



eSAPIENCE CENTER FOR COMPETITION POLICY

**VIEWPOINT:**

**The Burden of Proof in the European Commission's Draft Notice on Remedies**

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## **The Burden of Proof in the European Commission's Draft Notice on Remedies**

By Carsten Grave

On April 24, 2007 the European Commission's Directorate General for Competition ("DG Comp") began its public consultation on the new "Commission Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004" when it published a draft of this text ("Draft Remedies Notice"), accompanied by a draft "Commission Regulation amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings" ("Draft Amendment to the Implementing Regulation").

The Draft Amendment to the Implementing Regulation will enable the Commission to request formalized remedy proposals and their assessment from the parties notifying a concentration (or merger). The Draft Remedies Notice contains an overview of DG Comp's current thinking on remedies in merger control proceedings, assessing several types of remedies, but ultimately focusing on the divestment of businesses, in line with both statistics (where divestments account for the majority of remedies in the Commission's merger control decisions) and its explicit preference for such remedies (see Draft Remedies Notice, para. 22). The Draft Remedies Notice will, once finalized, replace its 2001 predecessor, the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 ("2001 Remedies Notice", see 2001 Official Journal of the European Communities, No C 68, page 3). Competition law practitioners should be aware, however, that DG Comp will certainly be inclined to apply the principles and policies set out in the Draft Remedies Notice immediately, and not only after finalization.

Without stating that it would be the most important, or even most interesting, topic touched upon by the Draft Remedies Notice, this Viewpoint will focus on the burden of proof for the effectiveness of remedies proposed by the merging parties.

Let us assume that a concentration has been notified and the Commission has, in the course of the proceedings, substantiated a competitive concern. The notifying parties have submitted a remedy proposal accompanied by all information available to them about the expected effects of the suggested remedy, but the market test did not provide a clear-cut picture of the effectiveness of the suggested remedy. Two relatively recent decisions by the European Court of First Instance ("CFI") have been unclear on whether

the Commission, in such a situation, can – or rather must – prohibit the concentration or not. In other words, who bears the burden of proof for the effectiveness of a remedy?

In its decision of December 14, 2005 in Case T-210/01 – *General Electric v. Commission*, the CFI noted (para. 52):

“The Commission clearly set out [...], the objections pertaining to all the anti-competitive consequences of the merger, particularly those concerning horizontal and vertical effects deriving from the merger which were subsequently included in the contested decision [...]. In order to address the objections raised by the Commission [...], the applicant proposed [...] structural commitments which the Commission examined but rejected on the ground that practical considerations would have prevented their being put into effect. The applicant has put no evidence or arguments before the Court to explain in what specific regard the rejection of those commitments was illegal or unjustified [...]. The Commission is not responsible for technical or commercial gaps in the commitments in question (which led it to conclude that they were insufficient to permit it to approve the merger at issue); nor, more specifically, can those gaps be attributed to any unwillingness on its part to accept that other commitments, of a behavioral nature, might be effective. *It was for the parties to the merger to put forward commitments which were comprehensive and effective from all points of view [...]*” (emphasis added).

Compare, however, the decision of September 21, 2005, in Case T-87/05 – *EDP Energias de Portugal SA v. Commission* (para. 64):

“Furthermore, the fact that paragraph 6 of the Notice on Remedies [the 2001 Remedies Notice] indicates that ‘[it] is the responsibility of the parties to show that the proposed remedies ... eliminate the creation or strengthening of ... a dominant position identified by the Commission’ cannot alter that legal position. Even on the assumption that the Commission thereby intended to make the parties to a notified concentration responsible for demonstrating the effectiveness of the proposed commitments, an exercise which is consistent with their interests, *the Commission could not conclude that where there is doubt it must prohibit the concentration.* Quite to the contrary, in the last resort, *it is for the Commission to demonstrate that that concentration, as modified, where appropriate, by commitments, must be declared incompatible with the common market* because it still leads to the creation or the strengthening of a dominant position that significantly impedes effective competition.” (emphasis added).

DG Comp, in para. 8 of the Draft Remedies Notice, has clearly gone for the second alternative.

The CFI has noted in *EDP* (see the quote above) that the Commission's 2001 Remedies Notice cannot alter the distribution of the burden of proof, and, as a matter of general legal principle, will also apply to the new notice. The Commission can, however, validly, increase the procedural duties of the parties, in particular their obligation to provide information pertaining to the effectiveness of a suggested remedy. Against this background, the formalization of remedy proposals by the Draft Amendment to the Implementing Regulation may be seen as an attempt by the Commission to reduce the likelihood of a *non liquet* situation to a minimum, i.e., a situation where the results of the investigation remain unclear and the burden of proof actually becomes critical.

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