MERGERS (ALL INDUSTRIES): COMMISSION GUIDELINES

Subject: Mergers
Undertakings by parties
Divestiture
Trustee Mandates

Industry: All industries

Source: Commission Statement IP/03/614, dated 2 May 2003; Commission's Explanatory Note; Commission Guidelines on Divestiture Commitments and on Trustee Mandates

(Note. In recent reports on cases in which the parties to mergers and acquisitions have offered undertakings, often involving some form of divestiture, making it easier for the Commission to approve the proposed operations, there has been some discussion of the criteria governing the form and content of undertakings of this kind. The Commission has now codified these criteria in the form of guidelines. The Explanatory Note is set out below; the full texts of the Guidelines are on the Internet (see page 104). The Commission texts use the word, "commitments", when the word "undertakings" would be more appropriate in English. The Commission may have felt that this could be confused with the use of the word "undertakings" in the sense of companies and other legal entities.

The guidelines containing standard texts for divestiture commitments and trustee mandates are designed to help merging parties and their legal representatives in their dealings with the Commission and are designed to enhance efficiency and transparency of merger proceedings. Under the Merger Regulation companies can offer commitments in order to enable the Commission to clear a merger or an acquisition which otherwise would create or strengthen a dominant position. Timing is crucial under the legally-binding timetable set in the Regulation when merging parties reach the stage of offering commitments to the Commission. To increase efficiency, consistency and transparency of the negotiation and implementation of remedies, the Commission has developed a Standard Model for Divestiture Commitments and a Standard Model for Trustee Mandates under the Merger Regulation. These two standard texts will serve as best practice guidelines for the negotiation of remedies under the Merger Regulation.

These best practice guidelines will streamline the negotiation of the terms and conditions for commitments and trustee mandates and will relieve the merging parties of having to negotiate terms and conditions for such commitments from scratch under tight time constraints. The Standard Models are neither intended to provide an exhaustive coverage of all issues that may become relevant in a merger case, nor are they legally binding upon parties. Rather, they contain all standard provisions that should be included in divestiture commitments and trustee mandates and leave the flexibility to adapt the texts to the case in question. The standard models rely upon divestiture commitments as the common form of

remedy in merger cases. These commitments are thus most suited for a standard texts. However, it should be emphasized that the Commission will consider the acceptability of other types of commitments in appropriate circumstances.

The standard models are based upon the experience the Commission has gained in fashioning remedies in the last 12 years since the implementation of the Merger Regulation and on the Commission's remedies policy as set out in the Notice on Remedies, adopted in December 2000. They also take account of the results of the consultation for the draft model texts launched by the Commission last year. The Commission received a considerable number of positive replies from National Competition Authorities, the business and legal community as well as from trustees. The respondents acknowledged that the standard models would expedite the proceedings and allow the merging parties to concentrate more on the actual substance and implementation of commitments. Following the consultation, the standard texts were substantially amended.

The Standard Model for Divestiture Commitments describes all requirements for achieving full and effective compliance with divestiture commitments. More specifically, it is designed (i) to describe clearly the divestiture procedure, the business to be divested, and the obligations of the parties in relation to the divestment business for the interim period until divestiture has been completed and (ii) to set out the qualifications which the Commission requires for an acceptable purchaser for the divested business. The Standard Models for Trustee Mandates sets out the role and function of both types of trustees referred to in the Standard Commitments, that is the Monitoring and the Divestiture Trustee. It prescribes in detail the role and function of the trustee in the process in order to enable the trustee to expedite compliance with the commitments.

The Commission expects that the standard texts, as well as the explanatory note, will evolve, based on ongoing practice, and will regularly be up-dated, taking into consideration both the developments of the Commission's remedies policy and the experience gained from working with the merging parties and trustees.)

Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and Trustee Mandates

1. The European Commission's model texts for divestiture commitments and trustee mandates are designed to serve as best practice guidelines for notifying parties submitting commitments under the EC Merger Regulation. (Council Regulation EEC/4064/89 of 21 December 1989 on the control of concentrations between undertakings, as amended.) These texts are (1) the model to be used for divestiture commitments (the "Standard Model for Divestiture Commitments" or the "Standard Commitments"); and (2) the model for the mandate of the two types of trustees referred to in the Standard Commitments, that is, the mandate appointing monitoring and divestiture trustees (the "Standard Trustee Mandate").

2. The model texts (the "Standard Models") are based upon the experience the Commission has gained to date in fashioning remedies from previous merger cases and are drafted in line with the remedies policy set out in the Commission's

Notice on Remedies 2 (the "Remedies Notice"). The Standard Models are neither intended to provide an exhaustive coverage of all issues that may become relevant in all cases, nor are they legally binding upon parties in a merger procedure. Rather, they contain the elements for all standard provisions that should be included in commitments and trustee mandates relating to divestitures. In providing a framework for commitments and trustee mandates to be submitted in concrete cases, the Standard Models leave the flexibility to adapt the texts to the specific requirements of the case in question.

3. The Standard Models are designed to apply to all remedy proceedings in both Phase I and Phase II, therefore to all Commission decisions according to Articles 6(2) and 8(2) of the Merger Regulation. The Standard Models deal specifically with divestiture commitments inasmuch as the Commission's Remedies Notice stipulates that divestiture commitments are normally the preferred form of merger remedies; they are also the most common. However, it should be underlined that the Commission will consider the acceptability of other types of commitments in appropriate circumstances, as set out in the Remedies Notice. (See Commission Notice on remedies acceptable under Council Regulation EEC/4064/89 and Regulation EC/447/98.) Individual provisions contained in the Standard Models can be used in cases involving such other types of commitments.

4. Finally, it is expected that the text of these models will evolve, based on ongoing practice, and will be regularly up-dated by the Commission, taking into consideration both the developments of the Commission's remedies policy and the experience gained from working with the merging parties and trustees in future matters.

The Purpose of the Standard Models

5. The Commission recognises that timing is crucial when merging parties reach the remedies stage in merger review procedures, where they offer commitments in order to resolve the Commission's competition concerns in a given case. Through the use of standardised models, the merging parties and the Commission will be relieved of the heavy demands – both in terms of time and resources – that would otherwise be required to negotiate the standard terms and provisions for commitments and trustee mandates under tight time constraints. The use of standardised models will expedite the proceedings and allow the merging parties to concentrate more on the actual substance and implementation of the commitments.

6. The use of the standard models will ensure consistency across cases and will thereby contribute to increasing the level of transparency and legal certainty for the merging parties offering commitments to the Commission.

Overview of the Contents of the Standard Models

7. The Standard Model for Divestiture Commitments sets out all requirements for achieving full and effective compliance with divestiture commitments offered by the merging parties (the "Parties") to obtain a clearance decision. More

specifically, this Model is designed (i) to describe clearly the business to be divested ("Divestment Business"), the divestiture procedure and the obligations of the parties in relation to the Divestment Business for the interim period until divestiture has been completed, (ii) to set out the various responsibilities that the merging parties will thereby have, respectively, to the Commission, the Trustee, and the Divestment Business; and (iii) to enshrine the importance which the Commission places upon requiring an acceptable purchaser for the Divestment Business in order to ensure the viability and competitiveness of the new entity in the market where the divestiture takes place.

8. The Standard Model for Trustee Mandates sets out the role and functions of the Trustee, as provided in the Standard Commitments, in a contractual relationship between the Parties responsible for the divestiture and the Trustee. As the Commitments set out the basis for the responsibilities of the Trustee, the Standard Trustee Mandate has been prepared in conformity with the requirements laid down for the Trustee in the Standard Model for Divestiture Commitments.

9. Although the Standard Trustee Mandate is a bilateral contract between the Parties responsible for the divestiture and the Trustee, this document forms the basis for a tri-partite relationship among the Commission, the Trustee, and the Parties. The relationship between the Parties and the Trustee is not a traditional trusteeship. The Trustee rather benefits from a status which makes it independent from the Parties and which is characterised by the role of the Trustee to monitor (Monitoring Trustee) or even to effectuate (Divestiture Trustee) the Parties' compliance with the commitments. Accordingly, the Parties are not entitled to give instructions to the Trustee, whereas the Commission is allowed to do so. This specific relationship is also confirmed by the fact that the Trustee Mandate requires the Commission's approval.

10. The Standard Trustee Mandate is designed (i) to facilitate the smooth and timely appointment of the Trustee and the approval of the Trustee Mandate; (ii) to clarify the relationship among the Commission, the Trustee, and the Parties; and (iii) to set out the tasks of the Trustee in the process in order to enable the Trustee to expedite compliance with the commitments. Whereas the Standard Trustee Mandate defines the role of a Monitoring and a Divestiture Trustee in one text, they can be assigned to different Trustees in practice.

11. In providing guidance for the interpretation of the Standard Texts, a certain hierarchy is established. The Standard Trustee Mandate should be interpreted in the light of the Standard Commitments, as they lay the foundation for the application of the Trustee Mandate. To the extent that they are attached as conditions and obligations, the commitments are to be interpreted in the light of the respective Commission decision. Moreover, both Standard Texts should be interpreted in the general framework of Community law, in particular in the light of the EC Merger Regulation, and by reference to the Commission's Remedies Notice setting out the Commission's remedies policy.

Description of the Provisions of the Standard Models

12. The most important provisions contained in both Standard Models are briefly set out below.

Standard Model for Divestiture Commitments

13. The Standard Model for Commitments has the following main elements.

14. Section A contains a definitions section.

15. Section B contains the commitment to divest and the definition of the Divestment Business. After spelling out the general obligation to divest the Divestment Business as a going concern, paragraph 1 describes the divestiture procedure, which may take two phases. The Commitments provide that in the first phase (that is, the Divestiture Period), the Parties have the sole responsibility for finding a suitable purchaser for the Divestment Business. If the Parties do not succeed in divesting the business on their own in the Divestiture Period, then a Divestiture Trustee will be appointed with an exclusive mandate to dispose of the Divestment Business at no minimum price, in the Extended Divestiture Period. The individual deadlines are determined in the definitions section. The experience of the Commission has shown that short divestiture periods contribute largely to the success of the divestiture as, otherwise, the Divestment Business will be exposed to an extended period of uncertainty. The Commission will normally consider a period of around 6 months for the Divestiture Period and an additional period of 3 to 6 months for the Extended Divestiture Period as appropriate. These periods may be modified according to the particular requirements of the case in question.

16. The divestiture commitment will take a special form in those cases where the Parties propose an up-front buyer. The Parties commit not to implement the proposed concentration unless and until they have entered into a binding agreement with a purchaser for the Divestment Business, approved by the Commission. The qualification of the buyer are the same as in other divestiture commitments. The up-front buyer concept has been applied in several cases (Cases COMP/M.2060 – *Bosch/Rexroth*; COMP/M.1915 – *The Post Office/TPG/SPPL*; COMP/M.2544 – *Masterfood/Royal Canin*) and will be used in the specific circumstances as described in the Notice (Paragraph 18 of the Remedies Notice). The structure of the divestiture commitment also needs to be adapted in cases of alternative divestitures, in particular "Crown Jewels" structures, i.e. structures in which the Parties commit to divest a very attractive business if they have not divested the originally proposed business until the end of a period fixed in the commitments. The circumstances in which the Commission will accept alternative divestiture commitments are also set out in the Remedies Notice (Paragraphs 22, 23 of the Remedies Notice).

17. The divestiture commitment includes the commitment not to re-acquire direct or indirect influence over the Divestment Business (paragraph 3). This re-acquisition prohibition is limited to ten years after the date of the decision and serves to maintain the structural effects of the Commitments. The Commission

may grant a waiver if the structure of the market has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary to render the concentration compatible with the common market.

18. Section B, together with the Schedule to the Commitments, defines what is included in the Divestment Business. The clear identification of the Divestment Business is of great importance as thereby the scope of the divestiture and of the hold-separate obligations are defined. As set out in the Notice, the Divestment Business is considered to be an existing entity that can operate on a stand-alone-basis (The importance of the divestiture of an on-going business for the success of the remedy has also been underlined by the FTC in a published study entitled *A Study of the Commission's Divestiture Process*, prepared by the Staff of the Bureau of Competition of the Federal Trade Commission, p.10ff.) The Divestment Business is the minimum which is to be divested by the Parties in order to comply with the Commitments. In order to make the package more attractive to buyers, the Parties may add, on their own initiative, other assets (Cf. paragraph 21 of the Remedies Notice). The Divestment Business must include all the assets and personnel necessary to ensure the viability of the divested activities. Whereas this principle is set out as an undertaking of the Parties in paragraph 3 of the Standard Commitments, the Parties have to give a detailed factual description of the Divestment Business in the Schedule to the Standard Commitments.

19. The Divestment Business must comprise the Personnel and the Key Personnel retained by the Divestment Business as well as the personnel providing essential functions for the Divestment Business, such as the central R&D staff. The personnel (according to groups and functions performed) is to be listed in the Schedule to the Commitments, the Key Personnel is to be listed separately. The principle, indicated in paragraph 4 (d), is that the personnel should be transferred with the Divestment Business. If the Divestment Business takes the form of a company or if the transfer of undertakings legislation applies, the personnel will normally be transferred by operation of law. In other cases, the acquirer of the business can retain and select the personnel and can make offers of employment. The transfer – whichever form it takes - is without prejudice to the application of Council Directives, where applicable, on collective redundancies (Council Directive EC/59/98 on the approximation of the laws of the Member States relating to collective redundancies); on safeguarding employees rights in the event of transfers of undertakings (Council Directive EEC/187/77 on the approximation of the laws of the Member States relating to the safeguarding of employees rights in the event of transfers of undertakings, businesses or parts of a business, as amended by Council Directive EC/50/98); and on informing and consulting employees (Council Directive EC/45/94 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, as amended by Directive EC/74/97), as well as relevant national law on these matters.

20. Furthermore, the Standard Commitments foresee that the Divestment Business shall be entitled to benefit from products or services provided by the Parties for a transitional period, determined on a case-by-case basis, if this is

necessary to maintain the full economic viability and competitiveness of the Divestment Business (paragraph 4 (e) of the Standard Commitments referring to the products or services listed in the Schedule).

21. Section C contains a number of related commitments, which are designed to maintain, pending divestiture, the viability, marketability and competitiveness of the Divestment Business. These provisions deal with the preservation of the divested entity's viability and independence, as well as the hold-separate and ring-fencing obligations. The Hold Separate Manager, to be appointed by the Parties and normally the manager of the Divestment Business, is responsible for the management of the Divestment Business as a distinct entity separate from the businesses retained by the Parties, and is supervised by the Monitoring Trustee.

22. In certain cases it may also be necessary for the hold-separate obligation to apply to the corporate structure itself. That is, in cases where the Divestment Business takes the form of a company and a strict separation of the corporate structure is necessary, the Monitoring Trustee must be given the authority to (i) exercise the Parties' rights as shareholders in the Divestment Business and (ii) to replace members of the supervisory board or non-executive directors on the board of directors who have been appointed on behalf of the Parties (cf. paragraph 8 of the Standard Commitments and paragraph 6 (d) of the Standard Trustee Mandate).

23. Of particular importance is the ring-fencing of competitively sensitive information of the Divestment Business. The parties are obliged to implement all necessary measures to ensure that they do not obtain such information of the Divestment Business and, in particular, to sever its participation in a central information technology network. The Monitoring Trustee may allow the disclosure of information to the divesting party if this is reasonably necessary for the divestiture of the Divestment Business or required by law (e.g. information necessary for group accounts).

24. The related commitments further contain a non-solicitation clause for Key Personnel of the Divestment Business. According to the experience of the Commission, the non-solicitation period, dependent on the circumstances of the case, should normally be two years. In addition, the Commission may request the inclusion of a non-compete clause in the commitments protecting the customers of the Divestment Business for a start-up period. This may be required to enable the Divestment Business to be active as a viable competitor in the market. The period for such customer protection clause will depend on the market in question.

25. During the Divestiture Phase, the divestiture lies in the hands of the divesting party. The Commission does not have a preference as to the method the parties use to select an acceptable purchaser as long as they meet the objective of the divestiture, to maintain or restore competition. However, as part of the due diligence procedure, it is foreseen that the divesting party shall provide to potential purchasers sufficient information as regards the Divestment Business and allow them access to its personnel (paragraph 11 of the Standard Commitments) in order to enable them to determine whether it will be possible to

maintain and to develop the Divestment Business as active and viable competitive force in the market after the divestiture.

26. The divesting party shall further submit regular reports on potential purchasers and developments in the divestiture process to the Commission and the Monitoring Trustee (paragraph 12 of the Standard Commitments). This reporting mechanism gives the Monitoring Trustee the basis on which to assess the progress of the divestiture process as well as potential purchasers (for the Trustee's report, see paragraph 23 (vi) of the Standard Commitments) and keeps the Commission informed.

27. Section D sets out the requirements to be met by the Purchaser. The aim of this section is to ensure that the Divestment Business will be sold to a suitable purchaser who is independent of and unconnected to the Parties, and who possesses the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in the marketplace. These Purchaser Requirements can generally be met by either industrial or financial investors. The latter must demonstrate the necessary management capabilities and "proven expertise" which can in particular be met by financing a management buy-out.

28. Section D also deals with the approval process. After finalising the agreement(s), the divesting party shall submit a fully documented and reasoned proposal to the Commission. The Commission will verify that the purchaser will fulfil the requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. One element for its assessment will be the report of the Monitoring Trustee according to paragraph 23 (vii). The Commission may approve the sale of the Divestment Business without parts of the assets or personnel of the Divestment Business if this does not affect the viability and competitiveness of the Divestment Business, in particular if the Purchaser provides for such assets or personnel itself.

29. Section E deals with both the Monitoring and Divestiture Trustees. It identifies the terms for their appointment, as well as the content of the Trustee Mandates, and conditions for replacement of the Trustee during the divestiture periods if that becomes necessary. A Monitoring Trustee must be proposed by the Parties within one week after the adoption of the decision, whereas a Divestiture Trustee must be proposed no later than one month before the end of the Divestiture Period, (paragraph 16 of the Standard Commitments). The Commission wishes to emphasise the importance it attaches to compliance with these deadlines in practise, as otherwise the Parties are in breach of the commitments and the divestiture procedure is endangered.

30. Section E also sets out the duties and obligations of both types of Trustees. The Monitoring Trustee's responsibilities (mainly set out in paragraph 23 Standard Commitments) relate to both the management of the Divestment Business during the hold-separate period and the monitoring of the divestiture process itself. The supervision of the management shall in particular ensure the viability, marketability and competitiveness of the Divestment Business and the

compliance with the hold-separate and ring-fencing obligations. The Standard Commitments further assign certain monitoring tasks concerning the divestiture process to the Monitoring Trustee in the Divestiture Period. Once the Parties have proposed a purchaser for the Divestment Business, the Monitoring Trustee assesses the independence and suitability of the proposed purchaser and the viability of the Divestment Business after the sale to the purchaser, in order to assist the Commission in assessing the suitability of the proposed purchaser.

31. In the Extended Divestiture Period, the Divestiture Trustee will have an exclusive mandate to sell the Divestment Business at no minimum price and is empowered to include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale. However, it is foreseen that the Trustee has to protect the legitimate financial interests of the divesting parties, subject to its unconditional obligation to divest at no minimum price. The Divestiture Trustee must report regularly on the progress of the divestiture process.

32. Also in Section E (paragraphs 26 – 30), the duties and obligations of the Parties vis-à-vis the Trustee are defined. Beside the provision of information, the Parties are in particular obliged to provide the Monitoring Trustee with all managerial and administrative support necessary for the Divestment Business and to grant to the Divestiture Trustee comprehensive powers of attorney covering all steps of the sale of the Divestment Business. An indemnification clause is included in order to reinforce the independent status of the Trustee from the Parties. Such a clause is already common practice in the trustee mandates submitted to the Commission for approval. The Trustee may further, at the expense of the Parties, retain advisors with specialised skills, in particular for corporate finance or legal advice.

33. Section E further foresees that trustees may be removed only in exceptional circumstances and with the approval of the Commission before the complete implementation of the Commitments.

34. Section F contains a review clause, which allows the Commission to extend the periods specified in the Commitments and to waive or modify the undertakings in the Commitments. The Parties must show good cause in order to be able to benefit from the exercise of the review clause. Requests for the extension of time periods shall, normally, be submitted no later than one month before the expiry of the time period in question.

Standard Model for Trustee Mandates

35. The Standard Model for Trustee Mandates sets out the duties and responsibilities of both Monitoring and Divestiture Trustee in a single text. However, the language makes clear that the Commission does not have a preference for the appointment of a single person to serve in the dual role of both Monitoring and Divestiture Trustee. Rather, the decision as to whether one or more trustees are appointed should be determined on a case-by-case basis by the Parties. If more than one trustee shall serve in these roles, only the provisions

relevant for the Monitoring or Divestiture Trustee, respectively, have to be included in the individual mandate.

36. The Standard Trustee Mandate has the following main elements.

37. Section A contains some definitions and references to the definitions included in the Standard Commitments.

38. Sections B to G contain provisions regarding the appointment of the Trustee (Section B), its general duties (Section C), the specific duties and obligations of the Monitoring and Divestiture Trustees (Sections D and E), reporting obligations identifying certain important subjects that should be discussed in each report (Section G), and duties and obligations of the Parties vis-à-vis the Trustee (Section F). These arrangements are based on the provisions established in the Standard Commitments in relation to the Trustee and described above.

39. Sections H to J cover additional trustee-related provisions, including provisions regarding the remuneration of the Trustee(s), procedures concerning the termination of the Mandate, and certain additional provisions, such as determination of applicable national law.

40. In particular, the independence of the trustee and the absence of conflicts of interests of the trustee are of great importance for the Commission in deciding on the approval of the Trustee and the respective mandate. The provisions in the Standard Trustee Mandate (paragraphs 20 to 23) ensuring the independence of the trustee from the parties and the absence of conflicts of interest foresee the following procedure: (1) The Trustee must disclose all current relationships with the Parties (paragraph 20) at the time at which the Trustee Mandate is entered into. (2) During the term of the mandate, the Trustee undertakes not to create a conflict of interest by having or accepting employment or appointment as a Member of the Board of the Parties or by having or accepting any assignments or other business relationships with, or financial interests in, the Parties. (3) As legal consequences it is foreseen that, if the Trustee becomes aware of a conflict of interest during the Mandate, the Trustee must notify the Commission and resolve the problem immediately and, if the conflict of interest cannot subsequently be resolved, the Commission may require the termination of the trustee mandate. These rules concerning conflicts of interests apply to the Trustee itself, members of the Trustee Team and the Trustee Partner Firms as members of the same organisation. (4) For a period of one year following termination of the Mandate, the members of the Trustee Team shall not provide services to the Parties without the Commission's prior approval and must establish measures to ensure the integrity of the members of the Trustee Team.

41. In addition to the rules laid down in the Standard Trustee Mandate, it is up to the Parties and the Trustee to include provisions dealing with other potential conflicts of interests, such as conflicts of interests of the Trustee with potential purchasers. ■