Remedies in merger cases – a monitoring trustee's perspective

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Remedies in competition law – legal basis in EU and UK law

EU law – European Commission ("Commission")

- Regulation 139/2004 ("MR")
- Regulation 802/2004 (sets out Form RM)
- Commission notice on remedies acceptable under Merger Regulation ("RN")
- Best Practice Guidelines for Divestiture Commitments and the Trustee Mandate

UK law – Competition and Markets Authority ("CMA")

- Enterprise Act 2002 ("EA 2002")
- CMA Merger Remedies Guidance (CMA87, "RG")
- Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders (CMA11)
- Merger and Market remedies - guidance on reporting, investigation and enforcement of potential breaches (CMA123con)
- Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2revised)

Remedies in competition law – timing in EU and UK law

EU law

- Phase I: within not more than 20 WD from the date of receipt of the notification (RN, para 78)
- Phase II: within not more than 65 WD from the day on which proceedings were initiated (RN, para 88)

UK law

- Phase 1: within 5 WD after receiving the CMA's reasons for its SLC decision (undertakings in lieu = UILs, S73A(1) EA 2002)(RG, para 4.3)
- Phase 2: until after the response hearing (final undertakings, RG, para 4.63)

Remedies in merger cases – basic conditions for acceptable commitments – EU

The Commission has to take into account the following criteria when assessing a proposed remedy (RN, paras 9-14):

- whether it is capable of eliminating the competition concerns entirely and thereby preventing a significant impediment to effective competition (SIEC) taking into account:
  - all relevant factors relating to the remedy, including the type, scale and scope;
  - structure and particular characteristics of the relevant market, including the position of the parties and other players in the market;
- whether it is comprehensive and effective from all points of view;
- whether it is capable of being implemented effectively within a short period of time and, if required, monitored; and
- in addition, whether it is proportionate to the competition problem (MR, fn 30).

Remedies in merger cases – basic conditions for acceptable commitments – UK

The CMA has to take into account the following criteria when assessing proposed UILs (RG, paras 3.27-3.33):

- whether the remedy proposed would act in a "*clear-cut manner*" to remove all competition concerns meeting the test for reference caused by the merger (SLC), in particular:
  - whether there are any doubts about its overall effectiveness,
  - whether it comprehensively addresses the SLC,
  - whether it is capable of implementation within the constraints of the Phase 1 timetable,
  - whether it preserves any relevant customer benefits (RCBs).

Remedies in merger cases – market testing

Commission

The Commission consults with the competition authorities of the affected member states or third countries and third parties (RN, para 80). These are customers, suppliers and competitors as identified in the merger filing and any other third parties with an interest in the case.

The Commission sends out a non-confidential summary of the proposed remedies together with a questionnaire addressed to interested third parties. Unlike market tests in competition investigations, market testing of merger remedies is not a public process and the Commission does not publish a general invitation to comment. After the responses have been received, the Commission often has calls or meetings with interested third parties in order to clarify responses.

- Case COMP M.8948 – *Spirit/Asco* (2019) – three sets of commitments offered

CMA

The CMA publishes the provisionally agreed UILs and invites comments from third parties. The CMA is required by the EA 2002 to give third parties a period of not less than 15 calendar days in which to respond with comments on the purpose and effect of the proposed UILs (RG, para 4.27).

Remedies in merger cases – main types of remedies

- **structural remedies** (permanent changes in the structure of the markets concerned to allow the strengthening of an existing competitor/emergence of a new competitor, default option for the Commission/CMA, usually used for horizontal mergers, relatively easy to implement, no long-term monitoring required)
  - ➢ divestments of business
  - ➢ divestments of shares
  - ➢ termination of agreements
- **behavioural remedies** (obligations pertaining to the ongoing conduct of the merging parties following a merger, accepted exceptionally in specific circumstances, long-term monitoring required, most appropriate in digital markets)
- **“hybrid” remedies**
  - ➢ access remedies

Remedies in merger cases – divestment of business (1)

Commission

Possible components of the divested business (RN, para 27):

- tangible assets, e.g. research and development (R&D) facilities, production and distribution facilities, sales and marketing activities;
- intangible assets, e.g. intellectual property rights, know-how and goodwill;
- licences, permits and authorisations granted by governmental organisations;
- contracts, leases and arrangements with suppliers and customers;
- key personnel essential for the viability and competitiveness of the business.

Requirements regarding the divested activities in the EU (RN, para 23):

- comprises a viable business (=capable of operating on a stand-alone basis) to be sold to a suitable purchaser;
- capable of competing with the merged entity on a lasting basis;
- divested as a going concern (=having resources to continue operating in foreseeable future).

Remedies in merger cases – divestment of business (2)

Possible forms of the divestment of business:

- pre-existing company or business of the purchaser or the target
- assets carved our from a pre-existing company or business
  - simple carve-out
  - reversed carve-out
  - crown jewels carve-out

CMA

Approach to identifying a divestiture package in the UK (RG, paras 5.6-5.7):

- divestiture of all or part of the acquired business taken as a starting point.
- the smallest viable, stand-alone business that can compete successfully on an ongoing basis sought.

Remedies in merger cases – divestment remedies – suitable purchaser

Commission - requirements regarding the purchaser (*suitable purchaser* – RN, paras 48-49):

- independence of the merging parties;
- capability (financial resources and expertise); and
- no competitive or regulatory concerns or risks of delay in implementation.

CMA – additional requirement regarding the purchaser (RG, paras 4.39-4.41 and 5.20-5.27)

- commitment

Usually an existing competitor, but a new entrant possible.

In standard divestment cases, the parties are responsible for finding a suitable purchaser within a time period agreed with the Commission/CMA, usually given 3-6 months (**EU: first divestiture period, UK: initial divestiture period**). If the parties are not successful, a divestiture trustee is given an irrevocable and exclusive mandate to divest the business at no minimum price ("best available price" in the UK), usually within a further period of 3 months (**EU: divestiture trustee period, UK: trustee's divestiture period,** RN, paras 97-98 and RG, para 5.43).

Remedies in merger cases – divestment remedies – transfers (1)

[A] Transfer within a fixed time-limit (standard divestment)

Most popular in practice, used where the Commission/CMA believe it would be not difficult to find a suitable purchaser.

Commission: (1) Clearance decision –> (2) Main transaction completion and implementation –> (3) Remedy agreement signed –> (4) Approval of the remedy agreement and purchaser

- Case COMP/M.8870 – *E.ON/Innogy* (2019)

Having obtained the clearance decision, the merging parties may close the main transaction but are under an obligation to undertake the divestment within a short period of time. Failing this, the clearance decision may ultimately be revoked and the transaction may need to be unwound.

CMA: (1) Decision accepting UIL (Phase 1)/decision accepting final undertakings or imposing a final order (Phase 2) –> *(2) Main transaction completion and implementation* –> (3) Remedy agreement signed

- Case ME/6888/20 - *ION Markets Investment Group/Broadway Technology Holdings* (2020)

No prohibition on closing in the UK.

Remedies in merger cases – divestment remedies – transfers (2)

[B] Up-front buyer = sale to a specific *suitable purchaser* named in the clearance decision, the merging parties cannot close before the remedy agreement has been approved in the second decision

Used where the Commission do not have certainty that the parties will manage to divest within a short period of time to a suitable purchaser.

Commission: (1) Purchaser found –> (2) Clearance decision + Approval of the purchaser –> (3) Remedy agreement signed –> (4) Approval of the remedy agreement –> (5) Main transaction completion and implementation

- Case COMP/M.6570 - *UPS/TNT* (2013) – no satisfactory up-front buyer, transaction blocked
- Case COMP/M.8084 - *Bayer/Monsanto* (2018)

CMA: (1) Purchaser found –> (2) Decision accepting UIL (Phase 1)/decision accepting final undertakings or imposing a final order (Phase 2) + Approval of the purchaser –> (3) Remedy agreement signed –> (4) Main transaction completion and implementation

- Case ME/6524/15 – *Muller/Dairy Crest* (2015)
- Case ME/6728-17 – *Ladbrokes/Coral* (2018)

Remedies in merger cases – divestment remedies – transfers (3)

[C] 'Fix-it first' = legally binding sale agreement with a specific "suitable purchaser" required before the clearance decision

Fix-it-first solutions are rare although becoming more common. They are particularly appropriate where the effectiveness of a remedy will depend on the identity of and the agreement with the purchaser.

Commission: (1) Remedy agreement signed –> (2) Clearance decision + Approval of the purchaser and remedy agreement –> (3) Main transaction completion and implementation

- Case COMP/M.7758 – *Hutchison/VimpelCom JV* (2016)

The Commission approves the agreement with that purchaser in its clearance decision and no further approval is required post clearance.

Remedies in merger cases – divestment remedies – obligations in the interim period

Commission

Obligations of the parties in the interim period, i.e. between the clearance decision and the transfer to the purchaser (RN, paras 108-112):

- preservation of viability, marketability and competitiveness,
- non-solicitation,
- hold-separate obligations,
- ring-fencing,
- appointing a hold-separate manager (HSM).

CMA

Initial enforcement orders at Phase 1 continuing into Phase 2, and interim undertakings or interim orders at Phase 2 (RG, para 5.35).

Remedies in merger cases – structural remedies – divestments of shareholdings

Divestments of shareholdings and related rights

- Case COMP/M.8401 – *Johnson & Johnson/Actelion* (2017) – limiting shareholding in a subsidiary to 10%, no board nominations
- Case COMP/M.8465 – *Vivendi/Telecom Italia* (2017) – selling a stake in a subsidiary
- Case COMP/M.9014 – *PKN Orlen/Grupa Lotos* (2020) – divesting a 30% stake in the share capital of the target company's refinery along with governance rights

Divestments of rights arising from agreements

- Case COMP/M.6541 – *Glencore/Xstrata* (2012) – terminating an agreement

Remedies in merger cases – behavioural remedies

Classic behavioural remedies comprise an obligation on the merged entity to do or not to do something.

Commission

The Commission can accept commitments other than divestitures only in the circumstances where they are "at least equivalent" in their effectiveness to divestitures (RN, para 61). As a result, behavioural remedies are rarely accepted on their own and usually supplement other remedies. This appears to be changing (vide the speech by Commissioner Margarete Vestager digital markets from July 2019).

CMA

The CMA can use behavioural remedies as the primary source of remedial action only where (RG, para 7.2):

(a) structural remedies are not feasible; or

(b) the SLC is expected to have a short duration; or

(c) at Phase 2, behavioural measures will preserve substantial RCBs that would be largely removed by structural measures.

Remedies in merger cases – behavioural remedies – interoperability remedies and changes to long-term contracts

Interoperability remedies = obligations to ensure that IT systems remain interoperable with the products of competitors (RN, para 65)

- Case COMP/M.8124 – *Microsoft/LinkedIn* (2016) – interoperability of Microsoft Office with competing social networks
- Case COMP/M.8306 – *Qualcomm/NXP Semiconductors* (2018) – interoperability of Qualcomm's chipsets and NXP's NFC and SE chips with products of competitors
- Case COMP/M.9660 – *Google/Fitbit* (2020) – interoperability of wearable devices with Google's Android operating system for smartphones

Personal data remedies

- Case COMP/M.9660 – *Google/Fitbit* (2020) – separation of Fitbit's user data

Changes to contracts can be considered appropriate to eliminate competition concerns. This is, in particular, the case for exclusive long-term supply agreements (RN, paras 67-68)

- Case COMP/M.6458 – *Universal Music Group/EMI Music* (2012) – most favoured nation (MFN) clause

Remedies in merger cases – access remedies

Access remedies = obligations to grant access to key infrastructure, networks, technology and essential inputs on a non-discriminatory and transparent basis to eliminate foreclosure concerns (RN, paras 62-64 and 66).

Traditionally common in sectors involving incumbent companies, e.g. energy, aviation, telecommunications.

- Case COMP/M.3596 – *E.ON/MOL* (2005) – gas release programme in Hungary
- Case COMP/M.6447 – *IAG/bmi* (2012) – landing and take-off slots at London Heathrow
- Case COMP/M.8864 – *Vodafone/Certain Liberty Global Assets* (2019) – wholesale cable broadband access in Germany

Widely applied to new technologies, such as:

- Case ME/6638/16 – *Mastercard/VocaLink* (2017) – access to payment systems network in the UK
- Case COMP/M.8665 – *Discovery/Scripps* (2018) – access to TV channels in Poland

Remedies in merger cases – monitoring trustee - EU

Commission

RN describes a monitoring trustee (trustee) as the Commission's "eyes and ears" (RN, para 118). The trustee is appointed by the parties (mandate) and approved of by the Commission in the most complicated cases, the need to appoint the trustee is assessed on a case-by-case basis.

The trustee shall be independent of the parties, possess the necessary qualifications to carry out its mandate, and shall not be, or become, exposed to the conflict of interests (RN, para 124).

The trustee's role is to oversee the implementation of the commitments and the parties' compliance. Main tasks (RN, p 119):

- in the interim period, to oversee the safeguards for the divestment business;
- in carve-out divestments, to monitor the splitting of assets and the allocation of the personnel, and the replication of assets and functions in the business previously provided by the parties;
- to oversee the parties' efforts to find a potential purchaser and to transfer the business;
- to act as a contact point for any requests by third parties; and
- to report on these issues to the Commission in periodic compliance reports.

In divestment cases, the trustee can act as a divestiture trustee (RN, para 123).

The trustee is usually supported by technical experts.

Remedies in merger cases – monitoring trustee - UK

CMA

The CMA may approve of appointment of a trustee at Phase 1 or Phase 2, the need assessed on a case-by-case basis (RG, para 4.42). The trustee is more likely to be appointed where (RG, para 4.44): the divestiture package is not an existing business, significant assets are to be excluded from the existing business, significant transitional arrangements are required, and/or purchaser risks are particularly high.

The trustee's main tasks are to (RG, paras 4.42-4.43 and 5.37-5.38):

- in divestment cases, oversee and report to the CMA on the divestiture process,
- review the separation of businesses and ensure the divestiture package is in line with the proposed remedy,
- in the interim period, oversee the parties' compliance and the performance of the HSM.

The trustee can perform the role of a divestiture trustee (RG, para 5.44).

Remedies in merger cases – multi-jurisdictional remedies (1)

Trustee can be appointed in multiple jurisdictions.

Risk of divergent outcomes in various jurisdictions resulting from the regulators' perspectives. The Commission will focus on the effects of the merger in the EU, whereas the US regulators will focus on the effects of the merger in the US.

Cooperation agreements between competition regulators

- EU: US (agreements from 1995 and 1998, *Best Practices on Cooperation in Merger Investigations* updated in 2011), China (*Practical Guidance for Merger Cooperation* from 2015), and other major jurisdictions
- UK: Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (UK, US, Canada, Australia, New Zealand from October 2020)

EU-US Best Practices

- Enhanced cooperation through regular consultations, coordination of investigation timetables and sharing of information. Confidentiality waivers from the parties should be requested, joint interviews with executives of the parties and joint conferences with the parties should be encouraged (para 7).
- No guarantee of reaching similar conclusions. The regulators "*should strive to ensure that the remedies they accept do not impose inconsistent obligations on the merging parties*" (para 14). Subject to confidentiality undertakings, the regulators should share draft remedy proposals (para 15).

Remedies in merger cases – multi-jurisdictional remedies (2)

Consistent decisions

- Case COMP/M.4141 – *Linde/BOC* (2006)
- Case COMP/M.4726 – *Thomson Corporation/Reuters Group* (2008)
- Case COMP/M.5669 – *Cisco/Tandberg* (2010)

Divergent decisions

Clearance/remedies:

- Case COMP/M.6214 – *Seagate/HDD Business of Samsung* (2011)
- Case ME/6448/14 – *Reckitt Benckiser/K-Y brand (Johnson & Johnson)* (2015)

Remedies/prohibition:

- Case COMP/M.7555 – *Staples/Office Depot* (2016)
- Case COMP/M.8306 – *Qualcomm/NXP Semiconductors* (2018)

Thank you for your attention

Please stay in touch: fryderyk.hoffmann@mazars.co.uk