

Commission publishes best practice guidelines for divestiture commitments in merger cases

EU Competition Commissioner Mario Monti today announced the publication of best practice guidelines for divestiture commitments in merger cases. These 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 should further enhance efficiency and transparency of merger proceedings.

Under the Merger Regulation¹ 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.

In order to increase efficiency, consistency and transparency of the negotiation and implementation of remedies, the Commission has decided to develop a Standard Model for Divestiture Commitments and a Standard Model for Trustee Mandates under the Merger Regulation. These two standard texts are supplemented by an explanatory note and will serve as best practice guidelines for the negotiation and implementation of remedies under the Merger Regulation. The standard texts and the explanatory note are published on DG COMP's website under

http://europa.eu.int/comm/competition/mergers/legislation/divestiture_commitments

These best practice guidelines will streamline the negotiation of the terms and conditions for commitments and trustee mandates. It 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 underlined that the Commission will further consider the acceptability of other types of commitments in appropriate circumstances.

¹ Council Regulation 4064/89

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 very 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 streamlined and substantially amended taking into account the ideas raised in the consultation.

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.

It is foreseen that the standard texts, as well as the explanatory note, will evolve, based on ongoing practice, and will regularly be 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.