



EUCTP AML Competition Week,  
Beijing, China

# Merger Remedies in the UK Roundtable 2

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10 March 2014

# Overview

- Types of Trustees
- When are monitoring trustees/hold separate managers appointed?
- Practical aspects of appointment of trustees

# Types of Trustees and their role

- Hold separate – managing the acquired business separate from the acquirer when key man has left (applies to completed mergers)
- Monitoring – compliance with undertakings during ongoing investigation/divestment process/behavioural remedies
- Divestment – with power to divest

# Decision to appoint Monitoring Trustee/HSM

Likely **during an ongoing investigation** when one or more of the following risk factors have been identified:

- Breaches of interim measures
- Substantial integration prior to interim measures
- Integration (or additional) will continue throughout the investigation (e.g. Target is not a stand alone business)
- High Risk of Deterioration of the Business (loss of key customers/ staff)
- Senior management of target is absent or has strong incentive to operate on behalf of the acquirer

Examples: Tesco Slough (2009), Bucher/Johnstone Sweepers (2005)

# Decision to appoint Monitoring Trustee (2)

Monitoring Trustee may be appointed in relation to **final remedies**:

- To provide oversight on progress of divestment remedy and compliance with behavioural undertakings pending divestment
- Stericycle (2012), Tesco Slough (2009)
- To monitor behavioural undertakings
  - MacQuarie/National Grid (2008)

However, may not always appointed for behavioural undertakings:

- Imerys/Goonvean (2013)

# Divestiture Trustee

Generally CC takes power to appoint after an initial divestment period:

- Stericycle (2012)

However, in some instances appoints DT at the outset:

- Tesco Slough (2009)
- Ryanair (2013) n.b. On appeal

# Practical aspects of appointment of trustees

- Selection and approval process
- Qualifications and experience
- Mandate and remuneration
- Reporting Functions of Trustee (n.b separate compliance statement of CEO of business subject to commitments)
- Must provide sufficient detail for purchaser selection assessment when involving Trustee
- Need a clearly defined disposal plan to monitor during the divestiture process
- Need clear milestones for appointment of Divestiture Trustee

# Judicial Comments on Divestment and Divestiture Trustee – Stericycle/Ecowaste (1)

## Stericycle/Ecowaste 2012 Judgment of 25 May 2012

- Background:
  - Report referred to Initial divestment period (IDP) (date not public)
  - Report identified that CC would appoint divestiture trustee if not sold by end of IDP
- Stericycle claimed:
  - the knowledge of the existence of IDP prejudiced Stericycle
  - fact that divestment could be at no minimum price prejudiced Stericycle

# Judicial Comments on Divestment and Divestiture Trustee –Stericycle/Ecowaste (3)

## CAT Judgment (para 52)

“We agree with the CC that there is nothing in this point. It is clear from the Report that the CC’s principal concern was that the divestment takes place quickly. In any completed merger there are concerns about the diminishing viability of the acquired entity in the hands of the acquirer, even if the business is being handled by a Hold Separate Trustee in the interim. In this case there was also the need for the new owner to establish itself before the retendering of the Key Contracts: see paragraph 8.52 of the Report. The CC’s decision to encourage Stericycle to proceed speedily with divestment by announcing the backstop of the appointment of a divestment Trustee and sale without a minimum price was within its discretion. The contrary risk that Stericycle posits was unlikely to arise given that there are a number of potential bidders expected to be interested in acquiring the Ecowaste business.”