

Recent developments in EU and US merger remedies

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MERGER ACTIVITY

Despite the recent downturn in merger activity, merger enforcement remains vibrant in the US and around the world. During the fiscal year ending in September 2003, the US enforcement authorities challenged 36 transactions, resulting in:

- 12 consent orders or consent decrees (*see below, Divestiture in the US*).
- One Federal Trade Commission (FTC) administrative complaint.
- One pending Department of Justice (DOJ) case.
- 16 abandonments.
- Three restructurings.

In the European Union (EU) during 2003, the European Commission (Commission) initiated in-depth investigations of nine transactions (one being a referral from a member state). A total of 17 transactions were conditionally cleared subject to undertakings from the parties agreed during either initial or in-depth investigations.

The recent reform of the European Council's Merger Regulation (*Council Regulation 4064/89/EEC*) (ECMR) has continued the trend towards increased convergence of US and EU merger review standards. The reforms did not alter the Commission's substantive policy on merger remedies, but they did incorporate deadline changes that affect timing and strategy for negotiating remedies.

Substantive policies on remedies of both US and EU authorities have not changed significantly during the past year. On both sides of the Atlantic, enforcement in merger cases is motivated by the desire to preserve or restore competition in the relevant market. Faced with similar issues, the enforcement authorities' substantive approach continues to converge. Narrowly tailored mechanisms, such as crown jewel provisions, up front buyers and hold separate arrangements (*see below, Orders to hold separate or maintain assets*), are now found in both US and EU merger remedies.

This chapter summarises the US and EU authorities' approaches to merger remedies by looking in turn at:

- Divestiture in the US.
- Disgorgement in the US.

- Merger reform in the EU.
- The Commission's Notice on Remedies.
- The Commission's Best Practice Guidelines for Divestiture Commitments.

DIVESTITURE IN THE US

Section 7 of the Clayton Act (*15 USC § 8*) prohibits mergers that have the likely effect of substantially lessening competition or tending to create a monopoly in the relevant market. Subject to certain exemptions, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (*15 USC § 18a*) (HSR Act) requires merging parties in transactions above certain thresholds to file a notification form with the FTC and the Antitrust Division of the DOJ before the closing of the transaction. The two agencies have 30 days to investigate the merger and, if their competitive concerns are not resolved, they may issue a second request for significant, additional information. The waiting period is then extended by a further 30 days after the parties declare themselves in substantial compliance with the second request, at which time the parties are allowed to proceed with the deal unless the government has initiated proceedings to block the transaction.

Both the FTC and the DOJ prefer to resolve concerns about anti-competitive effects by having the parties divest business lines or assets to restore the competition reduced by the merger. In general, such remedies are negotiated by the parties with the agency staff and then incorporated into:

- A binding consent order issued by the FTC; or
- A binding consent decree issued by a federal court at the request of the DOJ.

(The two requests are functionally the same and the terms are used interchangeably below.) The content of consent decrees varies according to the facts of the case, but most share several features, including the following (*see www.ftc.gov/bc/mergerfaq.htm*):

- The divestiture must be absolute, meaning that the merging parties must cut all ties to the divested businesses or assets and have no ongoing financial interest in the buyer's success. In some cases, continuing arrangements (such as supply contracts or technical support) may be necessary to ensure the competitive viability of the divested assets.

- Provisions for naming a trustee to oversee the sale of the assets, if the assets are not divested within a certain time, may be included in the consent decree.
- Until completing divestiture, the parties are typically required to operate the assets to be divested independently of the remainder of the business. The objectives of such “hold separate” requirements are to:
 - preserve the assets' viability pending divestiture; and
 - prevent competitive harm in the interim.
- Smaller buyers have succeeded at least at the same rate as larger firms. The buyer's knowledge and experience in the business is more relevant than its size.
- Difficulties in divestitures included:
 - divestitures to buyers with limited resources or expertise (weak buyers); and
 - conduct that otherwise diminished the competitive viability of the assets acquired by the buyer.

Merger remedies have increasingly included a number of other additional elements. When the agencies are concerned about the ability of a package of assets to attract an acceptable buyer, the parties are now likely to be required to identify an up front buyer. An up front buyer is less commonly required when the divested assets constitute a standalone business. The agencies are also using crown jewel provisions, which require the divestiture of additional highly marketable assets, if the merging firms fail to divest the original asset package as required by the consent decree.

The agencies have also recently shortened the time available for parties to divest the assets, now requiring divestitures to occur within three to six months of the granting of the consent order. The FTC has stated that, under the one-year period previously given to parties, divestiture too often occurred at the end of the period, after the assets' value had deteriorated.

Divestiture study

The question remains as to whether the above or other remedial measures adequately preserve competition in the relevant market. In 1999, the FTC issued a study of its divestiture process that sought to determine how well buyers of divested assets fared as viable competitors and whether divestiture orders lived up to the FTC's remedial goals (*A Study of the Commission's Divestiture Process*) (Divestiture Study) (see www.ftc.gov/os/1999/08/divestiture.pdf). The Divestiture Study reached several significant conclusions:

- Three-quarters of the divestitures analysed in the Divestiture Study were found to be successful at maintaining competition in the relevant market, meaning that the approved buyer:
 - acquired the assets;
 - began operations; and
 - was operating in the relevant market within a reasonable period.
- Divestitures of ongoing businesses succeeded more frequently than divestitures of selected assets.
- Having a continuing relationship with the merged firms following the purchase of the divested assets can disadvantage buyers, but ongoing relationships were necessary for some buyers to succeed.
- **Assets to be divested.** Consistent with the findings of the Divestiture Study, both agencies favour proposals that would divest an autonomous, ongoing business unit. These divestitures reduce uncertainties about the viability and competitiveness of the proposed assets to be divested. If the proposed assets are not a separate business unit that has operated autonomously in the past, the parties should be prepared to demonstrate that the assets contain all components of a separable business unit, or that necessary components (such as manufacturing facilities, research and development, or IP (patents, know-how, technology, and so on)) are otherwise available. When the parties seek to divest IP, they must be able to show that a buyer would be capable of entering the market through acquisition of the IP and would have the necessary incentives to compete in the market and achieve the remedial purposes of the order.
- **Acceptable buyer.** Both agencies will insist that the proposed buyer of the assets must have the financial capability and incentive to acquire and operate the assets, and must have the competitive incentive to maintain or restore competition in the market. While the agencies have expressed no preference for the particular methods used by the parties to select an acceptable buyer (whether by competitive bidding, auction or contacting individual buyers), the investigating staff will independently evaluate the financial and competitive strength of the proposed buyer.

Buyers were often found lacking in sufficient information about the divested assets and many buyers perceived a lack of bargaining power in securing divested assets for sale.

FTC's statement on merger remedies

In April 2003, the FTC's Bureau of Competition issued a policy statement on negotiating merger remedies (*Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies*) (Statement) (see www.ftc.gov/bc/bestpractices/bestpractices030401.htm). The Statement is intended to improve the transparency of the process and help parties expedite merger remedy negotiations by explaining how the FTC staff handles these matters. Although the Statement expresses current FTC policy, many of its general principles reflect the DOJ's position as well and therefore provides sound practical advice for parties dealing with either agency. Where the DOJ has a different approach, this is set out below.

The Statement addresses the following issues:

- **Fix-it-first v up front buyer.** Unlike the FTC, the DOJ generally does not insist that the parties identify the buyer up front and, further, is amenable to divestitures arranged independently by the parties that do not require entry of a formal consent decree (the "fix-it-first" approach). The DOJ believes it has no power to review and block a transaction different from the one (post-"fix") that the parties have ultimately agreed. Also, if the parties have not already "fixed" the transaction and must find a buyer at a later date, the DOJ tends to be more comfortable than the FTC that it can vet appropriate buyers after entering a consent decree. The FTC, in contrast, strongly disfavours letting the parties fix their own transaction and increasingly insists that they not only submit to a consent order, but also identify the buyer before issuing the order, so as to maintain the greatest control over the divestiture process.
- **Divestiture agreement.** The staff will closely review the purchase agreement between the parties and the buyer of the assets to be divested to make sure that the agreement:
 - conveys all assets required to be divested; and
 - contains no terms inconsistent with the consent order or its objectives.

The staff's early review of the purchase agreement is key to avoiding delays in the process. It therefore may be useful to provide the staff with a draft agreement as soon as practicable. As part of their review of the divestiture agreement, the staff may work closely with, and request information from, the buyer. Third party consents and approvals (such as a supplier's consent to the transfer of a supply contract) must be obtained before the divestiture agreement can be approved. Again, this is an issue that is best addressed as early in the process as possible, to avoid unnecessary delay.

- **Additional provisions in the consent order.** When the divestiture is not of a complete standalone business unit, "gap filler" or transitional assistance may be needed to help the buyer compete effectively. For example, the parties can be required to supply certain products to the buyer until the buyer, can manufacture or produce the products on its own. Concerns regarding the need for continued relationships were identified in the Divestiture Study and, if continuing obligations between the parties and the buyer are required by the consent order, the staff will likely recommend that an independent third party monitors compliance with the order.
- **Orders to hold separate or maintain assets.** If there is a concern that the assets will suffer competitive harm or will diminish in competitive strength during the period before their divestiture, both enforcement agencies will insist on an order to hold separate and/or maintain the assets. A hold separate order requires the parties to maintain the assets to be divested (and possibly other assets as well) as a separate entity and further requires that the parties provide any necessary services to the business, such as supplying raw materials or internal accounting services. Even when there is little concern about competitive harm in the interim, the staff commonly requires an order to maintain the assets pending divestiture, to ensure that their value is not diminished. Orders to hold separate and/or maintain assets are

accompanied by the appointment of an independent third party to oversee compliance with the order.

- **Divestiture applications.** If the consent decree requires a post-order divestiture, the parties will be required to divest the assets within a certain time, to a buyer and in a manner that is acceptable to the staff. The parties have the burden of showing that the divestiture satisfies the conditions of the order. The application for approval of the divestiture must contain sufficient facts and documents to satisfy the parties' burden, and typically includes:
 - recent financial statements of the buyer;
 - an account of recent transactions between the parties and the proposed buyer;
 - business plans or other strategic documents demonstrating how the buyer will use the assets; and
 - an analysis of how the divestiture will maintain or restore competition in the market.

As the parties are required to consummate the divestiture within a specified time limit, the mere act of filing for approval of the divestiture does not satisfy the parties' obligation and the parties will be in violation of the consent order if the divestiture is not timely consummated. Often, the consent order will contain a provision permitting the FTC or the DOJ to appoint a trustee to divest the assets if the parties fail to do so within the given time period.

- **Timing.** Timing can be critical when negotiating remedies. Complicated divestitures require time for the agencies to analyse the proposed divestiture. Both agencies must follow internal procedures when considering a proposal that lengthens the time before approval of the consent decree. In addition to the internal management review that both agencies require, the agencies' top decision makers (the FTC's five Commissioners and the DOJ's Assistant Attorney General) must review and approve a proposed consent decree, which can take two weeks or longer if they request additional information from the staff or the parties.

DISGORGEMENT IN THE US

Although disgorgement (forcing a party to return wrongfully-obtained profits to injured parties) is commonly used in consumer protection cases, the FTC has very rarely sought disgorgement of unlawful profits in anti-trust cases. However, in December 2001, the FTC settled a case against the Hearst Trust and related entities (*FTC v The Hearst Trust, No. 1:01CV00734(TJP) (DDC 9 November 2001)*) with an order that included disgorgement of US\$19 million (then about EUR21 million) of profits won after an allegedly illegal merger. The unprecedented decision sparked considerable controversy, including dissenting statements from two of the five Commissioners. Since then, the FTC solicited public comment regarding the propriety of disgorgement to remedy competition cases generally, including mergers, and in July 2003 issued a formal policy statement setting out when disgorgement is appropriate (*Policy Statement on Monetary Equitable Remedies in Competition Cases*) (Policy Statement) (see www.ftc.gov/os/2003/07/d disgorgementfrn.htm).



Hearst

Hearst involved allegations of particularly egregious conduct. The target, Medi-Span, maintained a database used by doctors, pharmacies and hospitals to obtain information about drug prices, drug effects, drug interactions and eligibility for drugs under certain payment plans. First DataBank, a subsidiary of Hearst, owns the only other similar, widely used database. In December 1997, Hearst and Medi-Span filed pre-merger notification forms indicating Hearst's intent to acquire the Medi-Span business. The acquisition was completed in January 1998, following the expiration of the 30-day HSR Act waiting period.

After the acquisition, prices rose dramatically and customers complained. In December 1999, the FTC launched an investigation. Through compulsory process, the FTC obtained from Hearst several high-level corporate documents that evaluated the Medi-Span acquisition and its effect on competition. Those documents were not disclosed in Hearst's pre-merger filing, as required by the HSR Act.

As a result, the FTC sued the Hearst entities involved in federal court in April 2001 alleging a violation of the HSR Act and that the acquisition itself created an illegal monopoly in the sale of integratable drug information databases. A settlement was reached in November 2001 which required Hearst to divest the Medi-Span business and pay US\$19 million (then about EUR21 million) into an escrow account (to be distributed to eligible parties, including private claimants in related litigation) as disgorgement of unlawful profits.

The settlement was approved by the FTC despite Commissioner Leary's dissent from the part of the order requiring disgorgement. Although Commissioner Leary refused to say that disgorgement was never appropriate, he believed that in this case disgorgement was "unnecessary, if not affirmatively harmful," because here the disgorged profits would be used to offset existing private damages claims (see www.ftc.gov/os/2001/12/learystate.htm). Commissioner Swindle also observed that the "months-long pursuit of disgorgement has yielded a monetary recovery that adds no real value to the private remedy" (see www.ftc.gov/os/2001/12/swindlestate.htm).

To get a better understanding of the issues, the FTC sought public comments on the factors it should consider in applying disgorgement remedies. Several parties, including the Section of Antitrust Law of the American Bar Association, filed extensive comments (see www.abanet.org/antitrust/comments/2002/disgorge.pdf). The Policy Statement, issued in July 2003, reaffirmed the FTC majority's view in *Hearst* that disgorgement can be appropriate in competition cases. It also set out the following three factors for the FTC to consider:

- The FTC will typically seek monetary relief only where the underlying violation is clear.
- There must be a reasonable basis for calculating the amount of a remedial payment.
- The FTC will consider the value of seeking monetary relief in light of any other remedies available in the matter, including private actions and criminal proceedings.

The Policy Statement did not specifically discuss mergers, but did refer to *Hearst* as an example of a clear violation of both the Clayton Act's substantive merger standard and the HSR Act's notification procedures.

The FTC has not sought disgorgement in any merger cases since *Hearst*, but the Policy Statement confirms the continued vitality of the remedy in competition cases generally and appears to leave scope for using disgorgement in appropriate merger cases as well.

MERGER REFORM IN THE EU

The EU's effort to modernise its competition laws culminated in May 2004 in the entry into force of a reformed ECMR (*Council Regulation (EC) No. 139/2004*) along with a package of implementing regulations, enforcement guidelines and staff reforms (see http://europa.eu.int/comm/competition/publications/special/3_merger.pdf). The reforms included changes to:

- The substantive merger standard.
- The Commission's jurisdiction, particularly in relation to referrals from and to member states.
- Various procedural elements including timing of the various stages of review.

New guidelines were issued explaining and, to a limited extent, altering the Commission's analysis of horizontal mergers and, separately, setting out best practices for Commission staff to follow during merger reviews. Most of these reforms concern issues beyond the scope of this chapter and none purport to alter the Commission's past policies regarding remedies, but certain changes will have an effect on the process and, therefore, tactics of negotiating undertakings with the Commission to remedy competition concerns.

In brief, the reformed ECMR prohibits transactions that would "significantly impede effective competition, ... in particular by the creation or strengthening of a dominant position." Transactions meeting the ECMR's turnover thresholds, which were not changed by the reforms, must be notified by submitting a Form CO to the Commission's Merger Task Force. The new ECMR abolished the seven-day filing deadline and now merely prohibits the closing of the transaction until after clearance from the Commission, which continues to be subject to a binding timetable in the new ECMR.

Timetable for review. The first set of changes affecting merger remedies concerns this timetable, which was changed by the new ECMR and, in some respects, made more flexible. Under the revised timetable, the Commission reviews merger filings in two stages:

- **Phase I.** In Phase I, the Commission reviews the initial Form CO submitted by the merging parties. Form CO requires a significant amount of information about the parties and the proposed transaction (more than is required under the pre-merger notification requirements of the HSR Act). Under the Commission's Implementing Regulation (*Commission Regulation (EC) No 802/2004*), parties wanting to settle before an in-depth investigation must submit their remedial proposal within 20 days after notification. The Commission

must make a decision to initiate a full proceeding within 25 working days of receiving the filing. This initial deadline may, however, be extended by an additional ten working days if the parties offered remedial undertakings or a member state requests the transaction to be referred to it.

- **Phase II.** Phase II involves a more thorough investigation of the proposed transaction to determine if the concentration is compatible with the common market. This stage of the investigation can (and often does) last up to 90 days. Parties seeking to settle the case must submit proposed remedies within 65 days after initiation of Phase II. If they do so more than 54 days after initiation, then the total time for Phase II is extended by an additional 15 working days. Finally, and perhaps most importantly, the new timetable allows the parties, or the Commission with the parties' consent, to "stop the clock" and extended the total time by an additional 20 working days on request.

One of the complaints about the old ECMR's rigid time schedule was that the Commission staff frequently could not adequately consider proposed remedies and therefore felt compelled to proceed. The new schedule explicitly builds in flexibility for the Commission to take additional time to review proposed remedies at two stages of the process.

The reform package's Best Practices on the conduct of EC merger control proceedings (Best Practices) also have implications for negotiating remedies (see http://europa.eu.int/comm/competition/mergers/legislation/regulation/best_practices.pdf). No substantive policy changes are included, as the Best Practices specifically reaffirm the Commission's Notice on Remedies (*Commission Notice on remedies acceptable under Council Regulation 4064/89 and under Commission Regulation 447/98*) (Notice) (see below) and its statement of Best Practice Guidelines on Divestiture Commitments (*Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate Under the EC Merger Regulation*) (Best Practice Guidelines) (see below). Procedurally, however, the Best Practices elaborate on past practices and formally establish a series of up to five "state of play" meetings of the parties with the review staff. These meetings are intended to cover the full range of issues involved in merger review, but specifically also discussions about remedies. The first of the meetings should now occur within 15 days of the Phase I review. Subsequent meetings should occur:

- Within two weeks of initiating Phase II proceedings;
- Before the issuance of the Commission's formal Statement of Objections, following the reply and oral hearing; and
- Before the Commission's Advisory Committee (of member state representatives) meets.

The last two meetings are intended to serve primarily as vehicles to discuss remedy proposals.

THE COMMISSION'S NOTICE ON REMEDIES

The Commission's substantive policy regarding merger remedies was not changed by the merger reform. The ECMR authorises the Commission to declare a concentration compatible with the common market after the parties' modification of the deal. Much

like the US enforcement authorities, the Commission has struggled to find equitable and effective remedies for mergers that threaten to harm competition. Its policy on remedies has evolved significantly in recent years and has clearly been influenced both by the conclusions reached in the FTC's Divestiture Study and by a desire to improve the transparency and predictability of the merger remedy process. Divestiture remains a common solution to merger problems and the Commission has increasingly required many of the same commitments extracted by US authorities, such as:

- Favouring divestitures of ongoing businesses.
- Requiring crown jewel provisions and/or up front buyers.
- Setting shorter divestiture periods.

To clarify its analytical approach to merger remedies, the Commission issued its Notice to provide substantive and procedural guidance for practitioners and interested parties (see http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_068/c_06820010302en00030011.pdf). The Notice is comparable to the guidelines issued by US anti-trust authorities. It is a significant step towards the Commission's goal of implementing a transparent, cohesive and predictable regulatory scheme for merger remedies - a goal confirmed by the establishment in April 2001 of a unit within the Merger Task Force dedicated to advising on the acceptability and implementation of merger remedies.

While acknowledging that each transaction must be assessed on an individual basis, the Notice establishes several general principles governing its approach to remedies, such as:

- The Commission prefers structural remedies (such as the sale of a subsidiary) over behavioural remedies that may not be suitable to ensure the competitiveness of the market structure.
- The remedy must be able to restore effective competition in the common market on a permanent basis.
- The remedy must be capable of being implemented effectively within a short period of time and without additional monitoring or oversight by the Commission. The commitments must therefore contain specific details and procedures regarding their implementation to permit the Commission to evaluate them fully.

Divestiture issues

Although the Notice recognises that circumstances may warrant terminating exclusive agreements or requiring access to infrastructure or key technology, the remedy of preference is divestiture. The primary concern with divestiture is making sure that the divested assets, when in the hands of a suitable purchaser, can compete with the merged entity on a lasting basis. Typically, a viable business is an existing one that can operate on a standalone basis, without maintaining ties to the merging parties. The Commission may require divestiture of a business of the acquiring firm, particularly in hostile bid situations where there is more limited knowledge of the business to be acquired.

The Commission may also require a divestiture of activities in related markets in which there are no competitive concerns, if this is the only possible way of creating or enhancing an effective competitor in the affected markets. This occurred in *TotalFina/Elf Aquitaine* (Case No. COMP/M.1628, Commission Decision, 9 February 2000), in which the parties' initial proposal to sell portions of their assets in the liquid petroleum gas industry was deemed neither adequate nor precise enough to allay all serious doubts about the transaction. The Commission subsequently required the divestiture of a full subsidiary, in its approval of the merger in February 2000.

In certain circumstances, the Commission's recent practice has been to require crown jewel divestiture provisions. Like the US, these provisions require that, if the sale of the preferred divestiture asset does not occur by a specific deadline, the Commission will require the divestiture of a more valuable asset or group of assets. The Notice explains that alternative divestiture commitments, such as crown jewel provisions, may be required if the implementation of the parties' preferred divestiture option is uncertain or difficult, due to such factors as third party pre-emption rights or other uncertainties as to the transferability of key contracts, intellectual property rights or employees. While the Commission before the adoption of the Notice accepted alternative divestitures, post-Notice cases requiring crown jewel provisions include *Industri Kapital/Dyno* (Case No. COMP/M.2396, Commission Decision, 11 May 2001) and *Nestle/Ralston Purina* (Case No. COMP/M.2337, Commission Decision, 27 July 2001).

Suitability of purchaser

As a condition for approval, the Commission will require the parties to transfer the viable business to a suitable purchaser within a specific deadline. The Commission's criteria for determining the suitability of a purchaser require the purchaser to be "a viable existing or potential competitor, independent of and unconnected to the parties, possessing the financial resources, proven expertise and having the incentive to maintain and develop the divested business as an active competitive force in competition with the parties." This provision can greatly impact on the parties' efforts to obtain clearance. In *TotalFina/Elf Aquitaine*, for example, the Commission initially rejected a proposed list of purchasers for the divested assets on the grounds that they would not have the necessary incentive to maintain sufficient competition in the market.

If the viability of the divestiture package depends largely on the identity of the purchaser, the Commission will require the parties to enter into a binding agreement with an up front buyer approved by the Commission, before completing the notified transaction. This practice is similar to the FTC's approach. In *Bosch/Rexroth* (Case No. COMP/M.2060, Commission Decision, 4 December 2000), the Commission found that, if Bosch had divested the business to a weak buyer (such as one with limited resources or expertise), over time it could have won back lost market share. The Commission decided that the deal could not proceed until a suitable up front buyer had been found. An up front buyer was also required in *The Post Office/TGP/SPPL* (Case No. COMP/M.1915, Commission Decision, 13 March 2001).

Additional remedial obligations

The Commission may place several additional requirements on parties to ensure the viability of the divested business. Those obligations may include appointing a hold separate trustee, who can ensure that the merging entity fulfils its duty to maintain the economic viability and competitiveness of the divested assets until they are sold. The Commission may also appoint a divestiture trustee, who is responsible for overseeing the search for a purchaser for the divested assets and who may be given a mandate to dispose of the divested assets at any price, within a specific deadline and subject to the Commission's approval. The divestiture trustee may be the same entity as the hold separate trustee.

THE COMMISSION'S BEST PRACTICE GUIDELINES FOR DIVESTITURE COMMITMENTS

In May 2003, the Commission published Best Practice Guidelines for Divestiture Commitments in merger cases (see http://europa.eu.int/comm/competition/mergers/legislation/divestiture_commitments/). These include standardised model agreements of divestiture commitments and trustee mandates. These models are intended to help streamline the merger process and improve the transparency and predictability of merger remedy negotiations.

The standard model for divestiture commitments provides that, during the initial divestiture period (typically six months), the parties are solely responsible for finding a suitable buyer for the divested assets. If a suitable buyer is not found during this period, a divestiture trustee will be appointed to dispose of the assets, which should occur within three to six months. When an up front buyer has been proposed, the standard agreement requires the parties to promise not to implement the transaction until a binding agreement has been reached with the prospective buyer and approved by the Commission.

The model divestiture agreement is structured on the assumption that the divested assets can constitute a standalone business entity, including all intellectual property, personnel and other assets necessary to preserve the competitive viability of the assets. This requirement is designed to address the conclusions reached in the FTC's Divestiture Study with regard to the importance of divesting ongoing businesses. Provisions exist requiring, in certain cases, that the parties provide transitional assistance to the buyer, if such assistance is necessary to maintain the economic viability and competitiveness of the divested business. The standard commitments agreement also has hold separate provisions to preserve the value of the assets to be divested, as well as "ring fencing" provisions designed to ensure that, post-divestiture, the parties do not have improper access to competitively sensitive information of the divested business. The parties are further required to provide monthly progress reports to the divestiture trustee detailing the status of negotiations with potential purchasers.

The model divestiture agreement also has provisions designed to make sure that the divested business is sold to a suitable purchaser who will maintain the competitive viability of the divested assets. Like the US guidelines, the purchaser is required to be independent of the parties, and have the financial resources, expertise and incentive to maintain and develop the divested assets as a viable and active competitive force in

competition with the parties and other competitors. Financial investors seeking approval for the purchase of divested assets can demonstrate the necessary managerial capabilities and expertise through financing a management buyout.

Trustee provisions are also included in the model divestiture agreement. These provisions require the parties to appoint a monitoring trustee who oversees the management of the divested business during the hold separate period and the divestiture itself. During the extended divestiture period, the divestiture trustee is responsible for selling the divested business on appropriate terms and conditions. Detailed requirements for both the monitoring and divestiture trustee are set out in the standard model trustee mandate.

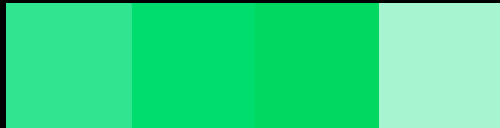
CONTINUED CONVERGENCE

The US and EU anti-trust enforcements agencies continue to converge in relation to remedying anti-competitive mergers. In

the US, the FTC continues to assert power to order not only divestiture, but also, in extreme cases, disgorgement of excess profits caused by an illegal merger. The DOJ, meanwhile, continues to disagree with the FTC’s view that all mergers requiring corrective action must be subjected to consent decrees and that up front buyers should generally be required. In most other respects, however, the two US agencies broadly share similar priorities and requirements when considering proposed merger remedies. The Commission shares most, if not all, of these priorities and requirements as well, reflecting significant influence from the FTC’s Divestiture Study. The recent reform of EC merger legislation and policy has not changed the Commission’s substantive approach towards remedies, but has introduced some scheduling flexibility into the mandatory review timetable, including the very important opportunity to “stop the clock” during Phase II to give the Commission and the parties sufficient time to work out a solution.

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