



European Commission

Competition

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MOFCOM: Workshop on Trustees in the implementation of remedies in Merger Cases

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Agenda

- Challenges in the implementation of remedies
- The role of Trustees
- Appointing a Trustee and relations with the Trustee



I. CHALLENGES IN THE IMPLEMENTATION OF REMEDIES



Main objectives during the implementation phase

- Structural/divestiture remedies:
 - Rapid divestiture
 - Suitable purchaser
 - Preservation of the competitiveness of the business in the interim
- Behavioural remedies
 - Effective monitoring of full compliance
 - Rapid clarifications of doubts/resolution of disputes
 - Effective adaptation of remedies to changing market circumstances



Typical problem areas

- Interim preservation of business to be divested
 - Hold separate obligations: e.g. cut-off of information flows,
 - Viability during the interim period: e.g. capital injections
- Extension requests for implementation
- Suitable purchaser of divested business
 - Verify that purchaser chosen by parties fulfils criteria
 - Find suitable purchaser (if parties fail)
- Adaptation of scope of business to be divested
- Compliance with behavioural commitments
 - How to monitor compliance and circumvention ?
 - How to ensure rapid and effective protection of third party rights/dispute resolution/clarification of interpretative doubts
- When and how to review and amend remedies



II. THE ROLE OF TRUSTEES



Role of Trustees

- Trustees in all EU remedies cases
 - Many of the typical problems in implementation require specialised business knowledge
 - Allows to concentrate limited Commission resources more on active cases
- Monitoring Trustee: “eyes and ears of the Commission” for both structural and behavioural remedies cases
 - Monitors behavioural aspects of the remedy, such as temporary supply agreements
 - Oversees carve-out, hold-separate, interim preservation provisions
 - Checks sales process and assesses proposed purchaser
 - First point of call for third parties
 - Special role in dispute resolution if foreseen in remedy
 - Reporting at regular intervals
 - Intervenes on Commission request
- Divestiture Trustee: actively dispose of the business at any price (prior approval of the Commission)



Example 1: behavioural remedies

Intel/Mc Afee – some critical issues:

- Choice of Trustee: experienced former top manager of a large technology business
- Resources and technical support: Renowned professor and research lab from top university
- Dispute resolution: tailored fast track arbitration with short deadlines with important role for Trustee
- Trustee has rights of access to information



Example 2: Hold separate...

- In order to avoid any withdrawal of assets / personnel / know how etc. from the divestment business by the parties, hold separate necessary.
- **Hold separate** consists of the legal and physical separation of the assets of the divested business from the parties' retained business and the parties' influence, so that the divested business:
 - can operate on a stand-alone basis,
 - is able to compete successfully on a lasting basis, and
 - is independent of the divesting parties.



...Example 2: Hold separate ...

Remedies study showed problems of shared assets

- Assets that frequently raised issues:
 - IT systems;
 - Pipelines, networks;
 - IPRs, know-how;
 - Central corporate departments, such as administration, marketing and sales, purchasing.
- Assets not transferred; degraded; incomplete
- Assets often need duplication, not just separation
- Frequent disputes over key personnel which was sometimes not clearly identified in the commitments



...Example 2: Hold separate

- Important role for **Monitoring Trustee** because source of frequent problems
- Introduction of a **hold-separate manager (HSM) who reports to Trustee and Commission**
- HSM = employee of the parties to ensure the separation of the divestment business who should be
 - Senior manager
 - Selected from the divested key personnel (incentive to act in the interest of the divestment business)
 - To be appointed immediately after the adoption of the Commission decision and even before closing
- Separation to be completed **before** sale



Example 3: Purchaser approval

- **Purchaser requirements**

- Proven expertise (especially in innovation-driven industries)
- Financial resources (businesses requiring big investments)
- Incentives to maintain and develop the business as a competitive force (business plans)
- Independent and unconnected to the parties
- No *prima facie* competition concerns or risk of delays in implementation

- **Role of Monitoring Trustee**

- Report on progress of sales process and potential buyers
- Check suitability of buyer
- Investigate potential issues
- Write reasoned opinion to the Commission



Example 4: Deadline extension

- **Rules on extensions**

- All deadlines in implementation can be extended if the parties show 'good cause'
- First Divestiture Period: relatively often extended for a brief period if positive outcome 'around the corner'
- Divestiture Trustee period does not happen very often, but can also exceptionally be extended
- Procedural requirements: motivated decision

- **Role of Trustee**

- Checks claims of the parties
- Provides reasoned opinion on whether extension request is justified



III. APPOINTING A TRUSTEE AND RELATIONS WITH A TRUSTEE



Choice of the right Trustee

- Pool of possible candidates
 - Boutique firms specialised in Trustee work
 - Accounting firms
 - Law firms
 - Teams in banks specialised in Trustee work
 - M&A teams
 - ...
- Factors determining choice
 - Focus of the implementation challenge: monitoring of behaviour vs. hold separate vs. divestiture itself vs. ...
 - Track record
 - Geographic requirements
 - Resource requirements
 - Knowledge requirements



Process

- Trustee proposed by the parties
 - Proposal at the latest 2 weeks after the decision
- Requirements
 - independent
 - qualified
 - no conflict of interest
- Trustee mandate also needs approval from Commission (standard mandate with adaptations)
- Trustee may need to dispose of expert/additional resources for difficult monitoring
- Trustee paid by parties – not acceptable: caps in the number of hours paid (would limit trustee's availability when problems occur after the defined hours)



Lessons learnt...

- Independence is most important selection criterion: must be the Commission's 'eyes and ears' despite being paid by the parties
- Appointed as early as possible, if possible already during the investigation phase; Remedies Notice provides for “up-front” monitoring trustee
- Must have a clear mandate and provide a convincing work plan
- Necessary skill sets depends on case, but must include at least: business management, accounting expertise, information management, and industry knowledge



... Lessons learnt

- Importance of kick-off meetings and regular follow-up meetings
- Regular high quality reports on the parties' compliance with the commitments
- Trustee should comment on the implementation of the hold-separate obligations and the hold-separate manager
- Mandate should extend until after complete transfer
- De-briefing meeting with the Commission