

# Implementation of Remedies

Alessandra Tonazzi  
Italian Competition Authority  
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## How to implement: factors facilitating effective implementation

- After the merger has been approved with remedies it is important to ensure that they are actually implemented. Some factors may assist in facilitating effective implementation:
- **Clarity.** It must be clear what the remedy is, how it will operate and what constitutes compliance. It must also be clear how the remedy binds the parties and what steps are available to the competition authority to enforce compliance. As complexity of design may increase the problems of implementation and monitoring may also escalate.
- **Consultation and Reporting.** Active consultation with the merging firms and other appropriate parties, during the implementation process, helps to identify unforeseen consequences and improves the achievement of the desired outcome. Periodic reporting is also a useful mechanism for effective implementation.



## How to implement: factors facilitating effective implementation

- ***Continuity of staffing.*** It is beneficial for a competition authority to provide continuity of staffing between the stages of choosing/designing remedies and their implementation. Continuity helps to ensure that familiarity with the circumstances of a merger is applied to implementation and also assists in anticipating implementation issues when evaluating remedies.
- ***Periodic assessment of practice.*** It is helpful for competition authorities to conduct a periodic review of their remedies practice to identify learning points for improving impact and effectiveness.

*As noted in ICN Recommended Remedies Practice D, “Appropriate means should be provided to ensure implementation, monitoring of compliance, and enforcement of the remedy”.*



## How to implement: EU Regulation

- The Commission ensures the enforceability of commitments by making the clearance of the merger **subject to compliance with the commitments.**
- If a condition is breached, (for example the business is not divested in the time-frame foreseen in the commitments or afterwards), the clearance decision is no longer applicable and the Commission may, first, take interim measures then order any appropriate measure to ensure that the parties dissolve the concentration or take other restorative measures. In addition, the parties may also be subject to fines of up to 10% of the aggregated turnover of the undertakings concerned.
- Where the parties commit a breach of an obligation, that is the implementing steps which are necessary to achieve the conditions (e.g. appointment of a trustee, etc) the Commission may revoke its own clearance decisions. The parties may also be subject to fines of up to 10% of the aggregated turnover of the undertakings concerned. On top of this, the Commission can impose daily penalty payments until the parties comply with the obligation.



- The Italian Competition Authority **monitors the commitments' implementation.** Generally, the parties are requested to send to the ICA **periodical reports** on the state of implementation of the measures. With reference to divestiture measures, the ICA can fix, in the decision, a number of characteristics the buyer should have and, consequently, approves the purchaser of each divested asset. However, in Italy there are no guidelines regarding trustee appointments.
- In case of **non compliance with the decision** authorizing a merger subject to conditions, the transaction should be considered as a prohibited merger and the parties be subject to the same fines provided for by the law in case of implementation of a prohibited merger according to Art 19 of the Italian Competition Act (fines up to 10% of turnover).



- A competition authority may appoint, or approve the **appointment of, a trustee** to assist in various aspects of implementation such as **monitoring** or **divestment**.
- A trustee or monitoring agent may also be appointed to **facilitate the ongoing monitoring of behavioral commitments** such as rights of competitive access.
- When a package of complex remedies is adopted the trustee may have the function of **interpreting the application** of on-going commitments
- Trustees can provide non-binding views to an authority concerning implementation or effectiveness.
- The trustee should be managed by the competition authority and acts on behalf of the competition authority in circumstances where the authority lacks the resources or expertise.
- Trustees should be **independent of the merging firms**, have **appropriate qualifications** for the task and should **not be subject to conflicts of interest**.

- The **implementation phase** and the **appointment of trustees** are regulated thoroughly in the EC Notice on Remedies: detailed guidance is given on the implementation of divestiture commitments and some aspects of other types of commitments,
- Two kind of trustees are envisaged in the EC Notice on remedies: Monitoring and Divestiture Trustees
- Monitoring Trustees: oversee the parties' compliance with the commitments, in particular with their obligations in the interim period and the divestiture process
- Typical tasks of Monitoring Trustees:
  - Overseeing safeguards of business to be divested;
  - Monitoring splitting of assets in carve outs
  - Acting as contact point for third parties (potential purchasers)
  - Reporting to the Commission on these issues

## Timing: EC Notice on Remedies

- The divestiture process has to be completed within a **fixed time period** divided into a period for entering into final agreement and a further period for the closing, the transfer of legal title, the transaction.
- The **period for entering final agreement** is normally divided into a period when the parties can look for a suitable purchaser (first divestiture period) and, if they do not succeed, a second period when a divestiture trustee obtained mandate to divest the business at no minimum price (trustee divestiture period)
- Commission Experience: **short divestiture periods contribute to the success of the divestiture**
- Normally **six months** for first divestiture period and **three months** for trustee divestiture period





- As for the Monitoring Trustee the parties have to propose to appoint a Divestiture Trustees
- If the parties do not find a purchaser in the first divestiture period the Divestiture Trustee will be given an irrevocable and exclusive mandate to dispose of the business
- The Divestiture Trustee may include in the sale and purchase agreement such terms and conditions deemed appropriate for an expedite sale

## Impact of implementation issues on choice of remedies

- Competition authorities should seek **to anticipate implementation issues when evaluating remedies.**
- **Clarity of design** is a key virtue in assisting rapid and effective implementation
- Structural remedies (especially divestitures) usually easier to implement. Behavioral remedies, especially if complex, more difficult to implement.
- *Edizione Holding/Autostrade* case: **example** of the difficulties associated with monitoring complex behavioural remedies
- In January 2000 the Italian Competition Authority authorised the acquisition of a controlling interest in Autostrade (the company in charge of the motorways management) by Edizione Holding, a company operating in the motorway catering market through its subsidiary Autogrill.



## Impact of implementation issues on choice of remedies

- The Italian Competition Authority authorized the merger on condition that:
  - i) Autostrade would not directly supply catering services, but entrusted them to third parties through competitive tenders; ii) Autostrade entrusted the management of the tenders to third parties; iii) the share of motorway catering points entrusted directly or indirectly to Autogrill (72%) would not increase.
- In November 2004 the Authority completed an investigation concerning Edizione Holding's failure to comply with the remedies: the tender procedures initiated by Autostrade in October 2003 were designed in such a way as to put Autogrill not on fair grounds with competitors.
- 18 completed tenders had to be cancelled and the Authority imposed a fine on Edizione Holding of €6.79 million, equal to 1.2% of the company's turnover.

