been lodged in the context of the review of commitments.

IV. Conclusion

105. In December 2013, the Commission announced a "*simplification package*" aimed at streamlining and speeding up merger control procedures.[125] Unfortunately the Commission did not use this opportunity to address the review of commitments. Nonetheless, nature abhors a vacuum. If the Commission provides no guidance, the Ombudsman and EU Courts will step in, and potentially reach solutions that will run counter to the Commission's wishes. Particularly given today's uncertain economic environment, it may be time for the Commission to acknowledge that merger control does not stop at clearance decisions. In this regard, absent any clear guidance and procedural framework as to the potential modification and waiver of commitments, companies will increasingly find themselves between a rock and a hard place. ■

125 Commission's press release IP/13/1214, *Mergers: Commission cuts red tape for businesses*, 5 December 2013.

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