Merger Remedies Study

Public version

DG COMP, European Commission

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Notice on the public version

This is the public version of the Study. It is essentially identical with the DG COMP internal confidential version, except for the following points:

1) All references to cases, relevant markets, economic sectors, and particular remedies are removed. For the 40 cases, random numbers are attributed. They are mentioned in the Study as c1…c40. For the 96 remedies, random numbers were attributed and they are referred to as r1…r96.

2) All case descriptions in the text (in boxes) are anonimised by replacing all company names, relevant markets, definitions or any other information that may reveal the identity of the case, the remedy or the parties by "[…]". In some of these descriptions also the case or remedy references had to be replaced by "[…]".

3) Annexes 2 and 3 containing the lists of analysed cases are removed, as is Annex 9 which includes more detailed case descriptions.

These changes were carried out in accordance with the confidentiality assurances made to participating companies (see Annex 4: Model contact letters with confidentiality assurance, p. 177).

The Study was entirely carried out in-house by **DG COMP** staff. This final report is therefore a **DG COMP** staff paper, setting out the findings of the Study. It does not represent the views of the European Commission. The Study was carried out and the final report was prepared by the following Commission staff:

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GLOSSARY OF TERMS

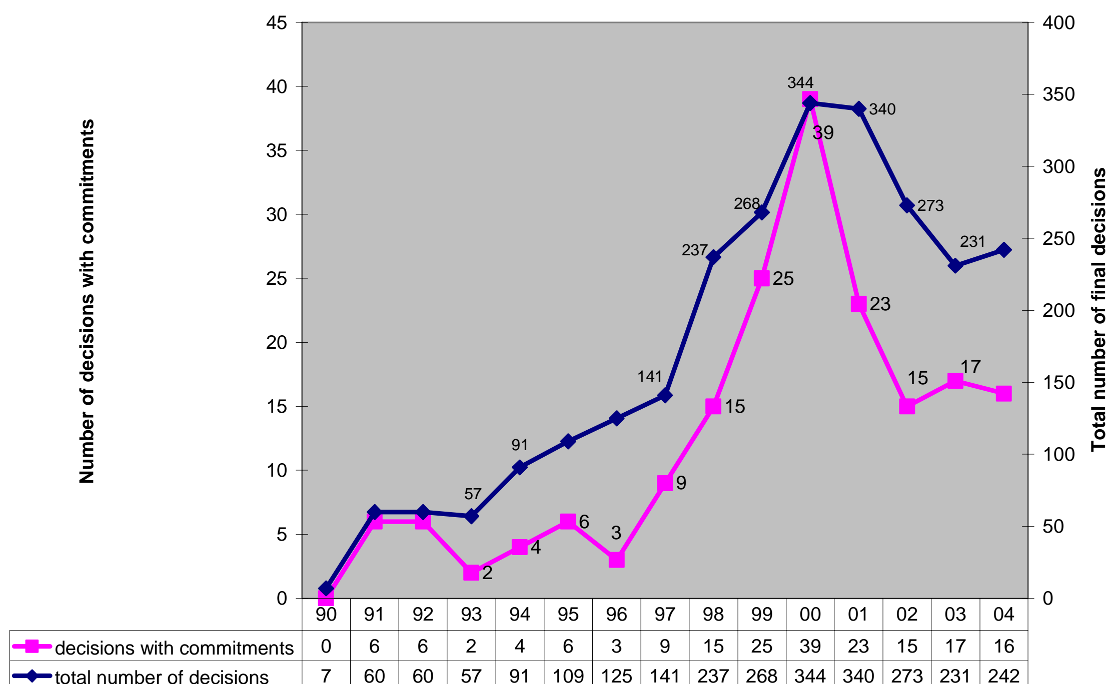
Annex 1: Glossary of terms, p. 173, includes specific terms used in this Study. Terms in the Glossary are marked in **bold** in the text.

I. INTRODUCTION

A. Background and objectives of the Study

1. Since its entry into force in 1990, the European Merger Regulation (**ECMR**)[1] has provided that the "undertakings concerned"[2] may modify their proposed concentration by offering commitments to remove the competition concerns identified by the Commission[3] in its investigation.[4] Since 1998, the **Implementing Regulation** has provided for the time limits and procedure for the submission of commitments under the **ECMR**, both in **Phase I** and **Phase II**.[5] From 1990 to the end of 2004, from a total of 2,469 final merger decisions, the Commission cleared 190[6] concentrations with commitments (118 **Phase I** and 72 **Phase II** decisions). Chart 1 shows the yearly evolution of the number of Commission merger decisions and the number of decisions with commitments.

Chart 1: Number of Commission merger decisions with commitments (left scale) compared to the total number of merger decisions in the years 1991 to 2004 (right scale)



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1 See Annex 1: Glossary of terms, p.173.

2 Broadly speaking, "undertakings concerned" are the parties to a merger or the acquirer(s) and the target of an acquisition.

3 The term "Commission" is used in this Study to refer to the European Commission.

4 Articles 6(2) and 8(2) of the **ECMR**.

5 Articles 18 and 19 of the **Implementing Regulation**.

6 Not included in these numbers are six clearance decisions with commitments where the parties later abandoned the merger. These were: M.157 *Air France/ KLM*; M.856 *British Telecom/ MCI*; M.1229 *American Home Products/ Monsanto*; JV.19 *KLM/ Alitalia*; M.1439 *Telia/ Telenor*; M.1630 *Air Liquide/ BOC*.

2. The Commission's practice regarding the treatment of merger remedies has been continually improved. It was published for the first time in 2001 in the Commission's **Remedies Notice**. In 2003, **DG COMP** published **Best Practice Guidelines** on remedies which included two **Model Texts**: the **Model Divestiture Commitments** and a **Model Trustee Mandate**. The **ECMR**, its **Implementing Regulation**, the **Remedies Notice**, the **Best Practice Guidelines** and the **Model Texts** have to date provided extensive guidance to the business and legal communities, setting out the general framework on the types of acceptable remedies, the procedure for their submission to the Commission and the requirements for their implementation.
3. The objective of this Study was to review with the benefit of hindsight the design and implementation of commitments offered and accepted by the Commission in previous cases so as to identify areas where further improvements to the Commission's existing merger remedies policy and procedures may be necessary in future.
4. To this end, the Study conducted an *ex post* evaluation of the design and implementation of a sufficiently representative number of remedies accepted in merger cases notified during a given reference period. The focus of the Study was to identify what factors and/or processes may have positively or negatively influenced the effective design and implementation of merger remedies.
5. There are almost no public *ex post* studies on the effective implementation of merger remedies of any competition regime in the world. While competition authorities have carried out some case-by-case analyses, the topic has not yet been widely explored. The pioneering work in this area was the study carried out by the **US FTC** and published in 1999,[7] which was based primarily on interviews with purchasers of divested assets.[8] The present Study builds on such previous work and aims to contribute to the debate on merger remedy issues.

B. Methodology

1. Selection of a representative sample of cases and remedies

6. The Study analysed 40 decisions adopted by the Commission in the five-year period 1996-2000. Annex 2: List of analysed cases and remedies (by date of decision) – [confidential], p. 176, and Annex 3: List of analysed cases and remedies (by type of remedy) – [confidential], p. 176, present detailed lists of the studied decisions and remedies.
7. The 40 decisions selected account for 44% of all merger decisions involving remedies during this five-year period (91 decisions). They also account for 21% of all remedy decisions ever adopted under the old and the new **ECMR** until the end of 2004 (190 decisions).
8. A single decision normally includes an assessment of the impact of a merger in several markets and, therefore, may include several different remedies. The Study attempted to

[7] "A Study of the Commission's Divestiture Process", prepared by the staff of the Bureau of Competition of the Federal Trade Commission, 1999, William J. Baer, Director.

[8] It concluded that: (1) 75% of divestitures ordered between 1990 and 1994 had succeeded in creating viable operations in the relevant market; (2) purchasers and divesting parties often act according to their respective interests that are frequently different from the concerns of the competition authority; and (3) **divestiture commitments** need certain safeguards to ensure their proper implementation.

analyse all remedies in the selected cases. However, not enough market information was obtained for all remedies concerned. In total, 96 remedies were retained for the Study. They represent 74% of all the remedies included in the 40 decisions chosen and 42% of all 227 remedies included in the 91 conditional clearance decisions adopted during the five year reference period (see Table 1).

Table 1: Number of selected cases and remedies

	Conditional clearance decisions (cases)	Remedies
Total in period 1996-2000	91	227
Number analysed	40	96
% of total	44%	42%

9. The period 1996-2000 was chosen because it contained the most recent set of cases for which the implementation of the remedies could be analysed *ex post* after a reasonable interval (*i.e.* three years for the most recent cases). It should be noted that all selected cases were decided before the publication of the Commission's **Remedies Notice**, **Best Practice Guidelines** and **Model Texts**.
10. For the purpose of a quantitative assessment, the Study used clear principles to count and classify remedies. These are further explained in Annex 8: Methodology used to count remedies, p. 229. In principle, one remedy was counted for every competition concern on one **relevant market**. However, where one divested business covered several geographic markets with similar characteristics, several measures were counted as one remedy; where two businesses were bought by two different purchasers, even if they concerned only one **relevant market**, they were counted as two remedies.
11. The selection of decisions was aimed at creating a balanced sample of remedies as regards three criteria: (1) the types of remedies; (2) the number of remedies accepted in **Phase I** or after an in-depth **Phase II** investigation; and (3) the different industrial sectors involved. In the selection, the Study did not consider five cases where the merger was abandoned, nor five cases that were still open pending implementation, and two cases with pending proceedings before the Community Courts.[9]
12. Type of remedy: when comparing the different types of remedies studied and the respective proportions of all remedies accepted during the five year reference period 1996-2000, it shows that the selected sample can be considered representative of the total cases (see Charts 2 and 3).
13. Detailed explanations of the different types of remedies will be provided later in this Part under "Typology used in this Study to classify remedies", p. 17.

[9] Abandoned cases: M.856 *British Telecom/ MCI*; M.1229 *American Home Products/ Monsanto*; JV.19 *KLM/ Alitalia*; M.1439 *Telia/ Telenor*; M.1630 *Air Liquide/ BOC*; Cases still open pending implementation: […]. Pending proceedings before the Community Courts: JV.37 *BSkyB/ Kirch PayTV*; M.1672 *Volvo/ Renault*. The term "Community Courts" refers to the Court of First Instance and the European Court of Justice.

Chart 2: Type of remedy - The 96 analysed remedies

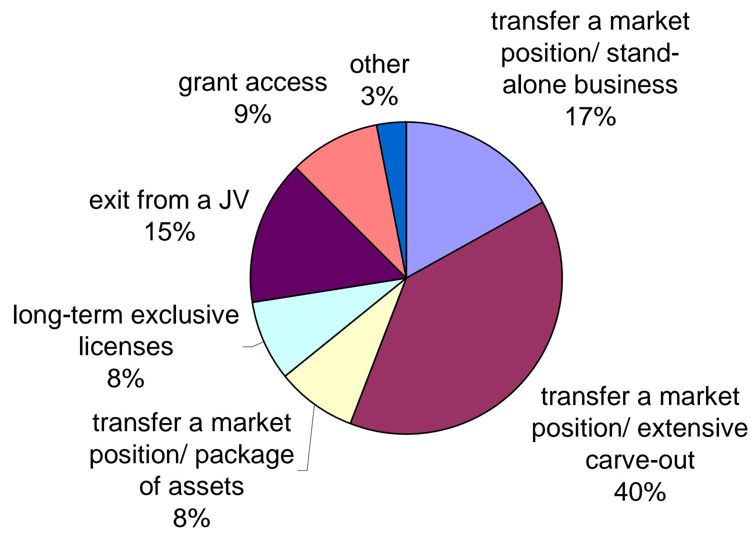
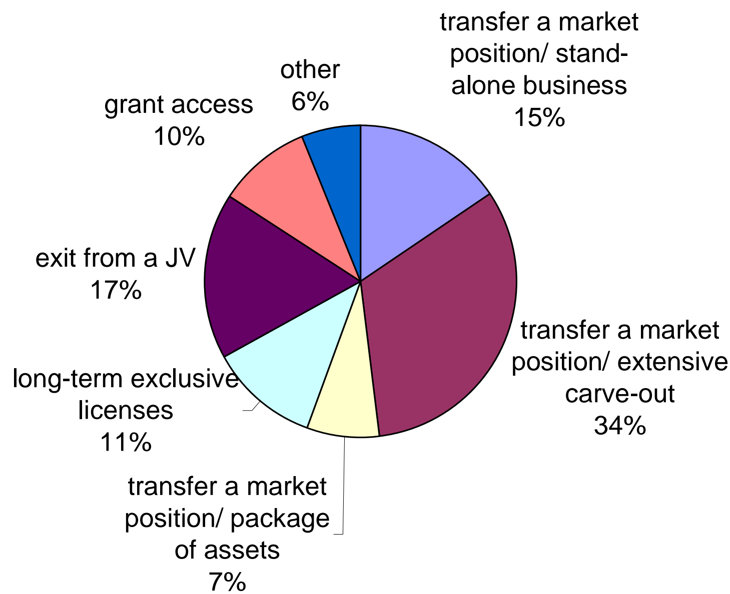


Chart 3: Type of remedy - All 227 remedies of the years 1996-2000



14. Investigation phase: Table 2 illustrates that the proportion of remedies accepted after a **Phase I** or an in-depth **Phase II** investigation also corresponds closely to their proportion in the total number of remedies over the years 1996-2000.

Table 2: Number of selected Phase I and Phase II cases and remedies

	Cases		Remedies	
	Total in 1996-2000	Selected	Total in 1996-2000	Selected
Phase I	61	23	109	52
% of Phase I	63%	58%	48%	54%
Phase II	30	17	118	44
% of Phase II	37%	42%	52%	46%
Total	**91**	**40**	**227**	**96**
Total %	**100%**	**100%**	**100%**	**100%**

15. Industrial sector: When considering the industrial sector of the remedies, the following picture emerges (see Table 3 below) that shows that the sample is broadly representative also with regard to the industrial sectors analysed according to the NACE classification system.

Table 3: Proportion of remedies in each industrial sector (NACE)

	All remedies 1996-2000		Analysed remedies		% analysed remedies of all remedies 1996-2000
C: Mining and Quarrying	11	**5%**	3	**3%**	27%
D: Manufacturing	152	**67%**	68	**71%**	45%
E: Electricity	12	**5%**	6	**6%**	50%
G: Wholesale and retail trade	5	**2%**	3	**3%**	60%
I: Transport, storage, and communication	22	**10%**	8	**8%**	36%
J: Financial mediation	10	**4%**	4	**4%**	40%
Other	15	**7%**	4	**4%**	27%
Total	**227**	**100%**	**96**	**100%**	42%

16. The sample of remedies analysed in the Study is thus broadly representative of the overall number of cases and remedies in the reference period 1996-2000 according to the three criteria: the types of remedies, remedies accepted in **Phase I** or **Phase II**, and the industrial sectors involved.

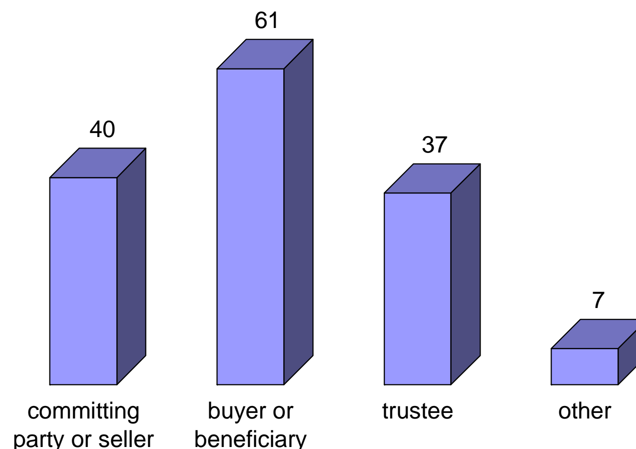
2. *Interview methodology*

17. After the selection of cases and remedies to be studied, interview teams reviewed the case files and prepared for the interviews sample questionnaires, which were evaluated in a pilot test of nine cases. The questionnaires were tailor-made to each type of interviewee: (1) the

committing parties or sellers, licensors or grantors; (2) the buyers, licensees or grantees; and (3) trustees, respectively. The questionnaires were amended in the light of the results of the initial pilot phase. Sample questionnaires for each of the afore-mentioned interviewee categories are included in Annex 5: Sample interview questionnaires (by type of interviewee), p. 181.

18. Interview teams began contacting companies in the spring of 2003 and requested interviews with company representatives who had been personally involved in the negotiation and/or implementation of the remedies concerned in order to obtain "first-hand information". Companies received confidentiality assurances.[10] They co-operated on an entirely voluntary basis and were generally forthcoming.[11] By mid 2004, 145 interviews had been carried out with a wide range of company officials, including CEOs, heads and members of legal, **M&A**, finance, strategy, purchasing, marketing and sales departments, as well as product managers and legal advisors.[12] Chart 4 shows a breakdown of the persons interviewed according to their role in the merger remedy process.

Chart 4: Breakdown of the 145 interviewees according to their role in the implementation



19. In each interview, the above-mentioned questionnaires of around 120 questions were considered in a structured but open interview format of one to three hours each. The interviews were tape-recorded and detailed minutes prepared. The answers were cross-checked against the statements of the other interviewees who had been involved with the same remedy. The robustness of the evidence obtained and the consistency of the replies were discussed both within the interview teams and in broader panels containing other members of the Study team. Replies were also compared with information from other sources, such as the case file, written answers to specific follow-up questionnaires, and other publicly available sources. The open format allowed the interviewees to raise issues on their own initiative and enabled the interview team to discuss either case and remedy-specific issues in depth.

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[10] The contact letter including the confidentiality assurances is included in Annex 4: Model contact letters with confidentiality assurance, p. 177.

[11] Only 10% of parties contacted (15) could not be interviewed, mostly because the relevant people had left the company or because they preferred to submit written comments.

[12] In comparison, the **US FTC** Study of 1999 on their own divestiture process had carried out 47 interviews, most of which (37) with buyers, covering all 35 divestiture orders issued in the years 1990-1994.

20. The Study did not carry out fully fledged new market investigations. Interviews with other market participants, such as customers, suppliers or competitors, were carried out in only a limited number of cases.

21. Interview teams sent out written questions to a number of companies to clarify points left open in the oral exchange.

22. In addition, interview teams sent out and received detailed follow-up questionnaires from 25 companies involved in 10 remedies (six cases) in two selected industrial sectors: pharmaceuticals and paper/pulp. For these remedies, detailed quantitative economic data was thus collected regarding the market characteristics, the price elasticities of products in the market, the evolution of the market, and the market position of the companies. Sample follow-up questionnaires sent to each category of recipient are at Annex 6: Sample follow-up questionnaires (by type of interviewee), p. 212.

23. On the basis of the collected information and the Commission's case file, interview teams drafted remedy reports for each remedy in accordance to a standard format, and held case discussions both within the interview team and in wider panels including members from other interview teams. Prior to conducting the interviews, the case files were discussed with **DG COMP** officials who had at the time conducted the merger investigation and had been involved in the design and implementation of the remedies. Equally, final versions of the remedy reports were also submitted for comments to **DG COMP** officials who had conducted the merger procedure at the time. The standard format is at Annex 7: Standard format for remedy reports, p. 228.

24. Several of the cases analysed had involved co-operation with the US competition authorities. In nine of these co-operation cases, involving 29 remedies, the competition concerns – and thus the scope of the remedies – were similar in both jurisdictions. An exchange of views with counterparts at the **US DOJ** or **US FTC** also took place in relation to these cases.

3. *Limitations of the methodology*

25. The *ex post* review of the process of implementation of merger remedies had to overcome several methodological difficulties. First of all, for some remedies it was difficult to determine comprehensively market outcomes in the absence of fully fledged new market investigations. The Study relied to a large extent on the interviews and data provided by the key participants in the process, such as the committing parties, the purchasers or other beneficiaries of the commitments, the trustees, and some others. In some cases, the Study benefitted from data generated in a subsequent merger investigation in the same relevant market or the same sector.

26. Secondly, several exogenous factors can contribute to an observed market outcome. To disentangle their relative importance and mutual interdependency sometimes proved to be difficult in practice. For example, in one case in the energy sector, remedies were ordered soon after significant liberalisation measures had been introduced.[13] The Study could not finally determine whether the remedies or the liberalisation measures had had the more decisive impact on the observed market outcome in terms of prices. In another case, a remedy to transfer a market position was followed by the entry of a significant rival two years later.[14] Here, too, it was difficult to determine whether the remedy or the new entry

[13] c13.

[14] r94.

had had the greater impact on the market. These examples also show that even a full-blown market investigation would not have avoided certain of the Study's methodological limitations.

27. Finally, to assess the market impact of a remedy, the Study also sought to compare the actual market developments with the results that would have been likely to occur, absent the remedy - the counter-factual scenario. The interview method proved to be a useful approach for obtaining the views of industry participants on these issues, but all counter-factual scenarios necessarily remain speculative.

28. More specifically, the assessment of the effectiveness of the nine access remedies and of three "other" remedies was frequently limited to a verification of whether implementation had actually occurred, with supplemental market information being considered, where it existed. As regards access remedies, neither was there an opportunity to systematically interview the companies which had complained of possible foreclosure risks during the initial investigation, nor to interview companies which could, but did not, seek to benefit from the access commitment.

29. The above-mentioned limitations and difficulties encountered in collecting all the necessary information naturally circumscribes the robustness of the statistical results presented in this Study, which should therefore be treated as mainly indicative.

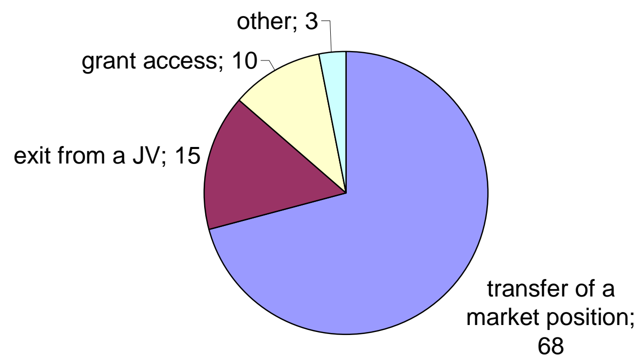
C. Typology used in this Study to classify remedies

30. The Study analysed 96 remedies, which were classified into four types according to the intended competitive effect of the remedy (see Chart 5). The Study distinguished: (1) commitments to transfer a market position; (2) commitments to exit from a joint-venture; (3) commitments to grant access; and (4) (a small number of) other commitments.[15]

31. As mentioned, the methodology used to count remedies and determine the main remedy type is exposed in Annex 8: Methodology used to count remedies, p. 229.

[15] In the confidential version of this Study, the classification of all remedies is fully listed on a case by case basis in Annex 2: List of analysed cases and remedies (by date of decision) – [confidential], p. 176, and by type of remedy in Annex 3: List of analysed cases and remedies (by type of remedy) – [confidential], p. 176.

Chart 5: Number and types of analysed remedies



32. Commitments to transfer a market position aimed at re-creating the competitive strength of a business in the hands of a suitable purchaser who exercises a sufficient competitive constraint on the merging parties. Such remedies were divided into four groups:
    (1) divestiture of a controlling stake in a company that was already a viable stand-alone business (15 remedies);
    (2) divestiture of a business unit that needed to be carved out extensively from a greater company structure (37 remedies);
    (3) divestiture of a package of assets that combined the assets of more than one of the parties (so-called "mix and match") (nine remedies); and
    (4) divestiture or grant of a long-term exclusive licence with indefinite duration or until expiration of patent protection (eight remedies).
33. Remedies that concerned the granting of licences for certain **IP rights** were either considered as commitments to transfer a market position, when the purpose of the remedy was to transfer a business to a suitable competitor and when the licence was sufficiently long-term to allow such a transfer. Other **IPR** licences fell into the category of access remedies when they concerned assets that had to be made available to other market participants to resolve foreclosure concerns.[16]
34. As the most common type of remedy, the Study inquired into the implementation process of commitments to transfer a market position in the greatest detail. The Study found that implementation risks are connected to: identifying the right business, preserving the divested assets in the interim, and transferring them to a new owner who is willing and able to maintain and develop them in competition with the sellers and other competitors in the market.
35. Commitments to exit from a **JV** require the committing parties to give up their **joint control** over a business by transferring it to a suitable purchaser. Normally, the purchaser in these cases is the existing **JV** partner. The **joint control** over the **JV** has to be severed

[16] Access remedies are discussed in Part III on "Implementation of commitments to grant access and other commitments", p. 114.

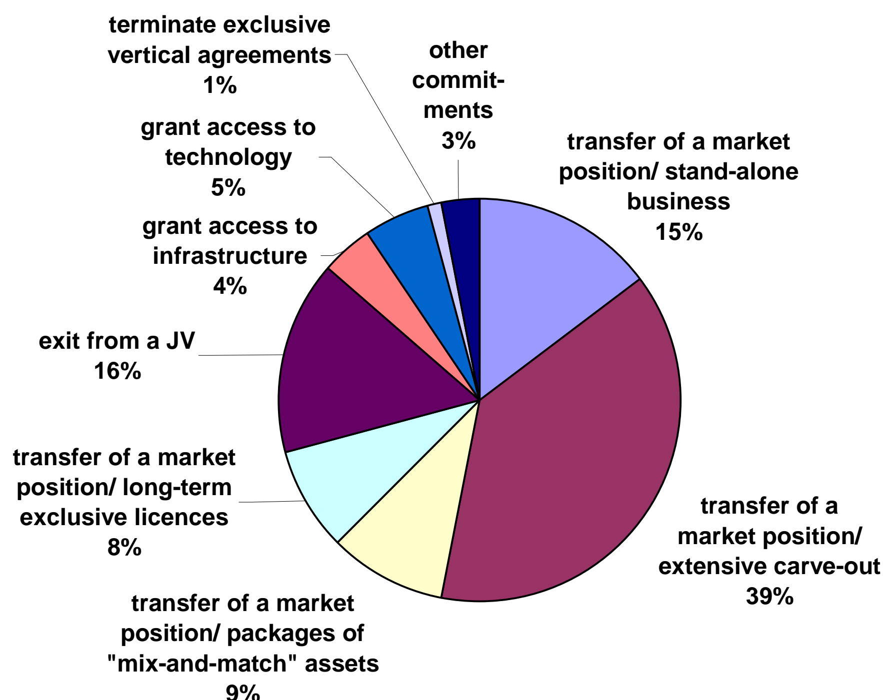
permanently. The Study inquired, in particular, into the implementation problems deriving from the rights of the other **JV** partner(s).

36. Commitments to grant access are measures to provide other market participants with access to key assets and thus reduce barriers to entry. The Study analysed three types of access remedies: (1) granting of access to infrastructure or technical platforms, (2) granting of access to technology via licences or other IPRs, and (3) termination of exclusive vertical agreements.

37. The Study inquired into some common issues of access commitments, in particular the terms of access, the ability of grantors to circumvent the goals of the access, the risk that the Commission would be drawn into extensive policing of the commitments if no self-enforcing mechanism could be devised (thus leading to high administrative costs), the risk of increased uncertainty in the market, the risk that the grantors might innovate less or offer lower quality products if the gains have to be shared with competitors, and, last but not least, the risk that competitors might be enabled to co-ordinate their market behaviour better.

38. "Other" remedies included one which aimed at severing the influence of the merging parties in a competitor, one which aimed at separating two collectively dominant competitors, and one which involved the withdrawal of a brand from a market.

Chart 6: Type of remedy: Detailed shares of the analysed remedies

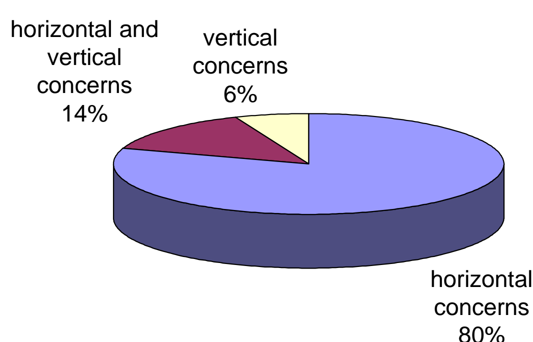


39. The classification system adopted for presenting the Study's findings differs somewhat from the other distinctions often used in analysing remedies: it is different from the common dichotomy of structural and behavioural remedies, and also slightly different from the often-used distinction between divestiture and non-divestiture commitments.

40. However, this Study will also refer to "**divestiture remedies**" or "**divestiture commitments**", which in the Study are all of the following: all 68 commitments to transfer a market position, including eight commitments to grant a long-term exclusive licence, all 15 commitments to exit from a **JV**, and one "other" commitment. Thus, the Study analysed in total 84 **divestiture commitments** and 12 non-divestiture commitments (of which 10 "access" and two "other" commitments).

D. Types of analysed competition concerns and theories of harm

Chart 7: Competition concerns addressed by the remedies



41. Of the 96 remedies examined in the Study, 80% involved **horizontal competition concerns**, meaning that the undertakings concerned were actual or potential competitors in the same **relevant market** (see Chart 7). In addition, a further 14% of the 96 analysed remedies involved **horizontal concerns** including significant **vertical concerns**, such as potential foreclosure **downstream** or **upstream** of the market in which the merging firms were combining their activities, while 6% of the 96 analysed remedies involved pure **vertical concerns**.

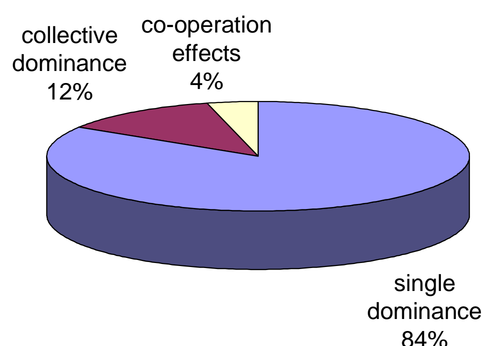
Table 4: Type of remedy per type of competition concern (numbers of analysed remedies)

	Type of remedy				Total
Type of concern	Transfer a market position	Exit from a JV	Access	Other	
Horizontal	58	13	3	3	**77**
Horizontal and Vertical	10	1	2	0	**13**
Vertical	0	1	5	0	**6**
Total	**68**	**15**	**10**	**3**	**96**

42. Further analysis shows (see Table 4) that **horizontal concerns** were commonly addressed by all types of remedies but most often by commitments to transfer a market position. The picture is similar for cases involving both horizontal and **vertical concerns**, except that

access remedies were relatively more frequent (15%), and exiting **JV** remedies, relatively less so (8%). **Vertical concerns** were mainly addressed by commitments to grant access (83%).[17] Access remedies were also accepted to resolve competition concerns in cases involving a combination of **horizontal** and **vertical concerns**.

Chart 8: Theories of harm of the analysed remedies



43. Chart 8 illustrates that 84% of the analysed remedies aimed at preventing a single dominance situation post-merger.[18] 12% aimed at preventing a collective dominance situation (co-ordinated effects). The remaining 4% do not fit squarely within either of these two categories and related to co-ordination of the parent companies of a **JV** similar to Article 81 **EC** concerns, or the strengthening of the dominance of a third player (one remedy).

Table 5: Types of remedies per theory of harm

Theory of harm \ Remedy type	Transfer	JV	Access	Other	Total	% of all 96 remedies
Single Dominance	60 74%	10 12%	9 11%	2 2%	**81** **100%**	**84%**
Collective Dominance	4 36%	5 45%	1 9%	1 9%	**11** **100%**	**11%**
Co-operation effects	4 100%	0 0%	0 0%	0 0%	**4** **100%**	**4%**
Total	**68**	**15**	**10**	**3**	**96**	**100%**

[17] Five out of six remedies for **vertical concerns**.

[18] All cases were decided under the old **ECMR** which used the dominance substantive test. The 81 single dominance remedies can be further sub-divided according to the competition concerns identified in the Commission's decision: 45 to prevent the *creation* of single dominance; 20 to prevent the *strengthening* of single dominance; and 16 to prevent the *creation or strengthening* of single dominance.

44. Further analysis shows (see Table 5) that single dominance concerns were most commonly addressed by commitments to transfer a market position. Collective dominance concerns were generally addressed by commitments to exit from a **JV** but also by commitments to transfer a market position.

E. Organisation of this Study

45. The Study will first present the analysis of the implementation process for commitments to transfer a market position and commitments to exit from a **JV** (Part II, p.23) and then commitments to grant access and other commitments (Part III, p.114). The Study will also discuss an overall evaluation of the effectiveness of the analysed remedies (Part IV, p.124), and finally presents its conclusions (Part V, p.137).

II. IMPLEMENTATION OF COMMITMENTS TO TRANSFER A MARKET POSITION AND OF COMMITMENTS TO EXIT FROM A JV

1. This Part of the Study deals with the design and implementation of commitments to transfer a market position and commitments to exit from a **JV.** Most of the issues raised are those typically associated with **divestiture remedies**.
2. This Part of the Study provides an analysis of the main issues identified in the design of commitments to transfer a market position and then discusses issues that arose in the most important implementation steps such divestiture commitments usually undergo.

A. Scope of the divested business

3. Commitments to transfer a market position aim at restoring a competitive force in the market on a lasting basis. The scope of the divested business determines to a large extent whether this new operator will be viable, capable of being operated independently from the divesting parties ("stand-alone") and constitute – in the hands of a suitable purchaser – an effective and lasting competitive force vis-à-vis the parties and other competitors.[19]
4. The inadequate scope of the divested business was the most frequent of all design and/or implementation problems identified in the Study. One or more serious issues concerning scope were identified in 79% of the 84 analysed **divestiture remedies**. A high number of these issues remained unresolved during the implementation process and led, by themselves or in conjunction with other implementation issues (in particular the choice of a suitable purchaser), to four remedies being "ineffective" and 17 being considered only "partially effective".[20]
5. This chapter describes, first, the different types of issues that received insufficient consideration in defining the scope of divestiture remedies and provides specific examples. It then compares the effectiveness of remedies of different scope (those involving more or less than the overlapping business). Third, it examines the interaction between the definition of the scope of a divested business and the buyer approval. Finally, it addresses some specific issues, such as the description of the scope of the divested business in commitments or transitional agreements.

1. Serious issues regarding the scope of the divested business

6. The Study identified the following types of issues that received insufficient consideration in defining the scope of divestiture remedies and led to serious problems during the remedy's implementation (Chart 9):
   (1) insufficient consideration of **upstream** and/or **downstream** dependence (vertical relationships);
   (2) insufficient consideration of geographic limitations;
   (3) insufficient consideration of what constituted the "critical mass" necessary to create a viable divested business;

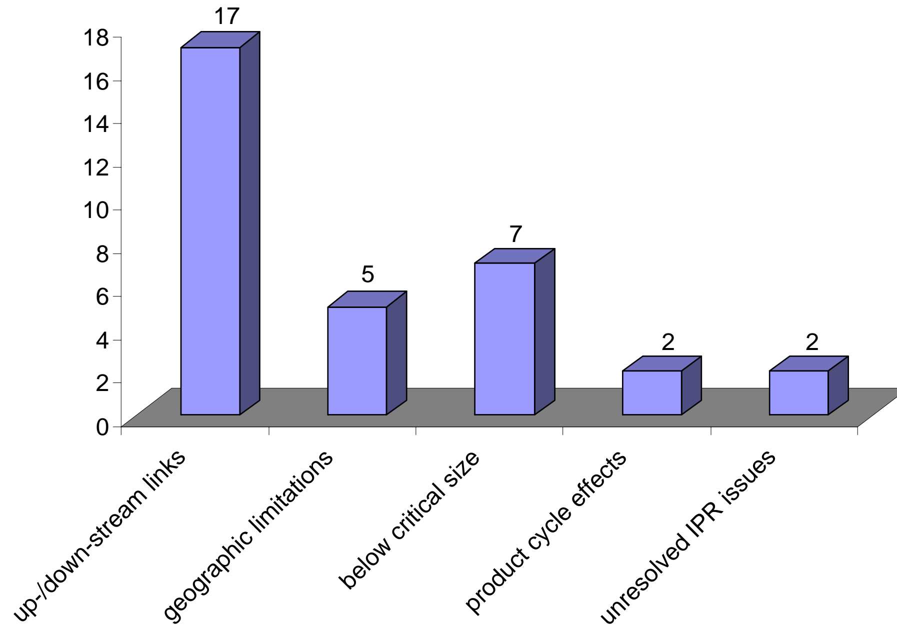
---

[19] Paragraph 14 of the **Remedies Notice** notes that a viable business is one that "*can compete effectively with the merged entity on a lasting basis*".

[20] These terms are explained in Part IV of the Study on the Effectiveness of the analysed remedies, p. 124.

(4) insufficient consideration of "product cycle effects"; and
(5) failure to delineate the proper scope of **IPRs**.

Chart 9: Number and types of serious issues in the scope of a divested business



7. The different issues can be described in the following manner:
   (1) Up-/downstream links: failure of the remedy to deal with the purchaser's continuing *vertical dependence* on the parties, *e.g.* for critical inputs, after sales services, or other critical assets;
   (2) Geographic limitations refer to the damaging effect of a *geographical split* in the remedy's scope, *e.g.* where a business is divested only in one national market but sufferes from a brand-split where a neighbouring and closely related market is not included;
   (3) Below critical size: insufficient considerations of *critical size* issues occurred where the divested business was too small to be an effective competitor in anybody's hands (except, perhaps, in the hands of some large competitors who, though, would create new competition concerns);
   (4) Product cycle effects: insufficient consideration of projected demand shifts away from the divested product, which may *e.g.* be a mature but declining business, towards the newer products retained by the merging parties, which have greater strategic importance and which have better future business prospects;
   (5) Unresolved IPR issues: insufficient consideration of the **IPRs** needed to support the divested business which are not included in the divestiture package, or the subsequent transfer of which may be encumbered by third party rights.

a) Remedies to remove horizontal concerns

8. The Study analysed many remedies where the commitments failed to take into account the **upstream** and/or **downstream** relationships that increased the purchaser's dependence on the seller.[21] Two remedies in the sample are particularly illustrative.

> In the **Phase I** remedy […], the parties committed to divest a technology business ([…]). However, the remedy failed to take into account the fact that the purchaser of such a technology business had to have access to state-of-the art demonstration plants in order to attract new customers. The only plant in the divested business which used the divested technology was an old plant, which was unsuitable for demonstration purposes, while another plant, retained by the seller, would have been better adapted for this purpose. The purchaser has remained in the market and continues to offer the divested technology, but it has lost ground to the seller's newer competing technology. It can be concluded that the remedy did not adequately deal with the implications of this vertical aspect, *i.e.*, the commercial ties between state-of-the-art production facilities and sales of the related technology. The purchaser reported that the lack of access to such newer production facilities has limited its commercial chances of success.

> In the **Phase II** case […], there was a vertical relationship between […] ownership and provision of services run over the […] network ([…]). However, the vertically related asset ([…] network) was not divested, as the [… network] also served other business needs of the merging parties ([…]).
>
> The seller's commitment to execute a lease agreement with the purchaser to ensure access to the […] network proved insufficient. The leasing arrangement proved incapable of dealing with the dynamic nature of the industry and turned out to be quite costly for the purchaser […]. Rather than paying the seller for the installation of a new [… network], the purchaser preferred to migrate its acquired business – […] – to a different network. However, during this transition, [… the purchaser] lost no less than 50% of its customers in the process, as these customers were dissatisfied with the interruptions and technical service problems caused by this migration.
>
> During the divestiture period, numerous **carve-out** issues arose because [… the divested business] had been firmly integrated into [… the seller's other] business. Many of [… the seller's] customers had sourced both […] services from […the seller], as these services had been offered as a single bundled package. Thus many customers remained with [… the seller] for other […] services, even after the divestiture, and consequently they had an increased incentive to switch back to [… the seller] for their […] services, as well.

9. One remedy is particularly illustrative of geographic limitations.

> In the **Phase I** remedy […], a brand divestiture, the purchaser complained that the seller had committed to sell one "rising brand" but only in […]. As a result of this geographic limitation, the purchaser could not sell the product in neighbouring […] (despite a high volume of cross-border trade in […], and substantial cross-advertising

21 Examples: r6; r26; r30; r63; r72; r80; r93.

due to partially shared media coverage). The seller continues to market this brand in [… the neighbouring geographic market].

10. The Study analysed several remedies where the size of the divested business was below the critical size required to be viable.[22]

In the **Phase I** remedy […], the **overlap** to be divested consisted in […party B's] business in […], a very small integrated business. This business was found to be in competition with […party A's] business as it had similar effects (both were used in […]). There was a vertical relationship between [… party B] and [… party A's] business, as [… party B's] business depended on the supply of […] on which [… party A] had a monopoly. ([… Party A] gave a non-discrimination commitment regarding the supply of […] but this non-discrimination agreement proved unclear in its meaning and impossible to monitor.) The (small) buyer suspects that [… party A] favours its subsidiary in […] (49% participation but no control) to whom it lost most of its essential "outside […]/**EEA**" revenues, the loss of which made the divested business much less viable. However, the vertical dependency was not caused by the merger (and subsequent divestiture) but pre-existed between [… party A] and [… party B]. It is therefore likely that the problem was simply one of critical size, with the new buyer and the divested business being too small to defend their "outside […]/**EEA**" sales and not having sufficient critical size to have any negotiating power vis-à-vis [… the merged entity] which would have reduced the risks of vertical dependency. (With [… party B] the business had five employees, made 3.5 million EURO turnover, and used one machine.)

The **Phase I** remedy […], a business with [… few] million Euro turnover, shows that critical size depends on the buyer's other activities in this market. The initial buyer, a big company ([…]) who bought these assets in a package, concluded that the […] business lacked critical size and sought to sell it on as quickly as possible. The final buyer/licensee ([…]), a specialised company in […], already had some activities in […] and therefore could more easily compete with [… the seller] on this basis. However, its ultimate success seems to have been greatly aided by the fact that the seller itself had unsuccessful product launches which permitted the buyer to grow. Even if the final result in this case seems satisfactory from a competition point of view [… the first purchaser's] initial reaction clearly shows that substantial questions remained regarding viability and stand-alone capability […]. There is no indication that the Commission took any account of this risk in its remedy suitability assessment, although, probably, the final buyer/licensee was one of very few possible viable buyers for such a small business.

In the **Phase I** remedy […], [… the seller] divested […] in […]. However these assets, small in turnover and market share (7% and 4%, thus below the **overlap** of 14%), carved out from the acquiring party's four times bigger market share, not supported by production facilities, without their endorser brands (buyer had to license them), could not be developed successfully by the buyer ([…]). The buyer bought these assets in a package and wished to sell them on immediately but could not find a

[22] r17; r25; r26; r34; r57; r60; r75.

subsequent buyer. The buyer still sells these products but does not believe it is an effective competitor to the market leader, the merged entity. The divestment evidently lacked both critical size and commercial potential.

11. Another remedy concerned product cycle effects.

In the **Phase I** remedy […], it was clear to both the seller and the buyer (who bought the asset in a package with other assets which were the real focus of its interest) that the divested "**overlap**" brand ([…]) was declining, would be loss making and would lose sales. However, no trace of such analysis can be found in the Commission's (rather static) market-share oriented approach in this case. (There is hardly any independent remedy suitability analysis on this point in the Commission's decision.) […] The incentive by the buyer to invest in this brand was extremely limited and the buyer apparently accepts that this […] brand is likely to be pushed out of the market at some point.

12. At least four remedies raised serious **IP rights** issues of which two remained unresolved.[23]

In the **Phase II** remedy […], the […] business was to be divested. In this remedy, the **conglomerate** aspect, while not entirely neglected, was still not sufficiently considered: The divestment was a technology package. The acquirer's business was to be divested. However, neither the commitments text nor the reasoning on the suitability of the remedy in the decision dealt with the fact that this particular technology was technically tied to other components […] which were not included in the remedy package. This resulted in a situation where the buyer of the divested business could not, for several years, compete with the merging parties in this important segment because it was entirely dependent on the supply of the complementary products from the merging parties. The Commission seems to have been – in principle - aware of such technical bundling in this sector: it required the divestiture of another complementary product – […] - together with the […] business leaving it open whether both belong to the same product market: however, the analysis of the commercial and technical reality did not go far enough.

The **Phase II** remedy […] raised certain issues regarding **IP rights**. The purchaser reported that the design rights to […] had not been divested to him, thus forcing him to incur substantial costs to develop new designs with a new supplier. During the time required to develop the new products, the divested business suffered substantial market share losses.

13. All of the above issues led to difficulties in implementation of the remedies and regularly made them less effective. Some of the analysed remedies suffered from lack of attention to more than one of these issues. One remedy faced problems related to all five issues.

[23] r21 (see example in box later in this Section); r49; r80; r93.

Phase II remedy […], divestiture of the […] business:

Markets: The divestiture concerned a product market in a sector in which innovation played an important role ([…]). Individual product markets tended to be small and bundled sales were common for a number of reasons:

(1) the […] machines themselves only constituted around 20% of the revenue, with the other revenue coming mainly from sales of complementary products/ supplies […] which these machines needed to perform their function; this resulted, together with clients' needs to spread costs over a longer period, in a business model whereby these machines were often not sold up-front but leased and in fact paid for through tied-in sales of the complementary products;

(2) two distinct complementary products ([…]) belonging to separate product markets, could be used for the same machine and were therefore sold together;

(3) in line with the importance of these after-sales of complementary products, a certain marketing, distribution and maintenance infrastructure for performing these after-sales services had to be in place; and

(4) to make it profitable it was necessary to sell a number of products through the same infrastructure.

Mainly because of this sales and after-sales infrastructure, product markets were national, although production of the machines and […complementary products] was carried out on a wider geographic scale.

Competition analysis: The Commission found the creation or strengthening of a dominant position in [… a number of] national markets for one of the complementary products ([…]), for which national market shares in problematic markets varied between [… 40% and 80%] combined, and overlaps were up to [… 5%].

Remedies: Early in the procedure, recognizing the existence of a competition problem, the parties offered the divestiture of the - by far - smaller one of the overlapping businesses in the eight **EEA** markets for which competition problems had been found […]. The business comprised rights to a certain type of machine ([…]), including stocks, spare parts, machines placed with customers but still owned by the supplier, customer lists and all contracts and rights for the complementary product […] in which a competition problem had been found which were usually *de facto* tied to the machine, for these […] **EEA** countries. There was the option to expand the geographic scope to the whole of Europe. Ownership of the business outside these countries and of the technology itself remained with the seller who had an obligation to supply new machines, [… complementary products], and innovations to the buyer "at favourable prices".

Remedy implementation process: The business turned out not to be particularly attractive to buyers, which seems to have been clear to the committing party at the time the remedy was offered, as the remedy text allowed separate divestitures in each national market if no buyer for the whole could be found. None of the bigger companies were interested, and one mid-sized player, who had a distribution network in place offering complementary products for other machines, was the only potential buyer of the whole. To this day, more than five years post decision, the buyer is still dependent on [… the seller] for supply of the bundled products to the **relevant**

market. It needs supplies for certain types of [… complementary products], also some parts of the […] machines.

The business needed to be carved out from the seller's other activities and was rather small (turnover on average 2 million Euro per country).

Remedy Study interview results: The business was not, in the trustee's and the buyer's view, in any way a "stand-alone" business.[24] In the buyer's view the business described in the commitments text was not a viable business either. This was because it did not contain the second complementary product ([…]) which all clients asked for in combination with the divested complementary product ([…]). The buyer's commercial need to procure supply of this second complementary product gave the seller leverage to considerably damage the buyer's otherwise favourable supply/purchase conditions thus preventing its commercial independence from the start […].

The business lost almost 30% of its turnover within two years in spite of high customer satisfaction with its performance (which seems to rule out buyers' incompetence as an explanation for this loss of sales). Partly, this loss of sales was due to the fact that the divested business was in a declining market segment ([…]). The buyer consequently found the remedy to be ineffective. However, the buyer stayed in the market, although not as an entirely independent competitor as it is to this day still supplied by the seller. It intends to launch new […] machines in the near future, targeting also some of its current customers and hoping to increase its turnover substantially. The buyer in particular criticised the Commission, in not insisting on the inclusion of additional assets (particularly the second bundled product, a market on which no competition problems arose), and for the fact that it had not sufficiently considered that the commercial reality was different from the antitrust reality.

In the trustee's view it was also a mistake to limit the divestiture geographically to European countries as this unduly limited the purchaser's ability to develop the business. […]

14. In a number of cases, the seller found it necessary to add, on its own initiative, supplementary assets that went beyond the initial scope included in the commitments. This willingness to expand the scope of the remedy may have had various causes: in some instances, it appears that sellers quickly recognised the initial lack of interest from prospective purchasers and thus broadened the package in order to expedite the sales process; in other instances, the sellers concluded that the original divestiture package was not sufficiently viable and stand-alone to attract a buyer who would qualify as a "suitable purchaser" under the Commission's "purchaser requirements".[25] A closer analysis of three such remedies confirms the view that this latter consideration was at least one of the main reasons for the addition of assets to the original divestiture package. All of the remedies involved issues of **upstream/downstream** dependence and one remedy in addition very likely involved issues of insufficient critical size.[26]

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[24] The trustee said: "it was a financial structure rather than a business".

[25] See **Remedies Notice**, paragraphs 19-21; **Model Divestiture Commitments**, Section D.

[26] r15; r39; r45; r87.

In the **Phase II** remedy […], the parties committed to divest their stakes in certain […] facilities. Since these assets were vertically linked to stakes in […], the parties decided to add the stakes […] to the divestiture package. In the interviews, both the sellers and the trustee agreed that the assets defined in the remedy package would otherwise have been very difficult to sell.

In the **Phase II** remedy […], the parties committed to sell their […] business. During the sales process, the parties voluntarily added assets from the neighbouring market of […] because these markets shared joint customers. This expansion of the scope of the divestiture package was a practical acknowledgment that the new package would be more attractive to prospective purchasers of the assets.

15. Finally, the Study found that there may also be other reasons which motivate a seller to expand the divestiture package voluntarily, without having explicitly committed to do so as a basis for the Commission's conditional clearance decision. Not all of these reasons are necessarily in the interest of promoting the remedy's effectiveness: for example, the seller may saddle the divested business with supplementary, less viable assets thereby burdening the purchaser with additional costs and liabilities, thus weakening the purchaser's competitive potential (for example, additional personnel that are not necessary for the business, or older, obsolete facilities and assets); or the seller may create a divestiture package that goes far beyond the scope of the divested business primarily for the purpose of expediting the sales process. The Study found that this type of expanded divestiture package could attract purchasers who might, in fact, be more interested in the peripheral assets than in the divested business, thus, casting doubt on the purchaser's commitment to develop the original divested business (rather than the more important added assets which it is acquiring). The Study came across two such remedies in which assets were later added clearly due to such other considerations.[27]

b) Divestitures to remove vertical concerns

16. The Study also analysed three **divestiture remedies** designed to remedy **vertical competition concerns**.[28] The analysis confirmed that for **vertical concerns** the same insufficiencies may occur in the design of the remedy. Two of the remedies failed to ensure the viability of the divested business by not taking into account considerations of **upstream** and **downstream** dependence and critical size criteria.[29]

17. In the third case (a rare instance of potential customer foreclosure), the remedy required the complete divestiture of the merging parties' activities in the (small) **upstream** market.[30] In that way, the merging parties' only competitor in the **upstream** market could not be foreclosed from its customer base, specifically, the merging parties. In this case (as in any other vertical case), the complete divestiture of the activities in one of the vertically related markets resolved the foreclosure concerns; however, the purchaser experienced considerable difficulties in attempting to establish itself in the market, and reported that its survival remains uncertain.

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27 r30; r56.

28 In another remedy the divestiture was included as an alternative commitment but was not used.

29 r44; r58.

30 […].

In the **Phase II** case […], it was feared that a producer of […] who supplied these to one of the merging companies might be foreclosed by the fact that the operation removed its only customer in this market ([… party B], part of the merged entity) who was vertically integrating, whereas the other merging party ([… party A]) had at some point produced some little but highly sensitive component ([…]) for "[…]" (a somewhat artificially narrow market comprising only the products […]). [… The producer] would be foreclosed from access to [… the product] produced by [… party B] as [… party B] would in the future produce those in-house. The remedy consisted in the entire "[…]" product divestiture of the merging companies thereby taking away their ability to foreclose [… the producer]. The problem was that [… party A's] "business" was rather outdated and no longer fully competitive. Very few contract bids are made in this market and the only subsequent-to-divestiture bid was not won by the buyer of this business ([…]) but by [… the producer].

The buyer, […], at the time of the interview, *i.e.* several years after divestiture, was still in business, which argues for qualifying the remedy as successful.

However, the buyer had never succeeded in winning a bid (and its exit may still occur if another bid is lost). The business divested was of doubtful critical size and stand-alone quality. It had never constituted a separate clearly defined business unit within the merging parties so a rather difficult carve out situation arose. Although quite generous technical assistance was provided to the buyer (who bought the business for 1 Euro plus technical assistance, thus effectively for a negative sales price) some **know how** was lost in the **transfer**, making the business after **transfer** less competitive than before […]. It could be argued that the seller's release from its technical support commitment should have been conditional on the first successful bid by the divested business (which would have shown that the business was sufficiently viable and stand-alone.

c) Re-branding remedies

18. The Study also analysed re-branding commitments, *i.e.* remedies where the exclusive licence to a brand is granted for a number of years, during which time the licensee is expected to develop its own new brand. The idea is to enable the temporary licensee to capture the licensor's market share and maintain it via re-branding or substitution by another trademark.

19. Nine such temporary licensing remedies fell within the Remedy Study's sample of cases. Five of the remedies experienced problems,[31] three of which remained unresolved and led to insufficient viability.[32] They displayed two important disadvantages: First, the stronger the particular brand or trademark, the higher the inherent risks to the effectiveness. Second, temporary licenses were liable to create uncomfortable brand splitting situations, either geographically or between different (range) products in the same geographic area.

The **Phase I** case […] provides an example of where the scope of the remedy was too narrow. Two interviewed licensees (separate licenses were given for each affected geographic market) criticised the approach taken. One licensee flatly stated that the measure had no effect on the market at all. The other licensee found that it could

[31] r21; r38; r57; r65; r91.

[32] c1; r57.

exert some minor competitive constraint on the seller but was severely hampered by four limitations in the remedy's scope:

(i) the geographic restriction (in this case to [… one country], ignored commercial ties with and development opportunities in other [… neighbouring] markets);

(ii) the mere temporary licensing instead of permanent exclusive licensing which would have given the buyer increased incentive and ability to compete […];

(iii) the limitation of the license to one product only whereas competition in this area involved portfolio competition (necessity to offer at least a range of products in a related product area).

The remedy cannot therefore be considered effective, due to the lacking viability (in terms of "effectively competing") and stand alone character of this business. […] A divestiture of the brand (on at least an **EEA**-wide scale) including neighbouring product markets would have been the more appropriate solution.

The **Phase I** remedy […] demonstrated difficulties that were typically identified with commitments involving re-branding. In that case, the first licensee, […], had no intention of developing the business and thus sub-licensed to a second licensee, […], who had not been subjected to the Commission's review and approval process. […] The original licensor, whose consent was necessary for the sub-licence, offered far less favourable terms and conditions to this second licensee than those which had been approved by the Commission in the original licence to […]. Because the Commission was not informed of the proposed on-licence of the brands, it was not in a position to verify whether the second licensee was in a position to achieve the intended re-branding result.

Due to the time limitations imposed in the initial remedy granting the use of the original brand name, [… the second licensee] had very little time left for re-branding. In a situation involving an on-sale, the period of two years for re-branding was insufficient. The mandate of the trustee in this case was terminated following the **transfer** of the business to the first purchaser. The interviews indicated, however, that the trustee should have been kept in place until the re-branding exercise was completed. The trustee could then have ensured that the Commission was at least warned about the sub-licence.

20. Re-branding remedies have been found acceptable where the share of the problem market vis-à-vis the total brand equity (or trademark equity) was very small and therefore a divestiture (via an exclusive licence or an assignment) of the brand or trademark seemed disproportionate. This was the case where the competition problem arose only in a small geographic area or in one small product within a wider range of products whereas the merging parties' use of this brand or trademark was much wider geographically or in terms of product range.[33]

21. Of the three remedies that can be classified as effective[34] at least one also showed serious **transfer** losses. The risks entailed in the migration of a product to a different brand or trademark can thus be qualified as fairly high.

[33] Examples: r46; r54; r57; r96.

[34] r32; r46; r54; r67; r83.

22. To counterbalance the additional effectiveness risk the commitments included some additional safeguards in order to ensure the long-term viability of the business to be migrated. These were, in particular, always black-out periods to prevent the purchaser from "coming back" too early and to recapture part of the market share that was to be migrated to the temporary licensee. In one case the seller agreed to pay for the entire migration costs.[35] However, it remained unclear whether, in cases where the migration of the brand was likely to lead to some loss of market share, this was specifically considered, when determining the required scope of the business to be **transferred**.
23. It is noteworthy that all five problematic examples relate to small markets which typically pose particular problems for a remedy's viability.

2. *Effectiveness of remedies of different scope*

24. In determining the business to be divested, the analysed decisions frequently referred to the aim to remove the "**overlap**" between the merging parties in the market after the merger. The **overlap** is normally understood as the smaller of the two merged businesses active in the same **relevant market**, regardless of whether it belonged to the acquiring or acquired company. These descriptions of the remedy's objective appear to reveal an approach focused on the structure of the market, measured in particular in terms of market shares, rather than on the ability of the divested business to restore effective competition. It appeared appropriate, therefore, to examine the effectiveness of such approach in terms of market outcome.
25. For 49 of the 84 **divestiture remedies** sufficient information was available to determine whether the divestiture constituted just the smaller **overlapping** business, or more, or less.[36]
26. Chart 10 shows that in 28 of the 49 remedies, the remedy provided for the divestiture of "just the **overlap**". Another 14 remedies required divestiture of "more than the **overlap**", and seven remedies required the divestiture of a percentage of the combined entity's market share that was "less than the **overlap**".[37]

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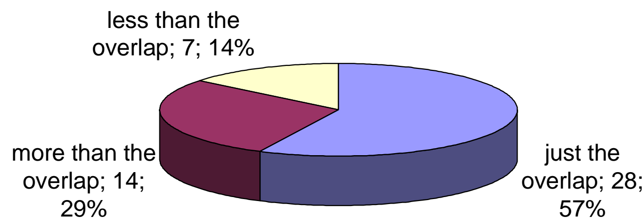
[35] r32.

[36] For the remaining 35 **divestiture remedies** the available information was insufficient to make a robust quantitative assessment on this aspect.

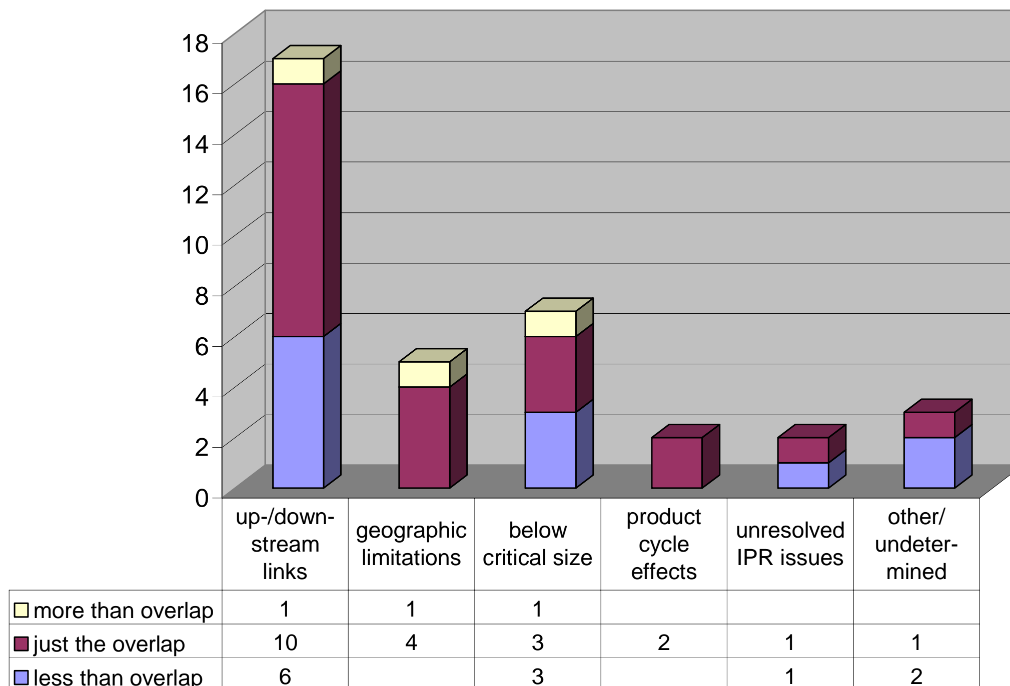
[37] "**More than the overlap**" refers either to the bigger of the two overlapping businesses or to the smaller business plus additional assets, in particular those expanding the geographic scope of the divested business. "**Less than the overlap**" means that fewer assets were divested than those to which the market share additions created by the merger can be attributed.

Chart 10: Percentage of divestiture remedies addressing "just the overlap", or "more than the overlap", or "less than the overlap"



27. More specifically, there were 21 serious unresolved issues in the 28 "**overlap**" divestitures, 12 issues in the seven remedies where "less than the **overlap**" was to be divested, and three issues in the 14 remedies where "more than the **overlap**" needed to be divested.[38]

Chart 11: Number and types of insufficiencies in the scope of a divested business



	up-/down-stream links	geographic limitations	below critical size	product cycle effects	unresolved IPR issues	other/ undeter-mined
more than overlap	1	1	1			
just the overlap	10	4	3	2	1	1
less than overlap	6		3		1	2

[38] Apart from these issues that remained unresolved and thus likely affected the **competitiveness** of the divested business, an even higher number of serious design issues that came up during implementation were resolved within three to five years after the Commission decision (they are not shown in Chart 11).

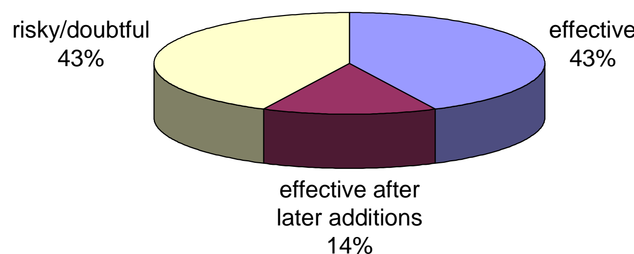
a) Overlapping business divestitures

28. Remedies requiring the divestiture of "just the **overlap**", in the sense that the smaller of the two overlapping businesses was divested, proved to be sufficient in a substantial number of cases. The Study found that a remedy was more likely to be effective where the divested business was relatively self-contained, with stand-alone characteristics that would support its long-term viability. 12 remedies (in six cases) fell into this category.[39] In addition, four of these remedies (in three cases) involved the divestiture of stakes in a **JV**.

29. The Study also analysed two remedies where significant **carve-out**, stand-alone or viability issues had existed at the time the remedy was proposed. The Commission addressed these concerns by including specific safeguards in the remedy. In one remedy, the risk was mitigated by the choice of an exceptionally well-suited purchaser, combined with a stand-alone fall-back option.[40] In the other remedy, the seller offered a very substantial financial commitment to make the divested business viable.[41] These remedies entailed substantial additional costs to the parties but ultimately proved to be effective.

30. Contrary to the results in the afore-mentioned cases, in which divesting "just the **overlap**" succeeded, an equally large number of 12 remedies reviewed pointed to implementation issues. These cases indicated that acceptance of divesting "just the **overlap**" to resolve **horizontal competition concerns** could be risky if a number of common problems relating to the scope of the divested business were not addressed thereby failing to create a viable competitor.[42] The Study thus found that the narrow scope of the divested business led to actual implementation problems, or put the effectiveness of the divestiture at risk, in at least 12 remedies.

Chart 12: Effectiveness of 28 divestiture remedies where "just the overlap" was divested



[39] r8; r9; r12; r18; r37; r41; r48; r53; r75; r77; r81; r94.

[40] r43.

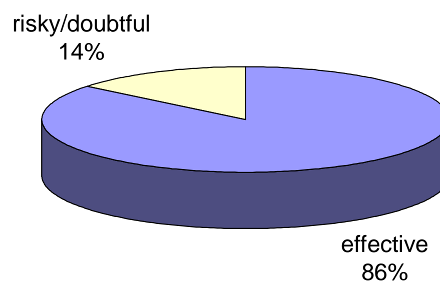
[41] r90.

[42] In this Section of the Study, the analysis of a remedy's effectiveness distinguishes between "effective", "effective after later additions", and "risky/doubtful". The "risky/doubtful" category corresponds to the category of remedies with serious design and/or implementation issues that remained unresolved, which is used in Part IV on "Effectiveness of the analysed remedies", p. 124. Such remedies fall into the two categories of remedies classified in that Part as "partially effective" or "ineffective".

b) Divestitures of more than the overlapping business

31. **Divestiture remedies** whose scope went beyond the **overlap** had the highest rate of effectiveness (86%, see Chart 13). Out of 14 such remedies analysed, the Study found only two remedies in which effectiveness was doubtful due to issues relating to the scope of the divestiture. The other 12 remedies were composed of businesses which were sufficiently viable and stand-alone to ensure the remedy's effectiveness.

Chart 13: Effectiveness of 14 divestiture remedies where "more than the overlap" was divested



32. Two sub-categories of such "more than the **overlap**" **divestiture remedies** can be distinguished:

(1) First, where divestiture of the larger of the two overlapping businesses is offered: in two such remedies found in the Study, no problems were reported in terms of viability of the business to be divested.

> In the **Phase II** remedy […], the remedy concerned worldwide markets. [… Party A's] business, which was less integrated than [… party B's] business, was divested. One interviewee expressed the view that this requirement was US-driven. The […US authorities] also requested divestment of the [… neighbouring] business, which had not been a **condition** of **EC** clearance. The Remedy Study did not explicitly address the issue of whether or not the […] business alone would have been a viable business but no comments to the contrary were made by interviewees.

> In the **Phase I** remedy […], the Commission accepted alternative remedies. Due to resistance of the **JV** partner concerning the sale of the smaller business, the seller had to proceed with the sale of the bigger and better business […]. It later bought out the **JV** partner in the retained business. Competition in this sector which suffered from external shocks (*i.e.* 9/11) is now more intense than it was at the time of the divestiture.

(2) Second, where divestiture of the smaller overlapping business is supplemented by the addition of other assets: This sub-category of remedies was found in 12 remedies (in six cases) in this Study. Of these 12, ten remedies (in four cases) were non-problematic and the remedies were rather successful.[43] As mentioned, in only two of these remedies (in two cases) even substantial additions to the **overlap** were not enough to guarantee the full viability of the remedy. One concerned insufficient geographical scope.

> In the **Phase I** remedy […], the buyer of a […] brand in […] complained that the geographic scope of the divestment, although widened to […], was still too narrow. In the normal course of business the buyer would have wanted to introduce the same brand also in […], an important […] market. However, the geographic limitation of the divestment (including trademark, **IPR**) prevented it from doing so. The buyer would have had to produce a completely different [… packaging] and develop a new brand, altogether a costly exercise.

The other remedy concerned an insufficient consideration of **upstream/downstream** relationships plus critical size/economies of scale issues.

> The **Phase II** remedy […], **JV** with […], involved a very small **overlap**/increment in a certain rather narrow product market. This **overlap** was divested to the **JV** partner, but in addition, other assets for neighbouring product markets had to be included in the package (these additional assets were worth five times the value of the turnover of the **overlap** business). This expanded package was necessary because the plant and its processes could not be separated.
>
> Nevertheless, the purchaser stated that it had not yet managed to compete effectively with the merged entity. The merged entity, on the other hand, had increased its already high market share of close to 80% by another 10%. The **JV** partner purchaser, who described itself as "too small", had been the reluctant buyer of the remaining **JV** stake. Following the divestiture, the purchaser reported that it lost industrial credibility due to the exit of its **JV** partner who had been essential as the leading technology partner who possessed the relevant (vertically related) technology.
>
> The purchaser stated that the divested business could have been made more viable, either by offering a different, even broader, divestiture package or by providing some other mechanism for strengthening the purchaser. More specifically, the vertically related technology problem could have been alleviated, for instance, by providing for better access to technological improvements, as well as supplementary technological support, and/or co-ownership of the technology, thereby strengthening the purchaser –a difficult task in any case. In dealing with the critical size problem, provisions for additional tolling rights in an expanded geographic area could have been beneficial.

c) Divestitures of less than the overlapping business

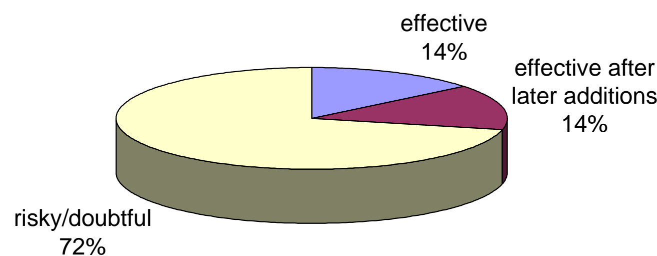
33. In remedies where "less than the **overlap**" was divested, the scope of the divested business typically included portions of the assets of one of the parties (or in rare cases a combination of assets of both merging parties, so called "mix-and-match" assets). The rationale for accepting such remedies was that, even taking into account a post-merger increase in the combined market share of the merging parties, their resulting market share would remain

[43] 19; 23; r36; r52; r66; r78; 82; 88; 89.

below the dominance threshold. Typical situations included mergers with retained market shares of below 40% and divested market shares of around 15-30%. As seen in Chart 10 above, such remedies were rare (14% of **divestiture remedies**), indicating that there were few circumstances in which such divestitures were deemed acceptable.

34. Results from "less than the **overlap**" **divestiture remedies** suggest that such remedies were often ineffective or risky (see Chart 14). However, seven remedies may have been too small a sample from which to draw definitive conclusions.

Chart 14: Effectiveness of seven divestiture remedies where less than the overlap was divested



35. Of the remedies where "less than the **overlap**" was divested, the Study found that only one remedy was effective.[44] In contrast, most of the remedies failed, were found to be ineffective, or were doubtful as to their full effectiveness (72%). Three of these remedies were found to be ineffective due to inadequate treatment of issues relating either to vertical dependence[45] or insufficient critical size of the divested business.[46] One additional remedy, whose scope excluded an important and promising segment of one of the overlapping businesses, led to a serious commercial weakening of the purchaser, a situation which the sellers exploited by increasing their market share.

> In the **Phase I** remedy […], the sellers committed to divest the product **overlap** in […] for only one portion of the main problem market ([…]): they excluded one product segment – […], the fastest growing segment – from the divestiture package. The sellers retained the right to use the brand only for a certain time during which they were allowed to re-brand the product. They succeeded in re-branding the product fairly quickly, although the black-out period continued to be in effect beyond this period. Paradoxically, the purchaser now suffers from the long black-out period in this product segment for its acquired brand […]. Because of the brand-splitting and the black-out period the purchaser remains unable to compete in the important and fastest growing product segment ([…]), a limitation which has the effect of weakening its overall brand equity. In this situation, the purchaser was faced with the

[44] r71.

[45] r11; r40; r44; r59; […].

[46] r60.

strategic choice of either abstaining from this product segment altogether or, attempting to introduce a new brand specifically for this segment for a limited number of years.

The purchaser managed to establish itself in the market, aided by the strong brand and additional measures by the seller to improve the purchaser's competitive position (investments in the corresponding production facility). However, due to the non-divestiture of the […] segment, the purchaser lost considerable market share (between 17% and 25%). Although the purchaser later managed to increase its market share at the expense of a third competitor, the resulting market situation is that the seller now has two to three times the market share of its closest branded competitors.

36. Three of the **divestiture remedies** (two cases) sought to eliminate, as part of wider packages, concerns of creation or strengthening of collective dominance.[47] The remedies aimed at creating a new competitor. The remedy in one of the two cases clearly failed.[48] This was due, first, to the failure to address adequately the nature of vertical relationships in the industry; and, second, to insufficient consideration of issues of critical size and economies of scale. The divested business was too small to compete in an international market, yet too large for the national market.

37. The outcome in the other two remedies was less clear-cut, as a new competitor was actually created.[49] However, market results have been criticized as competition is less than vigorous and the new competitor may have shown less ability and incentive to compete than was expected. Due to intervening exogenous factors (*i.e.* market liberalisation), no clear conclusions could be drawn on the effectiveness of the remedies in this case.

38. Finally, there was one case in which, whilst the prescribed remedy was "less than the **overlap**", certain complementary assets were later added voluntarily. The voluntary addition of assets can be taken as an indication that the business was not sufficiently viable and/or stand-alone and that without the additional assets, the effectiveness of the remedy would have been doubtful. Overall, this remedy failed to address adequately significant **upstream/ downstream** dependence issues, as well as issues of critical size - economies of scale and scope - and **IP rights**.

In the **Phase I** remedy […], the merging parties (sellers) committed to divest a […] plant and two […] production lines, including **IP rights** to manufacture these […]. This divestiture was to lead to a substantial reduction of the merged entity's market share in all countries concerned.

Two important assets were added upon the buyer's insistence: a vertically-related asset producing a key input ([…]), and an additional premium […] line (brand) produced in the divested […] plant, which the sellers had initially intended to retain. Without the addition of the premium […] line – the premium […] belonged to the same product market, however to a segment different from the one where the principal competition concern existed – the divested plant would have been underutilised and the buyer's […] portfolio deficient (*i.e.*, the addition of premium

[47] r5; r51; r86.

[48] r5.

[49] r51; r86.

[…] was necessary to meet requirements of critical size, economies of scale and scope).

In the interview, the seller generally acknowledged that additions to the remedy package, as it had been accepted by the Commission, were necessary in order to achieve a sufficiently stand-alone business. However, the seller regretted that in order to find a buyer it had to add the […] plant which was a shared facility, as both the seller and the buyer needed this input product. The addition of the […] plant thus reversed the vertical dependence which would otherwise have arisen. In fact, the seller sold the […] plant to the purchaser with the condition that the purchaser would enter a long-term supply agreement to supply the seller with all its […] requirements. In view of the substantial difference in size, as between the large seller and the much smaller buyer, this concession seems justified.

A third asset was added to the package: the […] brand. The buyer's (and seller's) reactions in this case clearly showed that a brand was necessary to turn the divested business into a viable and sufficiently stand-alone remedy package. Again, this addition to the package points to a certain deficiency in the design of the original remedy accepted by the Commission.

39. It can be concluded from the above that there are a large number of situations where a divestiture of larger than the overlapping business would have been necessary in order to secure an effective remedy. In particular, remedies where the more stand-alone of the two overlapping businesses was divested turned out to be more effective;[50] in contrast, remedies where the less stand-alone of the two overlapping businesses was divested frequently faced severe problems.[51]

40. The **Remedies Notice** acknowledges this risk, stating that the ability of the business to be operated on a stand-alone-basis is a factor which can justify the divestiture of the larger of the two overlapping businesses.[52] It also provides that the scope of a divestiture may be wider than the activities directly related to the **relevant markets** in which the Commission raised competition concerns, where this would be the only possible way to create an effective competitor in the affected markets. The results of the Study would tend to confirm the necessity of these requirements.

3. *Scope and purchaser approval*

41. The viability of a divested business is ultimately dependent on finding a "suitable purchaser". Interviewees in the Study indicated that a business that turned out to be non-viable in the hands of one purchaser could have been viable in the hands of another more suitable purchaser.

The best example for this is the **Phase I** remedy […]: while the business was not considered viable by the initial purchaser ([…], a large multinational […] company whose capability and incentive to develop such businesses […] seemed undisputed), it turned out to be a success when it was sold on to a much smaller, more specialised purchaser ([…]).

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[50] Good examples: r28 (business A instead of business B required after market test); r48; r71.

[51] Example: r72: at the time of the merger proceedings, a potential purchaser and competitor argued that business […A] would have been preferable to business […B] because it was a more stand-alone business.

[52] **Remedies Notice**, paragraph 17.

42. In the Commission's practice, the purchaser is typically unknown at the time of the decision (except in rare circumstances, where the seller identifies an "up-front buyer"). This uncertainty constitutes a major difficulty in assessing at the design stage whether the scope of a given proposed remedy would indeed be sufficient to remedy the competition concerns identified in the Commission's decision. The Study tried to distinguish between situations where problems resulted from the improper delineation of the scope of the divested business and situations where the problem was caused by the choice of a less than fully suitable purchaser.[53]

43. To increase the chances of successful implementation, the divestiture package can be designed as a fully stand-alone business, which would thus be attractive to a larger number of potential purchasers. On the other hand, a package that is more limited in scope would most likely be commercially attractive to only a smaller number of potential purchasers.

44. In the analysed remedies, the Study found that the Commission designed the scope of the divested business to meet the particular requirements of the market involved: sometimes the package was suited to many purchasers; sometimes it could only fit a few potential purchasers. This flexibility in delineating the scope of a remedy was necessary as regards both personnel and assets, including, for example, production facilities in branded goods cases or customer contracts.[54]

45. For example, as regards personnel, whilst some purchasers may be dependent on the entire sales organisation of the divested business, for other purchasers the same fixed scope of the commitment may mean simply extra labour costs and these purchasers may be better off with just a few key staff. The burdening of the purchaser with higher personnel costs may also apply to staff involved in production.[55]

46. The Study identified four principal ways in which the Commission had addressed the proper scope for a given remedy: (1) in one remedy, it required the seller to come up with an "up-front buyer" for the divested business;[56] (2) in some instances, it defined more specific suitability criteria for purchasers, for example, the need for a purchaser to be an established industry player with the necessary **know how**, or an industry player with the necessary distribution infrastructure;[57] (3) on several occasions, it granted the purchaser some discretion in delineating the scope of the remedy;[58] and (4) in other instances, it required the submission of alternative **divestiture remedies**.[59]

47. The first two solutions will be discussed in Section I on "Suitable purchasers", p. 98. Solution (4) is discussed in Section C on "Alternative divestiture commitments and crown jewels", p. 52. The third solution, leaving some choice to the purchaser, is advocated by the

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53 See also Section I on "Suitable purchasers", p. 98.

54 Example: r40, where it became clear that, in exceptional cases, some purchasers will be better off not to take all customer contracts but only those which they can serve profitably.

55 Examples: r30; r40.

56 […].

57 Example: In c20, the commitments annexed to the decision stated in […], inter alia, that "*those operators intending to make a purchase offer ... must be capable of showing their direct or indirect experience in the operation of […]*". Another example: r6 - the purchaser must be already active in the […] business and with access to a sufficiently large customer base in the **EEA**.

58 Examples: r63; r86.

59 r1; r43; r74.

Remedies Notice only in the field of personnel, where commitments may provide for a mechanism for the purchaser to select and retain the appropriate personnel.[60]

48. The Study found that there are risks inherent in an approach where the purchaser can define the scope of the divested business, as the economic interests of the sellers and the purchasers typically did not coincide with the competition objectives of the Commission.[61] For example, the committing parties may narrow the scope of the commitments by favouring purchasers who declare up-front that they do not require certain assets. Purchasers, on the other hand, may be prepared to trade off some of their future strength and **competitiveness** for the sake of a reduced purchase price; and, worse, unsophisticated purchasers such as new entrants may not even fully understand the competitive value of certain assets. These circumstances were difficult to confirm in the Study but often appeared to be real risks.

49. One remedy illustrates why personnel **transfer** issues should not be left entirely to the vagaries of negotiations between the seller and buyer. The Study found that the lack of clarity in delineating the scope of a remedy could give "bad-faith" sellers ample opportunities to weaken the competitive position of the divested business.

> In the **Phase II** remedy […], the parties committed to divest the […] business. The commitments text had left it to negotiations between the seller and buyer of the divested business to agree on the precise number of personnel to be divested with the business. Following the sale, the buyer claimed that the seller had played "dirty tricks" by not transferring several key personnel. The buyer saw this as one of the principal reasons why "nothing worked" in the business: customer satisfaction dropped and the divested business suffered such a major blow (losing 50% of its customers) that it was never able to recover its previous position. The personnel disputes were never resolved. The purchaser and seller settled their conflict later in an arbitration procedure, which resulted in the seller making a monetary compensation to the purchaser. However, this monetary compensation did not resolve the effectiveness issue of the remedy in competition terms.

4. Description of the scope of the divested business in the commitments

50. Most examined commitments had broadly enumerated the necessary assets and personnel to be incorporated in the divestiture package. The **Remedies Notice** and the **Model Divestiture Commitments** also advocate the identification of the most important tangible and intangible assets, as well as of personnel and key personnel.[62]

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[60] **Remedies Notice**, paragraph 47; Model Commitments text, paragraph 4 and Annex (Schedule).

[61] Most striking example: r72.

[62] The **Remedies Notice** states that "*the business to be divested normally consists of a combination of tangible and intangible assets*" and that such business "*could take the form of a pre-existing company or group of companies, or a business activity which was not previously incorporated in its own right*" (Paragraph 46). It stresses the need for committing parties "*to give a precise and exhaustive definition of the intended subject of divestiture*". The Notice further outlines that such description of the business "*has to contain all the elements that are necessary for the business to act as a viable competitor in the market: tangible (e.g. R&D, production, distribution, sales and marketing activities) and intangible (e.g. intellectual property rights, goodwill) assets, personnel, supply and sales agreements (with appropriate guarantees about the transferability of these), customer lists, third party service agreements, technical assistance (scope, duration, cost, quality) and so forth.*"(Paragraph 46) Excluded assets have to be identified separately (Paragraph 46). The **Model Divestiture**

51. The Study found that where commitments did not include a comprehensive list of assets to be assigned to the divested business, there were frequently situations where certain critical assets were omitted from the scope of the divested business. These omissions later caused problems and conflicts, the most complex of which occurred in the area of **IP rights** and **know how**.

52. Difficulties also arose in determining the scope of personnel to be **transferred**: one purchaser affirmatively stated that it was satisfied with the fact that *no* personnel had been **transferred** with the divested business it acquired.[63] Another purchaser in the same industry reported that the (voluntary) **transfer** of a single key employee had greatly enhanced the success of the divested business.[64] These examples would indicate that the scope of personnel to be **transferred** can occasionally be limited to a small number of key people, without adversely affecting either the economic interests of the purchaser or the effectiveness of the remedy. By the same token, it was not necessarily an advantage for the purchaser when the greatest possible number of staff was included in the scope of the business. The Study found that sellers have used divestiture provisions to "off-load" unproductive staff (by transferring them with the divested business), which had worked against the effectiveness of the remedy.[65]

53. Sellers have a better knowledge of the workings of the business which they propose to divest than does the Commission. Thus, the Commission cannot fully exclude the risk that omissions affecting the scope of the commitments may not be detected in time.[66] One commitment text included a useful clause linking the scope of the divested business to a statement of the purpose of the remedy in the commitments text.

54. The Study also examined commitments in which the ambiguity, or the incompleteness, of the scope of the divested business later led to disputes between the purchaser and the seller. In one case, the lack of clarity led the Commission (and probably the purchaser) to believe that the entire **overlap** would be divested, whereas in effect it was not.[67] In another commitment, the purchaser actually benefited (contrary to the likely intention of the seller in drafting the remedy) from the lack of clarity in the commitments text.

> In the **Phase I** case […], [… certain] capacity was to be divested, but the Commission decision did not specify which [… capacity was] to be divested and to which [… other capacity] only access was to be given. The buyer first claimed the [… right to acquire certaincapacity […]. However, the buyer itself then provoked the incompleteness of this very **transfer** […]when it discovered that it would have to bear higher costs, due to increased environmental requirements. This obliged the merging party to retain formal ownership, pay licences and bear the risk while the buyer enjoys the benefit of the use. While this may be in the interest of the buyer's

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Commitments, in addition to the **Remedies Notice**, refers to, if necessary, supply arrangements with the seller for a transitional period, and requires the parties to attach schedules detailing: (1) the legal and functional structure of the Divestiture Business, including the organisational chart; (2) a more detailed description of assets, personnel (key personnel and other personnel) and supply arrangements; and (3) an explicit requirement to define what the Divestiture Business does *not* contain (Model Commitments text, Annex (Schedule)).

63 r37; r78.

64 r56. The commitments text did not mention personnel.

65 r30; r40.

66 r30; r80.

67 r80.

> **competitiveness**, the continued link is not what the Commission had intended to achieve.

55. The clearest delineation of scope of remedies in the commitments texts has often been achieved through the detailed enumeration of assets, including the specific provision that a certain category of assets is defined as “including, but not limited to” the items that are expressly listed.

56. The commitment texts of the analysed Commission decisions rarely contained explicit criteria for assessing the viability requirement. Moreover, the Commission’s decision always assessed the suitability of the commitments primarily in terms of whether or not they resolve the competition concerns identified, rather than in terms of commercial viability. Thus, although there is rarely any direct assessment of the viability of the divested business in commercial terms, there is typically an indirect indication of what may constitute a viable business in terms of the end competition result expected of the remedy.

5. Transitional agreements

57. The Study analysed issues related to transitional agreements between the parties and the purchasers, such as temporary supply agreements, technical assistance, toll manufacturing agreements, and other transitional services. Such transitional arrangements may be necessary to maintain the economic viability and **competitiveness** of the divested business during a start-up phase.

58. Transitional agreements may create (temporary) dependence of the purchaser on the parties, thus influencing its competitive behaviour, creating information links, and making the divested business vulnerable to misconduct or neglect by the parties.[68] However, a number of cases showed that even longer transitional periods may be accepted if such arrangements are necessary for the successful implementation of the remedies.[69]

59. The Study analysed 18 temporary supply agreements that were aimed at facilitating the transition of the divested business to the new owner.[70] In about half of the analysed remedies, these agreements led to the dependence of the divested business on the parties which went beyond the transitional period. In one remedy in [… a high] technology sector such dependence led to major degradation of the divested business.

> In the **Phase II** case […], the parties committed to divest their […] business. During a two year transitional period the […] business continued to be operated from the seller’s network, not included in the divestiture package. According to the purchaser, this left him and his clients in the hands of the retained business that operated the network in a negligent way, leading to complaints about poor service levels. The purchaser lost half of all customers in the process and the remedy did not create a strong competitor. […]

60. The **Remedies Notice** states that the divested business must consist of a viable business that can be operated on a stand-alone basis, which means independently of the merging

[68] All of these agreements were supplementary to a main remedy and thus did not individually enter into the remedies count used for the statistics in this Study.

[69] Examples: r38; r43; r78; r90.

[70] r5; r6; r11; r13; r21; r29; r34; r41; r44; r48; r58; r59; r66; r70; r72; r74; r80; r86.

parties as regards the supply of input materials or other forms of co-operation other than during a transitory period.[71]

61. Regarding technical assistance or interim services, the Study found remedies where such transitional agreements played a crucial role for the success of the purchaser.[72] In the analysed remedies, purchasers regularly pointed out that the pricing of transitional agreements needed to be cost-based. Otherwise the economic viability of the divested business would be undermined, in particular if circumstances required longer than foreseen transitional periods. One re-branding case suggested that if transition occurred too quickly merely for cost reasons, this risked destroying a part of the commercial (and competitive) value of the business being **transferred**.[73]

62. The **Remedies Notice** clarifies that commitments proposals have to stipulate their "*scope, duration, cost, quality*".[74]

63. Furthermore, the mixed experience of purchasers in a number of cases showed the importance of correctly drafted **SPAs**, including ancillary transitional agreements in providing the necessary leverage to the purchasers concerning the enforcement of such agreements. These aspects are discussed in more detail in the Section on "Suitable purchasers".

64. Two remedies may indicate that toll manufacturing remedies can perhaps work satisfactorily as supplementary remedies in support of **divestiture remedies**.[75]

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[71] **Remedies Notice**, paragraph 14. The Schedule to the **Model Divestiture Commitments** and paragraph 4(e) specifies: "*the Divestment Business includes, but is not limited to, the arrangements for the supply with the following products or services by [the parties] or Affiliated Undertakings for a transitional period of up to [• months] after Closing*: [*Indicate the products or services to be provided for a transitional period in order to maintain the economic viability and competitiveness of the Divestment Business*]".

[72] r38; r43; r78; r90.

[73] r57.

[74] **Remedies Notice**, paragraph 46.

[75] r60; r71; where a toll-manufacturing agreement was included to give the purchaser of a certain plant the option of obtaining additional quantities going beyond the capacity of its plant.

B. Remedies that directly affected third parties

1. Any merger remedy affects third parties by its very purpose, as it seeks to restore and maintain effective competition in the marketplace. In this Section, the role of third parties is examined only to the extent that the effective implementation of a remedy is dependent on certain actions being taken by a contractual partner. The Study found that when third parties are in a position to prevent or impede the implementation of remedies that affect them, their actions have frequently led to implementation issues and subsequent delays in the implementation of remedies.
2. The **conditions** and **obligations** attached to the Commission's conditional clearance decision, subject to commitments, are binding only upon the parties to the concentration who initially offered the commitments.[76] Although a Commission decision involving remedies may affect the legal position of third parties, the Commission cannot require the implementation of commitments by third parties. It must, however, require the parties offering the commitments to implement the remedy fully. It is therefore the responsibility of the parties to the concentration to ensure, prior to offering a commitment, that there are no risks or uncertainties related to third party approval that may undermine the effective implementation of a particular commitment.
3. At least 10 remedies out of the 96 remedies analysed in the Study (10%) raised issues of third party dependence which put the timely implementation and full effectiveness of the remedy at risk. Two of these serious issues remained unresolved and may thus have actually reduced the **competitiveness** of the divested business.[77] Whilst the vast majority of remedies were implemented successfully, the Study demonstrated that the Commission cannot automatically rely on the co-operation of third parties.
4. The Study found the following instances of actual or potential third-party influence over the timely implementation of remedies:
   (1) delaying tactics by exercising blocking rights to thwart the implementation of the commitments;
   (2) lengthy and drawn-out negotiations with **JV** partners to enable the divesting party to exit or dissolve the **JV**;
   (3) third parties recognising their leverage in negotiations and demanding excessively generous terms in exchange for their co-operation;
   (4) refusal of a third party to terminate a joint licensing arrangement;
   (5) difficulties in obtaining the consent of a co-owner of a jointly-owned brand for the divestiture of that brand;
   (6) dissatisfaction of third parties with the profile of a purchaser leading the third party to require bank guarantees on the financial soundness of the purchaser;
   (7) threats by third parties to withhold consent to compliance with behavioural commitments;

[76] The Commission has not previously examined in a Study the role of third parties who could be affected in the context of merger remedies. The involvement of third-party interests is highlighted in the **Remedies Notice**, paragraph 7, as a factor that is relevant to the assessment of whether a particular remedy is likely to restore effective competition in the market.

[77] r31; r63; r90.

(8) launch of litigation by co-shareholders in order to block implementation;

(9) blocking disclosure of confidential **know how** to a purchaser; and

(10) difficulties in the negotiation of release from contractual **obligations**.

1. The influence of third parties on the implementation of remedies

1. The most frequent example of third party involvement in merger remedies was the requirement for the consent of a **JV** partner to the committing party's exit from the **JV** and/or to the entry of a purchaser. This was also the situation which created most problems.
2. Two remedies in the Study showed that in situations where the parties undertook to terminate their **JV** participation,[78] their partners invariably had substantial financial or strategic interests in the outcome of the committing party's exit. The importance of such interests was often underestimated by the seller, in particular in circumstances where the **JV** consisted of partners with distinct and complementary roles.

> In the **Phase II** remedy […], the sellers agreed to **transfer** to […] (the original rights holder) the whole of [… party A's] **EEA**-wide business […]. The parties also agreed to supply inputs to […] for production. […] is a small **R&D** company based in […] with a relatively small subsidiary and distribution network in the **EEA**. It therefore had to find a new marketing and distribution partner in order to carry on the business. Despite the fact that it acquired the business at no cost, […] delayed **closing** because the sellers were obliged pending **closing** to pay […] in each Member State in which the product had been marketed. The negotiations were protracted and **closing** took place 18 months after the Commission's decision was adopted. The delay effectively meant that the divesting parties had to finance […] in the meantime. The remedy delayed the product launch by several months.

> In the **Phase I** remedy […], the Commission accepted a commitment that […] would divest its entire […%] stake in […], its **JV** with […]. The compliance process did not go smoothly for […] as its relationship with [… the JV partner] became hostile. [… The JV partner] had pre-emption rights and tag-along rights in the shareholders' agreement. It wanted to decide on its new **JV** shareholding partner itself and therefore had an interest in ensuring that […] not sell at a high price. [… The JV partner] effectively removed [… a candidate purchaser] from the bidding rounds by concluding a separate on-selling arrangement with [… this candidate purchaser] – in order to reduce the pool of candidates and to reduce the sales price. These issues complicated the implementation of the remedy but may not have had any serious impact on effective competition.

3. Frequently, in commitments requiring the committing parties to exit from a **JV**, divesting parties reported that they were placed at a considerable disadvantage *vis-à-vis* their **JV** partner who sought to capitalise on the fact that it knew it had a high degree of leverage by demanding excessively generous settlement terms.

> In the **Phase I** remedy […], a co-shareholder in the **JV** launched civil proceedings in a national court to protect its rights by preventing the disposal of shares in the venture to a particular purchaser. The purchaser (who was also an existing

[78] Examples: r53; r75.

shareholder) would have changed the control situation in this **JV**: it would have led to a loss of control, or to a lesser degree of control, being held by the litigating co-shareholder, who also wanted to acquire the stake to be sold, albeit at a lower price. This dispute delayed the implementation of the commitments by more than one year.

4. The Study found cases where third parties behaved opportunistically and tried to maximise their leverage over the committing parties.

> In the **Phase II** remedy […], two of the sellers' **JV** partners ([…]) complained to the Commission and suggested that [… the seller] should be forced to divest its shareholding in [… the JV], a commitment which was later accepted in the decision. [… one complaining JV partner] was approved as purchaser, and it bought not only [… the seller's] shares but also those of [… the other JV partner], thus acquiring 100% of the shares. [… The other JV partner] explained in our interview that it, together with [… the purchasing JV partner], had for years sought to adopt a joint strategy to oust [… the seller] from [… the JV]. They saw the announcement of the […] deal as their opportunity to accomplish this goal. […].

5. Third party rights were also involved in a variety of contractual relations, such as, the **transfer** of licences, or the **transfer** of purchase and/or supply agreements. The Study found that third party co-operation in resolving contractual issues could not be taken for granted.

6. Of these contractual relations, the **transfer** of licences involving shared **IPRs** such as **know how** proved to be particularly complex. Problematic issues typically arose where the committing party had to compensate the licensor for its exit, which was reported to be particularly costly in cases where no equally suited licensee was readily available.

> In the **Phase I** remedy […], the seller ([…]) undertook to reverse all its arrangements with […] (including the surrender of the licence, trademark, **know how**, and so on) relating to […, product in development]. In order to maintain the viability of the new product, the seller agreed that it would, for a period of 12 months, continue to support the development and launch of the product. The commitment's aim was that the […] product would foster competition for the merged entity's dominant product. The merging parties complained that they were "held hostage" by [… the purchaser] and argued that the purchaser had demanded excessive financial compensation for termination of the licence. [… The purchaser] on the other hand argued that it had not been fully compensated, in particular for the six-month delay in launching the product that was caused by the remedy. The Commission allowed one extra month for the reversal of all arrangements with [… the purchaser]. The six month delay in the launch of the products in several national markets may have meant that the "purchaser" […] may have lost the important first-mover advantage on that market.

7. Another difficult licensing issue arose where third party consent was required for the disclosure of **know how** to the purchaser in order to ensure that it could make full and proper use of the divested assets.

> In the **Phase I** remedy […], the Commission accepted a commitment that […] would divest a technology business. Following the **transfer** of the business, the buyer complained to the Commission regarding the incomplete **transfer** of the **know how** required to run the business. It transpired that there were third party restrictions on the licenses and thus not all of the **IPRs** and the **know how** could be transferred. […] claimed it was prevented by third party agreements from disclosing shared

information. It also contended that certain of the third parties would not communicate with them. The Commission's investigation of the issue led to a softening of […] position: […] subsequently identified the relevant third parties who, following negotiation with […] and the buyer, allowed some information to be shared, but only for evaluation purposes and under strict confidentiality provisions. The delay meant that the purchaser was prevented from competing in the market for some time.

8. The Study found that where the sellers had not fully disclosed the existence of third party rights, the Commission was not in a position to accommodate the problem in the design of the remedy. In one interview, the committing parties claimed that they themselves had been surprised late in the process (during the implementation stage) to learn of the existence of third party rights that affected the divestiture package.

In the case discussed above, the Commission only learned about the restraints on the divested assets in the course of complaints from the buyer during the implementation stage. The parties committed to licence, and/or not assert, overlapping rights over […] technology in order to remove competition concerns of single dominance in this emerging market. The [… US authorities], in its parallel procedure, required that this licensing option be offered to an approved licensor, which was […]. [… The licensor] subsequently complained to both the US authorities and the Commission about the failure of the sellers to make a complete **transfer** of the required **know how**, arguing that the sellers were relying on claimed third party restrictions to justify their failure to **transfer** the […] **know how** fully. In fact, the **SPA** only required the seller to **transfer know how** that it owned and had the right to **transfer**. The issue could not be fully resolved:[79] the complex licensing and **know how** requirements led to several years of delays in the **transfer** of the business and, to date, [… the licensor] has not been able to grant any technology licence for the […] technology.

9. The Study also found instances where affected third parties were not consulted and consequently did not want to co-operate in the implementation of the remedies.[80]

In the **Phase II** remedy […], the Commission accepted the following two alternative remedies: (a) that [… C], a **JV** between [… the JV partner] and [… party B], would sell its […] business (including […]); or (b) that [… party B] would sell its 50% interest in [… the JV]. Regarding the first alternative, there were two obstacles: first, [… the JV partner's] consent was required in order to sell the […] business; and second, because the […] business was dependent on [… the JV partner] for raw material inputs, that meant that *in practical terms* [… the JV partner] was the only possible buyer. However**,** [… the JV partner] refused to consent to this remedy, thus making the implementation of the first alternative impossible. Regarding the second alternative, under the 50/50 **JV** agreement, [… the JV partner] also had a right of first refusal.

[… the JV partner] was unhappy with [… party A's] decision to offer these alternative remedies, both of which involved [… the JV partner] in a substantial way

79 The US authorities did not take further legal action, because they had not issued a consent decree governing the "fix-it-first" provisions contained in their remedy. Meanwhile, the Commission could not act because of the unclear wording in the decision and the commitments text.

80 Prior to the acceptance of proposed remedies, the Commission generally consults third parties present in the market by circulating a non-confidential version of the commitments as part of the market test, where appropriate. However, this was not always done as the following case demonstrates.

without its consent. It complained that it had not been consulted by the Commission about either remedy. Eventually, [… the JV partner] agreed to the second alternative, the acquisition of [… party B's] share in [… the JV], but insisted that it would not pay cash for the […] assets. Thus the parties resorted to negotiating an asset swap.

As no new **JV** partner with equal industrial knowledge and reputation could be found, the divested business (the **JV**) subsequently lost market share, while the business retained by the seller […] was able to increase its market share following the divestiture.

10. It should be noted that the cases reviewed in the Study did not indicate that third party suppliers or customers had raised significant implementation issues.[81] However, the Study found that problems arose where the supplier was the committing party, even if only for a transitional period.[82]

2. Remedies where third party implementation issues were avoided

11. A different issue arose in a case where a third party **JV** partner had the potential to exert leverage over the bidding process to divest shares in the **JV**.

In the **Phase II** remedy […], the parties committed to divest their shares in […] **JV** with […]. Under the **JV** agreement, [… the JV partner] had a pre-emption right which enabled it to buy the parties' shares if it matched the highest bid. In order to create an incentive for bidders to make higher offers, the sellers devised a system to make potential buyers anyhow come forward with their bid. The parties announced that they would pay the administrative costs of the highest bidder, as without the matching right of [… the JV partner] that bidder would have won the auction. This had the desired effect of encouraging bidders to come forward. [… The JV partner] matched the highest bid. Of course this solution engendered extra costs for the seller. Due to the devised system, there was no delay in implementation of the divestiture remedy.

12. The Study found that where there is only one potential buyer for the divestiture package, which often occurs in the case of the dissolution of a **JV**, the committing parties emphasized in the interviews that divestiture deadlines could unduly affect their economic interest by limiting their negotiating power in the **JV** exit process.

In the **Phase II** remedy […], the parties committed to dissolve their […] **JV** with [… the JV partner]. The unscrambling of the **JV** was extremely complicated and the Commission accepted very detailed commitments allowing [… the parties] and [… the JV partner] to agree on the **transfer** of alternative packages of assets from the **JV** to enable [… the JV partner] to carry on the business. The 12-month time limit set by the Commission for the dissolution struck the right balance between creating the incentives for the parties to negotiate dissolution, and ensuring […party B] was not part of the **JV** for any longer than was necessary.

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[81] This may be partly due to the fact that only a few customers and suppliers were interviewed in this Study.

[82] Example: r72.

3. *Overall findings*

13. Summing up, the Study found that whilst commitments to exit from a **JV** have caused a number of implementation issues, in particular delays in implementation due to the intervention or reduced co-operation of third parties, only in two remedies these issues were not eventually resolved and thus likely reduced the **competitiveness** of the divested business.[83]

[83] r31; r63; r90. See also the statistics in Part IV. "Effectiveness of the analysed remedies", p. 124.

C. Alternative divestiture commitments and crown jewels

1. Current practice of alternative divestiture commitments

1. The **Remedies Notice** provides for the possible use of alternative **divestiture commitments** in appropriate circumstances.[84]
2. The Commission accepts alternative **divestiture remedies** in cases where the parties' preferred divestiture package would be acceptable, if implemented, but where the complexities of the particular case indicate that implementation of the "first choice" remedy might not be possible. The alternative remedy is designed to ensure fulfilment with the Commission's competition goals and, thus, it is important that the alternative proposal must be "at least equal, if not better suited" to restoring effective competition, as stipulated in the **Remedies Notice**.
3. Alternative **divestiture commitments** replace the original **divestiture commitments** where the sellers are unable to divest to a suitable purchaser within the foreseen deadline. Alternative commitments are referred to as "**crown-jewels**" where the alternative differs from the seller's first proposed alternative in that it has a more extensive scope than the original choice of the parties and is thus more attractive to potential purchasers. The idea is that with a **crown-jewel** commitment the Commission can be assured that the parties will, in the alternative, be able to divest a viable business.

> In the **Phase I** Remedy […], a typical **crown-jewel** remedy was accepted. The parties committed to resolve competition concerns in a national market, either by: (1) granting a supply agreement; (2) granting an exclusive licence; or, (3) failing both of those, the alternative of divesting the entire business. The seller was able to attract a regional niche player in the market, who was satisfied with obtaining the supply agreement. In our interview, the purchaser noted that it had not been informed that broader alternative options existed, but stated that for its business purposes it was fully satisfied with the alternative it had obtained.

4. The **crown-jewel** may either be an upgrade on the original business or another more attractive business.[85]

2. Infrequent use of alternative divestiture commitments in the analysed remedies

5. In the Study sample of 84 **divestiture commitments** (including both commitments transferring a market position and exiting from a **JV**), alternative commitments were required in four remedies, three of which[86] dealt with problematic exits from **JVs**, *i.e.*, situations involving third party rights which might affect the implementation of the remedy. The fourth concerned the divestiture of a pipeline product.[87]

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[84] **Remedies Notice**, paragraphs 22 and 23.

[85] In the commitments involving certain […] products in case c13, the parties offered the following alternatives: (a) the divestiture of the production plant (for […]) and the entire commercial and technical **know how** package needed to support production and sale of the product; or (b) if no suitable purchaser could be found for that package, then the package would be expanded to include all customer lists and orders on hand relating to the divested product.

[86] r1; r43; r74.

[87] r47.

6. In one remedy, the parties' preferred commitment involved its proposed exit from the **JV** involved in the **relevant market**. As the **JV** partner would not agree to the seller's terms, the sellers were unable to obtain the partner's consent, and consequently, the alternative commitment, the divestiture of a subsidiary, had to be implemented.

In the **Phase I** remedy […], the parties undertook either to: (a) divest [… party A's] 60% stake in its […] **JV** to its **JV** partner ([…]), upon **condition** that both partners would enter into a letter of intent within the first four months of the deadline period, or (b) divest [… party B's] […] business. The former option was the sellers' preferred remedy. The parties executed a binding letter of intent to meet the commitments' requirements. However, the negotiations with [… the JV partner] broke down completely after six months, due to a failure to agree on terms, and the sellers were then required to implement the alternative commitment […], described by the sellers as "the most beautiful baby" in this sector.

7. Two further alternative **divestiture remedies** led to exits from **JVs**: in one instance, the sellers committed to exit or dissolve the **JV**,[88] and in the other instance, the remedy provided that either the seller or its partner would exit from the **JV**.[89]

In the **Phase II** remedy […], the inclusion of alternative remedies in the commitments (*i.e.*, the dissolution or divestiture of either [… business] A or [… businesss] B) gave the sellers some flexibility in their negotiations, even though both options were dependent upon third party consent.

In the **Phase II** remedy […], the Commission accepted the following alternative remedies: (a) that […] (a **JV** between [… the JV partner] and [party B]) would sell its […] business, which would include […]; or (b) [party B] would sell its 50% interest in [… the JV]. Given [… the JV partner's] refusal to consent to remedy (a), the parties implemented remedy (b).

8. Another case involving an alternative commitment had an unusual "twist" in that the parties proposed a relatively novel remedy whereby the commitment would be triggered or not depending upon the success or failure of a rival's pipeline products.[90]

In the **Phase I** case […], the parties committed to out-licence a pharmaceutical pipeline product if it reached the successful conclusion of […] clinical trials, in order to remove the competition concerns arising from the strong presence of one merging party in the product and the potential strength of the other party's pipeline product in this market. The parties initially argued that there was no need for any commitment related to this product category. Based on their arguments and third party replies to the Commission's market-testing, the Commission eventually concurred that the likely success of this particular product was not clear, thus raising questions about the need for any divestiture in this product market. The parties showed that there were four other large pharmaceutical companies who were presently conducting research – at

[88] r43.

[89] r74.

[90] r47.

the same stage of clinical development as the parties – and they argued that it was not clear who would be "first past the post."

The parties thus offered a relatively novel proposal to ensure that they would not, in the future, be the holder of the only successful product in this category. They submitted a commitment that would be subject to the following three conditions:

(1) […] clinical trials for the party's [… product] had been completed;

(2) all the competing pipeline products of the other four competitors had failed phase III trials and their clinical development had been discontinued; and

(3) there was no other competing product which had completed […] clinical trials […].

The Commission was only able to discharge this commitment two years after its decision, when the parties were finally able to demonstrate that there was another competing product ([…]) which had completed phase III clinical trials […] before the party's product reached that stage.

Interestingly, both the parties and [… the competitor] engaged in strategic behaviour. [… The competitor] fought the party's contention that its product had completed […] trials before [… the parties'] product, arguing that [… the parties] should be held to its commitment to divest. [… The competitor] claimed that its product was suited for "first line" therapy, whereas [… the parties'] had focused on "second line" therapy – thus, claiming that its product was not a substitute. After a third series of market-testing and voluminous submissions from several medical experts – the bulk of which supported [… the parties'] assertions that the products were indeed competitive – the Commission agreed to discharge [… the parties'] from this commitment.

In terms of strategic behaviour on the part of the parties, [… the competitor] argued that the Commission could not be sure whether [… the parties] were intentionally holding back the development of its product until after a competitor finished the […] trials first. This assertion was, of course, impossible to prove or disprove, but it raised an interesting question about the effectiveness of this type of remedy.

9. In addition, the Study reviewed five remedies in which the Commission had investigated proposals for alternative remedies and rejected the commitments offered, because they involved risks to effective implementation of the remedy which were deemed unacceptable.[91] In these cases, the Commission rejected the seller's proposed alternatives, either because the divested business would not have been a viable business in competition terms, or because the successful implementation of the remedy was not sufficiently certain, for example, because of complex **carve-out** issues.

10. The Study also identified eight (non-**JV**) remedies in which an alternative **divestiture commitment** or **crown-jewel** commitment would have been likely to improve significantly the effectiveness of the remedy,[92] either by: (1) increasing pressure on the seller to implement the remedy in a timely fashion; or (2) avoiding stalemate where the seller failed to find a suitable purchaser for its first (preferred) remedy package.

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91 Examples: r71 ([…] site needed **carve-out**); r48 ([…] plant not competitive); r20; r92 (only alternative was a supply agreement).

92 r3; r31; r39; r63; r72; r75; r76; r96.

11. Finally, in three remedies the Study collected statements from the parties, purchasers and trustees who claimed that no alternative **divestiture remedies** would have been possible in the framework of their respective cases.[93]
12. In several interviews, sellers reported that alternative remedies were significantly more costly than remedies with only one option because alternative commitments effectively doubled the resources and efforts required to preserve assets in the interim period: two hold-separate processes need to be installed to preserve both businesses, and both sets of assets required the oversight of trustees. Other drawbacks cited were the increased insecurity in the companies concerned, and the prolonged period during which competition would not be fully restored.
13. For some of the remedies where alternative remedies were not feasible (or were not offered by the parties) the possibility of including up-front buyer provisions could have also been a viable option. Such an option would be particularly suitable where the Commission found that there were serious threats to competition in the interim, or that assets could be degraded, because they were difficult to preserve in the interim.

93 r29; r42; r66.

D. Interim preservation and holding separate of the divested business

1. The Study analysed the 84 **divestiture remedies** regarding: (1) the preservation of viability, marketability and **competitiveness** in the interim period until divestiture; and (2) the obligation on the parties to hold the assets separate during that period. 31 remedies (37%) raised implementation issues in the sense that the effectiveness of the remedy risked to be or was actually reduced as a result.
2. Preservation and holding separate provisions are normally monitored by the Commission via a monitoring trustee. In addition, the parties are usually required to appoint a hold-separate manager who should be capable of carrying out the operational/executive management of the divested business on a day-to-day basis, including the hold-separate **obligations**, while being under the supervision of the monitoring trustee. Findings on the specific interim preservation and hold-separate functions of the monitoring trustee and the hold-separate managers will also be presented in this Section.

1. Length of the interim period

3. The interim period, *i.e.* the time between the parties proposal of their commitment and the acceptance by the Commission and the time when the purchaser takes over the business, usually corresponds with the so-called divestiture deadline. Divestiture deadlines are discussed in Section J on "Divestiture deadlines", p. 109 of the Study, including the main negative consequences if the interim period is too long. These are: (1) uncertainty within the divested businesses, leading in the worst case to what one purchaser described as "a complete halt of the business";[94] and (2) uncertainty in the market regarding the future of the business leading to a significant loss of competition in the market.[95] In dynamic markets reduced presence could quickly lead to significant losses of market strength that may be hard if not impossible to regain afterwards.

2. Preservation of viability, marketability and competitiveness

4. During the divestiture process and until assets and personnel are **transferred** to the new owner, the divested business needs protection from any degradation that might reduce its competitive potential. These were common **obligations** in all analysed **divestiture commitments**. They are also enshrined in the **Remedies Notice**.[96] The scope and intensity of the preservation requirements varied according to the specific circumstances of the remedies. For example, **obligations** were less demanding in situations where the committing parties divested only a minority stake in a company or where the existence of a strong **JV** partner helped to ensure that the **competitiveness** of the divested business is maintained.[97] Comparing the collected statements from the interviews it appears that

94 See statement of the purchaser […] in the remedy: r31; as well as the statements of purchasers in: r9; r45, discussed below.

95 Example: r31; r43; r45.

96 **Remedies Notice**, paragraph 50, states: "*It is the parties' responsibility to reduce to the minimum any possible risk of loss of competitive potential of the business to be divested resulting from the uncertainties inherent to the transfer of a business. Pending divestment, the Commission will require the parties to offer commitments to maintain the independence, economic viability, marketability and competitiveness of the business.*"

97 Examples: Minority stakes: r86; **JV** partner: r9; r41; r43; r48; r71.

preservation measures typically became more complex and difficult to verify when the divested business was not a stand-alone-business.[98] Particular difficulties arose in cases where the assets concerned the business associated with brands.[99]

5. The Study investigated the impact of three **obligations** on the parties, [100] namely to:

   (a) maintain the business and not to carry out any act that might have significant negative impacts on its value, management or **competitiveness**;

   (b) finance the divested business to allow the continued development of the business on the basis of the existing business plans; and

   (c) retain key personnel by offering, if necessary, appropriate incentive schemes.

6. As regards maintaining the business, the Study assessed several examples where the parties degraded tangible and intangible assets by active conduct or disregard (negligence). Intangible assets included in particular retention of the **know how** of the personnel and the order book of the business. The following are two of the most striking examples:

In the **Phase II** case […], the parties committed to divest the […] business that constituted the **overlap** in this market. The Commission and the [… US authorities] were concerned about a single dominant position and foreclosure from [… arrangements[101]] among the big players [… and] the merged entity would have had the ability to raise competitors' costs. The remedy review revealed that key personnel of the divested business had been compelled by the seller to sign non-disclosure agreements under the threat that otherwise all information on their computers would be wiped out. Both the threat of the destruction of stored information and the coercion of non-disclosure "agreements" clearly devalued assets that belonged to the divested business. After a few years the divested business filed for Chapter 11 protection and was sold on for a fraction of its original value.

In the **Phase I** remedies […], the parties committed to divest a large number of brands and businesses, including their endorser (umbrella) brands, in order to eliminate the **overlap** in markets where single dominance concerns had been identified. During the hold-separate period, overstocking of these brands by the customers led to increased sales activity. As a result, the purchaser reported that it was subsequently faced with diminished turnover and the viability of the divested business was negatively affected.

98 Example: r80.

99 Example: r39.

100 The **Remedies Notice** specifies in paragraph 51: "*The parties will be required to ensure that all tangible and intangible assets of the divestiture package are maintained, pursuant to good business practice and in the ordinary course of business. This relates in particular to the maintenance of fixed assets, know how or commercial information of a confidential or proprietary nature, the customer base and the commercial competence of the employees. Furthermore, the parties must maintain the same conditions of competition as regards the divestiture package as those applied before the merger, so as to continue the business as it is currently conducted. This includes providing relevant administrative and management functions, sufficient capital, and a line of credit, and it may include other conditions specific to maintaining competition in an industry.*"

101 […].

7. Such conduct, also called “front-loading”, can be a particular problem. By offering exceptional pricing promotions on divested products before the **closing** of the divestiture could take place, the parties are thereby depriving the buyer of substantial sales volumes during its post-**closing** transition period. Such front-loading meant the purchaser’s new customers did not need supplies from it for a few months following **closing**. This had serious consequences on the immediate financial health of the divested business, and moreover, it meant that the purchaser was deprived of the opportunity for direct contact with its new customers after **closing**. This delay also enabled the seller to continue promoting its own products to the customers, which worked to the detriment of the purchaser, who had legally acquired the commercial rights to these customers.
8. As regards the continued financing of the divested business, several purchasers indicated that committing parties had neglected the normal needs of the divested business during the interim period by failing, for example, to support investment programs or customer relationship management; as a result of which the divested business was economically harmed or hampered.[102]

> In the **Phase II** case […], the parties committed to divest brands, businesses and production capacity in the markets for […]. During the divestiture period, the parties stopped promoting certain brands included in the divestiture package, as they had previously announced their intentions (before having given the commitment) to gradually terminate these brands. Production dropped below 70% of the target that had been set. After the Commission raised this concern with the help of the trustee, the management of the divested business re-launched the brands.

9. Financing may also involve investments that lie outside the normal scope of the business. This occurred, for example, when parties have to secure concessions from government authorities for the new owner.[103] In another case, new environmental laws led to investment needs that the new owner, alone, would not alone have been able to finance.

> In the **Phase I** remedy […], the parties committed to sell their 20% interests in […] to eliminate competition concerns of a single dominant position. The purchaser […] negotiated an additional commitment not foreseen in the Commission decision ensuring that the seller would remain a shareholder for another three years in [… the business]. This was necessary to prevent shut-down of [… the business] as big environmental investments were coming up and the purchaser, who needed only 25-30% of the available capacity, would not be able to finance them alone.

10. As regards retaining key personnel, at least five remedies underscored the critical importance of retention programmes for key personnel, which took the form of financial incentives or of other motivational measures.[104] The provisions usually foresaw also the absence of all involvement with the retained business and non-solicitation clauses. There was an issue with the length of blackout periods in one case. Overall, the Study methodology encountered difficulties assessing the effectiveness of such schemes in practice.

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[102] Examples: c25; r26; r79.

[103] r34 (securing concession from […] authorities required big investments by the parties).

[104] Financial incentives were important in, for example: r1; r28; r45; r49. In r39, the parties decided not to split one of the divested companies [(…)] in order to make the divestiture package more attractive and keep personnel motivated.

11. Personnel issues appeared also as a consequence of sustained uncertainty among personnel related to the interim period in situations where the preservation and the hold-separate period was long and thus the identity of the purchaser remained unclear for a long period of time.[105]

3. Hold-separate provisions and ring-fencing obligations

12. The second important provision to protect and preserve the divested business requires parties to hold the divested business separate from their retained business during the interim period. The purpose of hold-separate provisions is to establish the independence of the divested assets and to cut off, as soon as possible, all influence of the parties on the divested business to ensure the preservation of its viability, marketability and **competitiveness**. Moreover, only a business that is held separate from the parties in the interim period will have a chance to exercise some independent competitive standing on the **relevant market**.[106]
13. In the analysed remedies, hold-separate provisions in the commitment texts did not follow any standard format. Frequently, the parties and trustees pointed out that the provisions were not clear enough; and trustees, especially, noted that they would have wished for more guidance from the Commission.[107] The need for clear and explicit hold-separate provisions became particularly obvious in divestitures involving long divestiture periods.[108] However, even in circumstances where the need for hold-separate clauses seemed less obvious, the analysed remedies indicated that such provisions were in fact necessary, for example, in up-front buyer scenarios where the divested business belongs to the seller,[109] or where the parties divested only a non-controlling minority or a **JV** stake.
14. In practice the implementation of hold-separate provisions raised the following points:
    (1) there was a high degree of variability in the scope and intensity of how hold-separate provisions were implemented;
    (2) the most common method for implementing the hold-separate provisions was that the trustee required compliance statements by the parties; in many instances the parties also had meetings on this point with the monitoring trustees.[110] From the analysis it remained overall unclear to what extent the parties had installed clear internal procedures, to implement and monitor their hold-separate **obligations**, which reach their entire organisation; and
    (3) commitments with alternative divestiture provisions necessitated preservation and holding separate measures for all alternative businesses, thus raising the costs for the parties and uncertainty in all the businesses concerned;[111] and

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[105] r9; r45. In r96 the identity of the purchaser, an investment fund [(…)], increased uncertainty among personnel.

[106] In some cases the **carve-out** of different assets was completed at different times requiring a staged implementation of the hold-separate obligations. For example: r9; r63.

[107] Examples: r30; r43.

[108] Examples: r33, 15 months; r45, 18 months.

[109] r6; r66; r72.

[110] Examples: r38;r46; r54; r67; r78; r96.

[111] Example: r1.

(4) in a **JV** situation where the **JV** is not a stand-alone business, cutting the **JV** off from the seller's business risked having significant negative consequences for the **JV** partner.

> In the **Phase II** remedy […], the parties committed to withdraw from […] **JV**, to eliminate competition concerns in the […] market. The **JV** partner […] did not wish to have the hold-separate **obligations** implemented, as in its view the enforcement provisions would have paralysed the normal functioning of the company. In this particular case, it was difficult to hold the **JV** separate from the divesting parties, as they contributed the crucial technology component. With the knowledge of the trustee, the hold-separate **obligations** were not implemented at all.

15. A particular aspect of the hold-separate **obligations** is the so-called "ring-fencing" of information, the purpose of which is to protect the divested business by severing all information exchange between the divested business and the seller, in order to restore the competitive process in the **relevant market** as soon as possible. Ring-fencing is primarily concerned with information systems, including common computer systems, and the imposition of restrictions on certain personnel regarding the exchange of commercially sensitive information.[112]

16. Not all cases included explicit **obligations**. The Study found four remedies in which "ring-fencing" became a strongly contested issue in the implementation of the remedies,[113] and a further nine cases in which minor implementation questions were raised in the context of "ring-fencing" **obligations**. In a number of remedies, "ring-fencing" became a complex task often requiring technological expertise, as well as careful planning and meticulous implementation. The procedure was particularly demanding in cases involving larger enterprises, complicated **carve-out** packages, and certain industries where information exchanges are normally facilitated through trade associations and other common market practices.[114]

17. The Study found that the following "ring-fencing" procedures were most commonly used:

(1) personnel were instructed in writing about the new procedures for restricting information exchanges;

(2) the trustee required that certain staff sign confidentiality declarations;

(3) the trustee specifically informed relevant personnel about their non-disclosure **obligations** in the context of hold-separate and ring-fencing provisions; or

(4) the trustee analysed the company's corporate organisation and cut reporting lines, where necessary, in order to protect sensitive information.

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[112] While the **Remedies Notice** is silent on this point, the **Model Divestiture Commitments**, paragraph 9, includes an explicit clause: *"[Parties] shall implement all necessary measures to ensure that they do not after the Effective Date obtain any business secrets, know how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business. In particular, the participation of the Divestment Business in a central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Business. [Parties] may obtain information relating to the Divestment Business which is reasonably necessary for the divestiture of the Divestment Business or whose disclosure to [the parties] is required by law."*

[113] r30; r41; r48; r90.

[114] r30; r90.

18. Interviews revealed that even such "soft" ring-fencing provisions were not systematically applied. With some exceptions,[115] intensity of implementation was judged low by the Study team, which consequently made it difficult to draw any conclusions as to the effectiveness of such "ring-fencing" **obligations**.
19. In a small number of instances, the parties and the trustee complained that the strict "ring-fencing" regime had hindered their efforts to divest the business.[116] Overly strict hold-separate provisions had prevented the parties from having access to necessary data that was vital for preparing the sales prospectus and the due diligence procedure, as well as for conducting the sales negotiations with potential purchasers.[117] In one merger, the parties found themselves exposed to indeterminate liabilities because they were unable, due to lack of access to internal information on the current state of their divested business, to gauge the extend of the warranties they would need to provide to the purchaser.[118] In another case the parties complained to the Commission during the sales process regarding what they considered to be the over-zealous enforcement of information restrictions by the trustee. The Commission intervened to strike a balance between providing the best possible protection of the divested business and the legitimate interests of the parties to carry on their business in a commercially feasible manner**.**[119]
20. Finally, not surprisingly, it appeared to be easier to implement "ring-fencing" commitments when the divested business was a viable stand-alone business with a distinct management.[120]

4. Monitoring by a trustee

21. As the Commission cannot on a daily basis be directly involved in overseeing compliance with the interim preservation measures, it uses monitoring trustees mandated to act in the best interests of the business to be divested, and empowered to propose or impose measures considered necessary for compliance. The following observations deal with those aspects of the trustee's role that are specific to preservation and hold-separate provisions. Other aspects will be dealt with in Section H on "Monitoring trustees", p. 87.
22. The Study found very few instances where the services of a trustee did not appear to be necessary for the monitoring of the interim preservation and hold-separate provisions.[121] In two remedies, although foreseen in the commitments, the trustee was not appointed because the sale of the divested business occurred very soon after the Commission's decision.[122] The Study concluded that at least in one of these cases the monitoring trustee would have been necessary.[123]

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115 r41; r48 (three year ring-fencing of personnel); r90 (ring-fenced transition team of 30-40 employees).

116 r32; r30; r43.

117 r32; r43.

118 r30. It should be noted that the purchaser did not communicate these difficulties to the Commission during the proceedings but only voiced its complaint during the Study interview.

119 r33.

120 Examples: r52; r93.

121 Examples: r1; r66.

122 r66; r72.

123 r72.

23. In some instances, the importance of the monitoring trustee became apparent only later in the process. In one such remedy the trustee was instrumental in preserving the economic viability, marketability and **competitiveness** of the business by helping to bring factories back up to technological standards, checking with worker representations whether transition was going well and whether assets were preserved and kept viable.

> In the **Phase I** remedy […], during the implementation stage, a […] trade union representing the workers who were to be **transferred** with the business, brought to the attention of the Commission and the monitoring trustee the fact that physical assets of the business were in a poor state of repair and required investment, in particular, to meet environmental regulatory standards. The trustee engaged in a detailed investigation with the trade union to assess what was required and ensured that the seller made appropriate investments.

24. The Study also noted a high degree of variability in the scope and the intensity of how hold-separate provisions were monitored by the trustee:
    (1) in five cases the trustee appeared to be considerably less active in its preservation monitoring than what was required in hindsight;[124]
    (2) in four cases the trustee was appointed very late in the process and, thus, could only perform limited preservation monitoring;[125] and
    (3) in two or more cases it was important for the preservation monitoring to extend the trustee's mandate until **closing** or until the **transfer** was completed to ensure proper and full **transfer** of the divested business.[126]

25. Trustee mandate: A number of trustees and parties stated in the interviews that they felt that the trustee mandate should have provided more clarity as to the provisions on asset preservation and holding-separate. Criticisms included the following: provisions were sometimes seen as too broad or too burdensome for the trustee; in some cases, the mandate did not clearly delineate the scope and intensity of the trustee's task; and in other cases, provisions led to excessive expenses for the parties.[127] In several cases the Commission had to intervene in disputes to find a compromise between the trustee and the parties regarding the scope and intensity of its monitoring task.[128]

> In the **Phase II** case […], the parties committed to exit from, or dissolve, a **JV** with […] in the […] market. The **JV** was divided among the partners and [… the JV partner] received all necessary assets after a statement of principle was negotiated. The separation of assets was complex and the trustee […] at times employed 70 consultants to split the IT systems. [… The trustee] considered the trustee mandate sufficiently precise and stressed the importance of generic terms in the mandate, giving the trustee scope and flexibility to intervene. On the other hand, the parties reported that the trustee had exaggerated its role and was consequently, in their view, unnecessarily costly. The Commission had to intervene and agree on a compromise work plan.

124 r8; r30; r39; r45; r53; r63.

125 r11; r38; r43; r44; r53; r59; r78.

126 c39; r80.

127 c25; r1; r43.

128 r43; r33.

26. The **Model Trustee Mandate** now specifically provides for the submission of a detailed work plan by the trustee.[129] Evidence from the Study suggests that this practice would have been beneficial in a number of cases. In four remedies, the trustee and the parties had in addition agreed on a code-of-conduct memorandum and established specific checklists.[130]

> In the **Phase II** remedy […], the parties committed that they would make arrangements for their **JV** partner […] to progressively exit from [… the JV]. The divestiture period was long (15 months) due to special circumstances. The parties employed an independent compliance monitor, […], but could not agree on a work plan. The main point of contention was whether the trustee could be present at all board meetings, including those when business strategy was discussed, which the parties considered unreasonably intrusive. A compromise on the work plan was reached only after three months and following the Commission's intervention. The parties reported that costs of the trustee's participation were USD 1 million, without even considering the additional costs of management time. [… The JV] noted that next time they would propose someone knowledgeable in the industry. The trustee pointed out how important it was to talk to the business people on the ground, not just with the company lawyers.

27. Trustees pointed out that in the context of holding businesses separate and preserving their **competitiveness** during the divestiture period, many developments cannot be foreseen. Trustee mandates and work plans therefore would have to also remain flexible so that the trustee could appropriately react to all emerging situations.

28. <u>Performance monitoring</u>: in a number of cases the trustees limited their performance monitoring to financial indicators.[131] There was no case in which the trustee provided a comprehensive report on the viability, marketability, and **competitiveness** of the divested business with at least all of the following elements: sales and output data, financial data (including production costs and maintenance spend), operating statistics (such as capacity utilisation, quality indicators, and accident statistics), data relating to employees, and data on significant new or terminated contracts. This means that the Commission was not being made aware of any possible problems and could thus not have intervened.

29. When asked how ideally the trustees might carry out performance monitoring, trustees indicated that the trustee should talk to management and to the hold-separate manager on a regular basis. Further, the trustee should check conformity with the planning documents and also verify that the nature and scope of activity, the industrial and commercial strategy, and the investment policy of the divested business are being maintained. Another way to benchmark the parties' management of the divested business would be to compare performance with that of the retained business. Parties would normally be able to furnish business data on the retained business and they should provide explanations in case of significant divergence.[132]

> In the **Phase II** remedy […], the parties committed to divest their **JV** stake in […]. The **JV** partner, […], who turned out to be the only possible buyer, preferred to have no hold-separate provisions implemented to avoid uncertainty in the continuing

[129] **Model Divestiture Commitments**, paragraph 23 (i).

[130] r33; r46; r54; r67.

[131] Examples: r8; r63.

[132] Example: r72.

operations of the **JV**. The hold-separate trustee, […], mainly monitored the **obligations** of [… the parties] to preserve the divested business through the use of a questionnaire which included the following elements:

(1) financial performance on a monthly basis, including: management accounting (including comparison actual results to budget and latest forecasts);
(2) commentary on performance;
(3) changes in customer lists: loss of contracts or customers; changes to existing customers relationships (changed to whom? why?)
(4) supply arrangements: any attempts to alter their terms and costs (raw materials, waste water, steam, electricity, security, etc.);
(5) **R&D**: Any changes in the scope of **R&D**, projects delayed, cancelled, etc.;
(6) Any capital projects cancelled or delayed;
(7) details of liabilities and exposures both on- and off-balance sheet;
(8) short term lending and cash flow forecasts (three to six months): commentary on underlying and changed assumptions and the reasons for changes from the previous month's end;
(9) details of bank/group facilities available to the business: anticipated funding shortages and any variation in terms;
(10) personnel changes: how many, new place of work, why leaving, anyone moved to other positions within the business, headcount numbers at the end of each month, showing administration, sales and marketing separately;
(11) any changes in logistics arrangements, storage, transportation;
(12) any safety incidents; and
(13) changes in equipment.

30. Monitoring of hold-separate and ring-fencing: the interviews revealed that the precise meaning of "holding separate" was not understood very clearly and that in many instances trustees did not have a precise idea of how to supervise the hold-separate **obligations** on a day-to-day basis in practice. Trustees mainly sent out questionnaires to the parties and/or the divested business and held status meetings.[133] Trustees rarely checked data with the respective personnel. Often, trustees did not routinely verify that instructions were dispatched to all concerned personnel and other business divisions regarding the limitations on the exchange of information, nor did they check to see whether key employees had given written commitments to implement the hold-separate **obligations**, to adhere to the information rules, and to confirm their compliance regularly. Compliance certificates were not requested from the parties or from the divested business. The Commission did not ask the trustee to positively certify compliance.

31. In two cases, the assigned trustees stated that they had considered it extremely difficult to ensure implementation of a proper ring-fencing mechanism and would have found it impossible to monitor in daily practice.[134]

[133] Examples: r11; r30; r43; r44; r59; r74.

[134] r53; r86. In another remedy the trustee had the special function of collecting licence fees from licensors to shield confidential information on sales figures from the parties: r79.

> In the **Phase II** case […], the parties committed to sell their stake in […] to eliminate concerns of a duopolistic dominant position in the […] market. The divestiture was part of a larger package […]. The parties implemented the "ring-fencing" **obligations** by halting formal information flows. However, as noted in interviews with the parties, trustees and industry experts, there are many informal information links in this industry, including channels providing for pricing transparency, which added greatly to the difficulty of preventing information exchanges. The trustee pointed out that stopping the information flow would have been impossible and that it would not have known how to monitor adherence to such provisions.

32. Trustee's competence: in the interviews, trustees indicated that a meaningful evaluation of asset preservation and hold-separate measures would require access to auditing expertise and some industry knowledge. Even with industry knowledge, the requirements for preservation and hold-separate monitoring can become a challenging task in a complex business **transfer** involving the carving out of the divested business.

> In the **Phase II** case […], the parties committed to divest […] to eliminate concerns of single dominance and the control of access to new […]. The preservation and hold-separate provisions were monitored by a trustee who was an industry expert. However, in this complex **carve-out** process, the trustee admitted to having lost some degree of oversight in distinguishing between necessary and unnecessary assets. Although the trustee was actively involved in the process through meetings and site-visits, it remained that too little information had been made available to it.

33. Trustees's independence: In a few cases analysed in the Study the trustee's independence was compromised which may have reduced its incentives to carry out the monitoring of preservation and hold-separate commitments.[135]

34. Case files did not systematically include final trustee reports with an assessment of the functioning and success of the interim preservation and hold-separate monitoring **obligations**.[136]

5. *Specific trustee function: replacement of board members*

35. The sample included eight remedies where the parties' interest in the divested business had to be severed and board members were to be temporarily replaced by the relevant trustee who was entrusted with protecting the company's interests in this capacity.[137] This is often the case when parties divest minority stakes or their interest in a **JV**. Such replacement tasks can involve responsibility for making substantial commercial decisions.

> In the **Phase I** remedy […], the parties committed to divest their minority stake in […] to eliminate duopolistic dominance concerns in the […] market. The parties' board members were replaced by a trustee, who represented the parties' interest during [… a very large business transaction of the JV].

[135] Examples: r39; r53.

[136] The remedy report in r43 suggested that trustee feedback could help identify underperformers and establish lists of good trustees.

[137] r9; r11; r32; r33; r43; r44; r53; r59; r63; r51.

> In the **Phase II** case […], the parties committed to eliminate single dominance concerns in the market for […] by divesting […] to one or more purchasers. In the interim period during the sales process, the trustee was responsible for fixing the [… sales prices for all products of the divested business].

36. One remedy raised the question of whether provisions in the trustee's mandate governing the replacement of board members should not be disclosed to the other shareholders.[138]

37. Despite the importance of such decisions being taken by the trustee in the interest of the divested business and the parties, the Study received little feedback on this aspect from those interviewed. Indeed, the Study found no serious indications that trustees had exceeded their powers, that parties found the trustee's powers excessive, or that trustee mandates should contain more details governing these types of situations. This may have been due to the low intensity of the work actually carried out,[139] or it may have resulted from a very close relationship between the trustees and the parties.

38. In some remedies it appeared that the trustee's dual role as a board member and monitoring trustee could, in certain circumstances, present the trustee with a conflict of interest.[140]

6. Hold-separate managers

39. At the time the Study sample of cases were decided, the notion of a hold-separate manager was just beginning to emerge.[141] The evidence from the Study is mixed. In some cases, the management of the divested business was not separately operating. In other cases, the existing management of the divested business simply stayed in place.[142] On the other hand, there were cases where the interim management was recruited from the outside to ensure independence; and sometimes it was the monitoring trustee who selected the hold-separate manager.[143]

40. The assessment of hold-separate management raised the following points:

    (1) hold-separate manager did not always co-operate closely with the trustee;[144]

    (2) hold-separate managers did not always remain with the divested business after **transfer** but instead returned to the retained business;[145] and

    (3) hold-separate managers were not always existing executives in higher management having sufficient decision-making powers.[146]

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138 r53.

139 Example: r51.

140 Examples: r32; r53.

141 The **Model Divestiture Commitments** stipulate in paragraph 6: *[The parties] shall appoint a Hold Separate Manager who shall be responsible for the management of the Divestment Business, under the supervision of the Monitoring Trustee. The Hold Separate Manager shall manage the Divestment Business independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by the Parties."* There are no such provisions in the **Remedies Notice**.

142 r15; r32; r45; r46; r54; r67; r71.

143 r30; r43; r48; r74.

144 Striking example: r48.

145 Example: r15.

146 Example: c39.

41. The Study found hold-separate managers, with responsibility for the interim preservation and holding-separate of the divested business answering to the trustee in that regard, and who are expected to stay with the divested business until well after the **transfer** was completed, would have been beneficial in virtually all **divestiture remedies**, particularly where the merging parties were capable of significantly degrading the divested business in the interim period (*e.g.* where the interim period was long).[147] In particular, the Study found that hold-separate managers play a crucial role in ensuring the independence of the divested business, its interim preservation from the parties and its holding separate.

42. In addition to these principles in the **Model Divestiture Commitments**, the Study found that most effective hold-separate managers were those who:

    (1) were independent from the parties;

    (2) closely co-operated with the trustee;

    (3) had undivided loyalty to the divested business;

    (4) remained with the divested business beyond the interim period;

    (5) were adequately experienced, and prepared for the tasks ahead;

    (6) were sufficiently senior to deal with the sellers' top management; and

    (7) were capable of solving problems and communicating effectively to resolve potential issues as quickly as possible.

[147] Examples: c39; r1; r15; r48; r87.

E. The divestiture process

1. In all analysed **divestiture remedies** it was up to the parties to steer the divestiture process and to find a suitable purchaser for the divested business. The preferred method of divestiture lay largely in the hands of the divesting parties. This corresponded to current practice.[148] Different sales processes are acceptable to the Commission, as long as they result in finding a suitable purchaser and conclude a final binding **SPA** within the foreseen divestiture period. In only one of the analysed remedies did the Commission object to the parties' proposal to make an **IPO** of the shares on the stock exchange.

> In the **Phase I** remedy […], the parties had already started the procedure for launching an **IPO** prior to notification as they expected the Commission to accept a commitment to divest a subsidiary. The Commission objected to the divestiture by way of an **IPO** pointing out that this procedure would likely weaken the competitive position of the divested business.

1. Information available to purchasers

2. An area in which purchasers and sellers in the divestiture process sometimes had conflicting interests was the issue of how much information contained in the confidential versions of the Commission's decisions (including the commitments) should be made available to potential purchasers over and above what may be contained in non-confidential versions of the Commission's decisions made available to the public. The underlying issue is the extent to which the precise scope of the accepted remedy must be known to the prospective purchasers.
3. The Study analysed two atypical remedies[149] in which the parties applauded the Commission for agreeing to veil the exact scope of the commitment. Both are related to the specific issue of alternative commitments that remained undisclosed to the public. No harm to the effectiveness of the remedies was detectable in either case. However, the stated aim of speeding up the sales process was not achieved in one of the two remedies and it cannot even be excluded that the sales process was actually slowed down.

> In the **Phase I** remedy […], the public text of the commitments only stated how much capacity was to be divested but did not specify plants that were to be divested, instead mentioning in one remedy additional plants as possibilities which actually were outside the scope of the divestment remedy. The seller argued that the veiling of the specific plants to be divested was necessary for a fair sales process and was also beneficial in terms of interim operation and preservation of viability of the divested plants (as the knowledge of divestment may have de-motivated the workforce). The seller argued that otherwise the few suitable buyers would have had an undue advantage which could have had a very negative impact on the sales price and could have motivated the prospective buyers to just sit and wait. However, it must be noted that the aim of speeding up the sales process was not achieved as this sales process took quite long.

[148] **Remedies Notice**, paragraph 21, and **Model Divestiture Commitments**, Section 1, and **Best Practice Guidelines**, paragraph 1.

[149] r39; r63.

In the **Phase I** remedy […], the public version of the commitments mentioned that a number of plants were to be divested without identifying which neither in the public nor in confidential version. This raised the following issues: different purchasers were bidding for different packages; the holding-separate and preservation became more difficult to monitor; there was staff uncertainty in the interim.

4. Purchasers had opposing views: One purchaser remarked that it did not know exactly what the scope of the commitment was and therefore "had to take what was offered" and that the seller had used this advantage to obtain some last-minute concessions, and had generally dominated the sales process. Yet, the seller in this case decided to offer more than it had committed to.[150]
5. It is clear, that only when and if the right potential purchasers receive adequate information on the divested business are they able to make informed decisions about the acquisition and the future prospects of the divested business. In particular, potential purchasers need to receive accurate and complete information in the offer memorandum, the due diligence and the sales documentation. Moreover, potential purchasers must be given sufficient time to acquaint themselves with the divested business, assess its potential and gather all related data during due diligence. This is reflected in current practice.[151]
6. In a number of remedies the parties had organised very short due diligence procedures and used short deadlines to restrict the number of potential purchasers.

In the **Phase II** case […], the purchaser was given only two days to carry out the due diligence and the parties restricted access to significant information, including information on key employees. The purchaser was thus unable to identify the employees it needed for the divested business. As a consequence of the short due diligence period the purchaser did not sufficiently understand the divested business and discovered later that it was missing key employees, customer documentation, and other essential assets. The divested business went bankrupt after a few years.

In the **Phase I** remedy […], the buyer of the divested business reported that it was unable to study the offer in detail or to visit the divested business and felt that the time to carry out its assessment was too short to make any proper assessment.

7. In at least two remedies the potential purchasers received incomplete or inaccurate information regarding the divested business and the sales process.

In the **Phase II** remedy […], the information provided to the purchaser of one of the divested products during the due diligence was incomplete. This delayed the **transfer** of the business because the purchaser had to identify which additional information was needed. Worse still, the parties' subsidiaries were not correctly instructed, did not co-operate with the purchaser, and did not provide the requested customer

[150] r15; r87. It must be emphasized that the information was publicly available on the Commission's website but the purchasers were too unsophisticated to know that and the sellers omitted to mention this. Also, in r56, the purchaser said it was not aware of the commitments.

[151] **Model Divestiture Commitments**, paragraph 11. As part of the due diligence procedure, it is foreseen that the divesting party shall "*provide to potential purchasers sufficient information as regards the divested business*", and "*provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel*".

information. According to the purchaser, as a result, the sales of the product dropped [… by 40%] in the first year after the divestiture.

2. *Strategic behaviour of sellers and purchasers*

8. The Study found indications that some sellers may have abused the lack of transparency in the divestiture process to propose a weak purchaser to the Commission as the only possible proposal. This may have been of interest for the parties in order to limit the future competition by the purchaser in cases where they retained a business in the same **relevant market**.[152] In this situation, it was difficult for the Commission to establish that other potential purchasers could have been suitable candidates.

In the **Phase II** remedy […], the parties chose to sell the divested business to a small and presumably weak competitor, a trading company that had not been active in the industry ([…]) before. The parties did not grant adequate time to other potential (industrial) purchasers to review the business, because they wanted to sell the assets to this particular small company. From the outset, the purchaser was unable to understand the **transferred** business properly, but attempted to do everything it could in order to keep it running and to educate its employees with the (limited) information it got from the parties. The interviews indicated that the seller's strategic behaviour in this case seems to have been related to the fact that the divested business was highly profitable and potentially very competitive.

9. Parties sometimes may have preferred foregoing a higher one off present sales price for potentially higher longer term anticipated gains resulting from a weaker competitor. It was mentioned in one interview that one reason for such strategic behaviour might be that some management rewarding schemes are based on the performance of the daily business and do not take into account extraordinary profits from asset sales. Therefore, the management has no incentive to sell at a high price to a strong competitor but rather to ensure that the purchaser does not compete too vigorously.

10. The Study also assessed other indications of strategic behaviour by the seller. Some committing parties interpreted the commitment text during the implementation stages in a way that was detrimental to the viability of the business or very unfavourable to the purchaser, or used "dirty tricks" in the hope not to be caught by the Commission's and the trustee's monitoring efforts. Examples:
    (1) divested business was inoperational when offered for sale;[153]
    (2) poaching of customers from the divested business during and after divestiture;[154]
    (3) preventing the monitoring trustee from properly carrying out its functions, *e.g.* checking the accuracy of the sales memorandum;[155]
    (4) restricting the information available to (potential) purchasers;[156]
    (5) bundling of divested business with other businesses for sale;[157]

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152 Examples: r5; r26; r75; r80.

153 r5. The Study found further examples where the bad intention of the seller were, however, less obvious.

154 r17; r19; r26.

155 r2.

156 r80.

157 r56.

(6) proposal of clearly unsuitable purchasers;[158]

(7) incomplete **transfer** of assets;[159]

(8) charging of relatively high input prices after divestiture;[160] or delay in provision of supplies after divestiture;[161]

(9) threat to terminate a distribution agreement;[162]

(10) poaching of key employees of the divested business after divestiture;[163]

(11) delay in solving third party **IP rights** issues after divestiture;[164]

(12) restriction of co-operation to delay the purchaser's product development;[165]

(13) launching of rival product immediately after divestiture;[166]

11. The Study's examined whether there was a correlation between the parties' conduct in the remedy process and the final outcome in terms of effectiveness. Results showed that strategic seller behaviour played a role almost four times as frequently in ineffective or only partially effective remedies (10 out of 26 remedies, *i.e.* 38%) than in the category of effective remedies (12%). Indeed, almost half of all remedies having unresolved design and/or implementation issues appeared to suffer from strategic behaviour by the seller. In the six remedies classified as ineffective strategic seller behaviour was identified in one remedy (17%).

12. Most analysed commitments have sought to minimise the scope for opportunistic behaviour of *purchasers* by keeping confidential certain additional aspects of the commitments, such as for example, the timetable for divestiture or the nature of an alternative remedy. A number of parties underlined the crucial importance of keeping the divestiture deadline confidential to prevent strategic bargaining by candidate purchasers and negative effects on the achievable sales price.[167] This is also current practice.

13. The Study analysed three remedies where the reduced number of purchasers significantly slowed down the divestiture process, mainly because potential purchasers would bargain harder after finding out that they are the only interested candidates for the divested businesses.[168] Such situations regularly lead to the parties requesting a prolongation of the divestiture deadline, with this entailing all the negative consequences of prolonged divestitures.

14. To guarantee that certain minimum process, transparency and equality requirements of the divestiture process are fulfilled, the Commission had in almost all commitments required a

[158] c20.

[159] r26; r72.

[160] r34; r80; r93.

[161] r37.

[162] r65; r91.

[163] r28.

[164] r63.

[165] r37; r94.

[166] r17.

[167] r41; r48; r53.

[168] Examples: r5; r26; r75.

trustee to check the sales information to be provided to potential purchasers and to oversee the due diligence process.

15. Finally, most commitments also required the trustee to review the suitability of potential purchasers. The role of the trustee in this regard is dealt with in Section I on "Suitable purchasers", p. 98.

F. Carve-out of the divested business

1. Typically, the sale of any business involves some element of **carve-out**.[169] Even a legally distinct divested business is normally dependent on certain central support facilities, such as IT, payroll, **R&D**, sales or purchasing, or other assets shared with the retained business. This Section deals with remedies where the **carve-out** required extensive separation of the assets of the divested business from the parties' retained business. Such **carve-outs** typically took place *after* the Commission's conditional clearance decision had been issued.

1. Separation of assets

2. The Study analysed 50 **divestiture remedies** where the stand-alone nature of the business required extensive **carve-out** of assets. This represented 60% of the 84 **divestiture remedies** analysed in the Study sample. The remaining 34 **divestiture remedies** (40%) required only limited **carve-out** activities because the divested businesses were already operating to a large extent on a stand-alone basis. Hence the ratio of **carve-out** to stand-alone divestitures is three to two in the Study sample, which is rather significant.
3. Of the 50 **divestiture remedies** requiring extensive **carve-outs**, 29 (58%) raised concerns about serious risks to implementation, including 16 **divestiture remedies** which actually led to one or more of the following adverse results:
   (1) seven remedies required intervention by the Commission to mediate between the seller and the purchaser.[170]
   (2) five remedies created longer term dependence by the buyer on the seller;[171] and
   (3) nine remedies likely have reduced the **competitiveness** of the divested business.[172]
4. The latter category of remedies was considered raising serious implementation issues, which remained unresolved. This occurred in nine out of 50 possible remedies (18%).
5. All aspects taken together, there were 16 remedies with serious **carve-out** issues. They belonged to 14 different cases of which six were decided in **Phase I**, and eight were decided after in-depth **Phase II** investigations. This slightly higher rate of serious implementation problems in **Phase II** cases may be due to the generally higher complexity of second Phase cases and the fact that, on average, these decisions include a greater number of remedies.
6. Of the 16 remedies with serious implementation issues, the business to be divested belonged to the acquirer in 27% of instances, to the target in 6% of instances. In the remaining 67% the business belonged to one of the **JV** or merger partners, thus the distinction between acquirer and target was therefore meaningless.[173] These results may be

[169] **Carve-out** consists of the legal and physical separation of the assets of the divested business from the parties' retained business, so that the divested business can operate on a stand-alone basis, which can compete successfully on a lasting basis independently of the divesting parties. See Annex 1: Glossary of terms, p. 173.

[170] r20; r30; r63; r67; r80; r90; r96.

[171] r20; r34; r38; r45; r78.

[172] r20; r25; r26; r34; r37; r63; r72; r80; r96.

[173] In the overall Study sample involving 84 **divestiture remedies**, the sources of divested assets came from the following sources: in 27 of the **divestiture remedies**, the business to be divested belonged to the purchaser

interpreted to confirm the findings of the **US FTC** study (discussed in the “Introduction”), which found that divested businesses belonging to the target company may experience fewer problems during **transfer**, because the committing parties do not already possess sensitive business information of the target and thus have fewer possibilities to alter or degrade the business during the interim period.

2. *Findings on shared assets*

7. Shared assets must typically be separated in all **carve-out** situations where the business to be spun-off was formerly integrated into a wider company infrastructure. This may include pipeline or network access, production, delivery, storage facilities, or support from central corporate departments (such as administration, marketing or purchasing).
8. Often the main problem with allocating such shared assets is that they not only have to be split, but that certain portions may have to be replicated. Replication can require a significant commitment of resources and investment that sellers often underestimate beforehand. Moreover, difficult management decisions must be made as to whether the original shared assets – involving infrastructure, software, function, or service – should be allocated to the divested business or should stay with the retained business. In addition, separation may be very costly when significant economies of scale or scope are lost, as is the case, for example, in the chemical industry when several products (from different **relevant markets**) are manufactured in the same installation.[174] Finally, where network assets have been used by several businesses, the separation may turn out to be virtually impossible, and in such cases other access solutions will have to be found.[175]
9. The separation of IT systems was often cited in interviews as a challenging issue and implementation problems occurred in at least five remedies.[176] In these remedies, companies had to devote substantial resources to separating such assets; and due to delays during the **carve-out** in some remedies considerable delays ensued in **closing** the transaction, delays that went well beyond the initial divestiture periods foreseen in the commitments.

> In the **Phase I** remedy […], the parties committed to return a licence for a pipeline product ([…]) which created **horizontal competition concerns** (single dominance) in the market for […]. The product had been jointly developed with the small **R&D** company […]. The sellers had given the commitment at the time of the product launch, which also depended on the approval of national drug administrations. The separation of the assets was complex and expensive: an IT consultant worked 18 months on the cleansing and purging of documents for the retained business. According to [… the licence owner], who had to find another licensee, the commitment delayed in the product launch by six months, or more. The former licensee paid more than 20 million euros in transitional assistance.

(32%); in 17 remedies to the target (20%); and in 40 remedies, to one of the merging parties or **JV** partners (48%).

174 Example: r71.

175 Example: r72.

176 r6; r43; r66; r90; r96.

In the **Phase II** remedy […], the parties committed to exit from, or dissolve, a **JV** with […] in the […] market to eliminate a horizontal **overlap** leading to single dominance concerns. The **JV** was divided among the partners, and [… the JV partner] received all necessary assets after a statement of principle was negotiated. The separation of assets was complex and the trustee at times employed 70 consultants to split the IT systems. The correct **carve-out** of the assets was crucial for the economic viability of the divested business.

In the **Phase II** remedy […] where the parties had to divest their […] business […], an interesting development occurred. The sellers complained that the purchaser ([…]) took unfair advantage of its strong bargaining position, resulting from the time-squeeze […]. The purchaser had negotiated extensive **transfer** clauses that would guarantee it a functioning IT infrastructure for the divested business. As the IT **carve-out** process was delayed due to complex separation and replication issues, the purchaser may have had access to confidential information of the seller ([…]) for a period of time.

10. The **carve-out** of tangible assets also presented particular problems. The Study found six remedies (12%) among the 50 **divestiture remedies** requiring extensive **carve-outs**, where the committing parties seemed to have consciously obstructed the **carve-out** of certain assets. In two remedies, certain machines were not **transferred** although they were dedicated to the divested business (and in one case even paid for).[177] In the other four remedies, it became apparent during the later **transfer** of the business that the tangible assets belonging to the business were in bad shape or incomplete.[178] This should have been noticed already earlier during the **carve-out**. The Study also found that in a number of instances, the buyers resorted to *ad hoc* negotiations with the sellers to expand the scope of the divested business to resolve **carve-out** problems they had identified.[179]

In the **Phase I** remedy […], the parties committed to spin-off their […] division to eliminate co-ordination concerns in the market for […] which was **upstream** of the **JV**. The business was sold in a leveraged management buy-out to the financial investor […]. During sales negotiations, the management of the divested business insisted that the remedy provided that a sufficient sales force should be allocated to the new entity to enable it to compete. Both the seller and buyer reported that high transitional costs were incurred to recreate critical assets of the business infrastructure, as the business had not previously been a stand-alone division within […]. In addition, the buyer undertook an extensive promotional programme to assure customers of the expertise and capability of a financial investor to manage the business successfully, and to give further assurances of quality control, in view of the fact that the buyer would not have the use of the "[…]" brand name.

[177] r26; r80.

[178] r5; r25; r30; r96.

[179] Examples: r15; r21; r31; r39; r45; r56; r66; r74; r87.

3. ***Findings on the allocation of personnel***

11. Unlike the treatment of assets, where they can either be split or replicated, in the case of the allocation of personnel the existing personnel must be clearly attributed to one or other of the two businesses. In addition, this allocation process needs clear "ring-fencing"[180] rules when individuals have worked for both the divested business and the retained business.[181]

12. At least two remedies raised serious issues of personnel allocation where key employees were not clearly identified in the commitment text, leading to disputes between the seller and purchaser that put the effectiveness of the remedy at risk.[182] Issues relating to the **transfer** of personnel will be discussed in Section G on "Transfer of the divested business", p. 80.

4. ***Responsibilities of the committing parties***

13. Overall, the Study found a mixed picture regarding the success of **carve-out** efforts by the parties in the analysed remedies. On the one hand, the ratio of remedies with serious **carve-out** issues seems rather high (16 out of 50). On the other hand, the Study found eight remedies where the parties, upon encountering **carve-out** problems, had immediately searched for appropriate solutions, such as expanding the scope of the divested business to produce a viable divestiture package.[183]

14. What became clear in the Study is that **carve-out** processes are complex tasks not all elements of which the committing parties can fully anticipate.[184] However, the Study also found at least two remedies where the parties had clearly not made sufficient efforts to design their proposed divestiture package properly to ensure that it encompassed all critical assets required to produce a viable divestiture package.[185]

15. In at least ten remedies, when **carve-out** problems came to the Commission's attention,[186] (20% of the 50 carve-our remedies), it insisted on the timely and full **carve-out** of all necessary assets, requiring the seller to use its best efforts in that regard. Where possible, the Commission sought to ensure that divested businesses became viable stand-alone entities by requiring the **carve-out** of appropriate assets.[187] However, this was not always

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[180] „Ring-fencing" is the concept of isolating the information that certain personnel holds from certain other parts of the business.

[181] When plants are divested a sort of "negative **carve-out**" may occur, *i.e.*, assets being extracted that do not exclusively belong to the divested business, may lead to concerns among personnel that the competitiveness of the business is being impeded. For example, in r96, workers unions questioned the viability of the proposed divestiture package (adequacy of level of investments, environmental liabilities, and access to proprietary product recipes) of the divestiture. [… The seller] actually moved out vital production equipment that the buyer needed to manufacture an important divested product.

[182] r56; r72.

[183] Examples: r15; r21; r31; r39; r45; r56; r66; r74; r87;.

[184] Examples: r75: during transfer it became clear that […a third party] would refuse to amend the licence agreement; r86: the [… authority] imposed additional **conditions** regarding personnel on the parties that were not in the commitment text.

[185] Examples: In r21, the seller agreed to divest its […] without including provisions for manufacturing [… essential inputs], which were produced at another plant […]; In r37, the merged entity, […], delayed the toll manufacturing for the [… purchaser] to gain market share for itself.

[186] r14; r20; r21; r30; r34; r45; r67; r90; r96.

[187] In r72 the **carve-out** problems were so extensive that modifications in the **carve-out** mechanisms were inadequate to reverse the customer losses that the buyer suffered.

possible. In at least six remedies serious (three) and less serious (three) **carve-out** issues were not resolved because:

(1) **carve-out** problems had not been identified in the market testing and thus went untreated by the Commission in the commitments;[188]

(2) the Commission was informed too late in the procedure to reverse a situation brought about by actions of the parties;[189] or

(3) the Commission was not competent to resolve issues that were not covered in the commitments but, rather, were included in private contracts between the buyer and seller; and[190]

(4) in one case the Commission relied on the **US DOJ** to enforce the **carve-out** as it had ordered the same commitments.[191]

16. There were no cases in which parties had explicitly initially committed to carry out a *timely, full and best effort carve-out* and there is no such **obligation** in the current **Remedies Notice** or the **Model Divestiture Commitments**.

17. Purchasers in three interviews (three remedies) indicated that implementation risks could be reduced in **carve-out** remedies where the Commission had thoroughly discussed and determined up-front with the parties the consequences of a possible failure of a **carve-out**.[192]

5. The role of the trustee

18. The Commission monitors the **carve-out** processes *via* the oversight of the monitoring trustee. This Section relates to the findings of the Study on the trustee's **carve-out** monitoring tasks are dealt with in Section H on "Monitoring trustees", p. 87.

19. In the remedies analysed, the Study found that the commitments and trustee mandates rarely contained explicit provisions for trustees to monitor the carving out of assets and never listed the exact duties.[193]

20. The Study found that the monitoring of the **carve-out** can be critical for the effectiveness of the remedy. In some instances, purchasers and trustees reported that a monitoring trustee clearly could have made a remedy more effective in the particular **carve-out** scenario.[194]

21. In only two remedies the trustee's involvement in the **carve-out** was seen as extensive, particularly with regard to the separation of IT systems.[195] In one remedy, the trustee was active in the **carve-out** of assets and consulted on issues with the Commission.

> In the **Phase I** remedy […], described above, the **carve-out** was difficult, in particular as regards the separation of IT systems and the allocation of the sales force.

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[188] Example: r37.

[189] Examples: r65; r63; r80; r91.

[190] Examples: r6; r26; r63.

[191] […].

[192] r21; r25; r72.

[193] Today, the **Model Divestiture Commitments**, paragraph 23 (ii) (d), explicitly refers to the **carve-out** duties of the monitoring trustee, who shall *"monitor the splitting of assets and the allocation of personnel"*.

[194] r63; r72.

[195] r43; r90.

> In addition, [… the seller] refused to turnover vital proprietary [… assets for …] products and removed the related production equipment (for […] products), which understandably led staff to believe that the competitive potential of the business was being harmed. Although the trustee was closely involved in the **carve-out** process, it was unable to prevent the seller from taking the vital assets. Nonetheless, the trustee worked to ensure that adequate investments were being made in the physical facilities, mediated with workers unions, alleviated fears concerning the identity of the purchaser (a financial investor, as opposed to an experienced manufacturer), informed the Commission of harmful conduct by the sellers, and helped to bring factories back to technical and environmental standards.

22. However, cases with very active trustees were found to be exceptional, accounting for less than 10% of the sample of 50 remedies involving significant **carve-outs**.
23. At least four out of the 50 analysed remedies clearly suffered from the trustee being appointed too late to critically intervene in the **carve-out** process.[196] One remedy led the purchaser to conclude that the trustee should have become active in the process even before the Commission's decision, as the parties had already commenced critical parts of the **carve-out** process during the merger proceedings.[197]
24. None of the analysed remedies included provisions that would have allowed the trustee and/or the Commission to determine which assets were predominantly related to the divested businesses.
25. Regardless of whether explicit provisions were included in the commitments or in trustee mandates, trustees reported that they invariably found that their role was not made sufficiently clear in their mandate regarding their **carve-out obligations** and authority to opine over the designation of **carve-out** assets.[198] Several trustees interviewed for the Study stated that they felt (or would have felt) overwhelmed by a requirement to monitor the proper **carve-out** of the divested businesses. In several cases, trustees reported difficulties in gaining direct access to the divested business.[199] In addition, in many cases the trustee had not been required to supervise the hold-separate manager or any other manager or officer responsible for the **carve-out** of the divested business.[200]
26. The feedback from interviews indicated that a trustee charged with monitoring **carve-out** issues needs specialised experience, for example for the independent verification of the sufficiency of assets or for dealing with certain technical questions. It also needs a good understanding of the business environment in case it becomes necessary to intervene where the sellers omits certain assets or personnel during the **carve-out**. In complex divestiture situations, even trustees with specific industry knowledge face a challenging task, in particular if the divested business is to be fashioned from a complex **carve-out** process.

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196 r63; r80; r96.

197 r30. This contrasts with a number of analysed trans-Atlantic remedies where the trustee was appointed as consultant to the US competition authorities to help in drafting the consent order (*e.g.* r38; r78).

198 Examples: r1; r32.

199 r2: the parties did not reply to information requests by the trustee; r25: trustee dealt only with the parties' lawyer; r65 and r91: [… sellers] allowed the trustees only an *ex post* control; Also c39; r38; r78.

200 Examples: c39; r32.

Therefore, experience in monitoring such processes ought to be considered a desirable qualification.[201]

> In the **Phase II** remedy […], the parties committed to divest […], as well as control of access to […], to eliminate concerns of single dominance. The preservation and hold-separate provisions were monitored by a trustee who was an industry expert. However, in the complex **carve-out** process involved in this case, the trustee admitted to having lost sight of what constituted necessary and unnecessary assets. Although it had been actively involved in certain meetings and site-visits, it complained that it had not been given access to all necessary information that was required to make informed decisions in overseeing the **carve-out** process.

27. The Study's findings suggest that investment banks typically do not possess the necessary competence in-house to be qualified to monitor **carve-outs**. When monitoring the **carve-out** and talking to individual employees, including managers, the trustee must be allowed to explain its role to personnel and co-shareholders, so that no misunderstandings arise about its role in the process.[202]

28. Several further remarks can be made in respect of trustees that are monitoring the **carve-out** of the divested business:

    (1) even in an up-front buyer scenario, there may still be a need for an independent trustee to monitor **carve-out**;[203]

    (2) it must be made clear to the trustee which functions and results are expected from its intervention; a checklist was found to be a good practice;[204] and

    (3) the Commission did not sufficiently control the work of the trustee.[205]

6. Role of the hold-separate manager

29. The Study found that hold-separate managers could have served a crucial function in defending the interests of the divested business in many **carve-out** processes. Relevant findings on hold-separate managers in general, are discussed in Section D on "Interim preservation and holding separate of the divested business", p. 56. The following observations can be made regarding its role in the carving out of the divested business:

    (1) hold-separate managers were not always in place at the time the **carve-out** process began;

    (2) where they were in place their incentives in ensuring a proper **carve-out** in the interest of the divested business were sometimes compromised insofar as they subsequently moved back to the parties' retained business soon after the divestiture process was completed.[206]

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201 Examples: r15; r43; r87.

202 Examples: r63; r32.

203 Example: r31.

204 Example: r30.

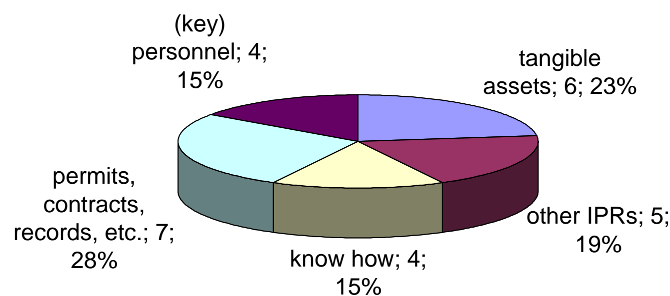
205 Example: r56.

206 Examples: r1; r15.

G. Transfer of the divested business

1. The requirement to conclude a binding **SPA** with a suitable purchaser within a specific deadline and to close the transaction within a given deadline following the Commission's approval of the purchaser is the normal **condition** imposed in clearance decisions subject to **divestiture commitments**.[207] The Study analysed the implementation of the **transfer** of the divested business both in the legal sense of **closing**[208] the **SPA** and in the sense of the actual **transfer** of the assets, personnel and **know how** which constituted the divested business from the seller to the buyer.
2. The Study found that the physical or actual **transfer** of tangible and intangible assets often occurred long after **closing**, in particular in cases where the **transfer** of **know how** was involved.

Chart 15: Number and types of serious transfer issues



3. Serious **transfer** problems were reported in at least 15 of the 68 commitments to **transfer** a market position (22%) and never in the 15 commitments to exit from a **JV**. Such serious issues involved the **transfer** of tangible and intangible assets, such as **IPRs**, **know how**, government permits, supply contracts, customer records, and personnel (see Chart 15). The 15 remedies raised some 26 serious **transfer** issues as many remedies involved issues in several types of assets. In 12 remedies these issues were considered unresolved after a three to five year implementation period.[209]

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[207] The **Remedies Notice**, paragraph 15, stipulates that the *"condition for a clearance decision by the Commission is that the viable business will have been transferred to a suitable purchaser (see purchaser standards) within a specific deadline. The two elements of the viable business and the suitable purchaser are thus inter-linked. The potential of a business to attract a suitable purchaser is, therefore, an important element of the Commission's assessment of the appropriateness of the proposed commitment (…)."* The **Model Divestiture Commitments** due not refer to the transfer of the business in this context.

[208] In the **Model Divestiture Commitments**, first paragraph, "**Closing**" is defined as "*the transfer of the legal title of the Divestment Business to the Purchaser*".

[209] r5; r11; r20; r25; r26; r44; r45; r57; r59; r63; r72; r80.

4. The Study found that the Commission had rarely intervened in the **transfer** process, except in unusual circumstances, for example, in the rare event of later purchaser complaints,[210] where the sellers or purchasers sought guidance on the interpretation of the commitments' requirements,[211] or where the monitoring trustee raised compliance issues.[212] Another general observation that emerged from the Study was that serious **transfer** problems occurred relatively more often in remedies involving the **transfer** of a market position through the extensive **carve-out** of assets, while they virtually never occurred in cases involving commitments to exit from a **JV**.

1. Transfer of tangible assets

5. As regards tangible assets, the Study analysed two remedies, where certain machines were not **transferred** although they were dedicated to the divested business (and in one case even paid for).[213] In a further four remedies, it became apparent during **transfer** of the business that the tangible assets belonging to the business were in bad shape or incomplete.[214] Further issues with tangible assets are discussed under "Findings on shared assets", p. 74, in Section F on "Carve-out of the divested business".

2. Transfer of intangible assets

6. As regards intangible assets, including **IPRs**, **know how**, and permits, contracts, customer lists etc., the Study found 16 remedies, in which the purchasers reported that the **transfer** of intangible assets had been incomplete or that the **transfer** had been significantly delayed.[215] What became clear in the Study is that in all of these instances the disputes over the **transfer** of assets, including **IPRs**, were difficult to resolve and always risked completely defeating the effectiveness of the remedy. Indeed, in at least two remedies the failure to **transfer IPRs** and/or **know how** reduced the remedy's effectiveness.[216]

> In the **Phase II** remedy […], the parties committed to grant a non-exclusive licence for […] technology background patents. The remedy was designed to eliminate competition concerns of a single dominant position in the […] market and the foreclosure of competition in the emerging […] technology. In a parallel procedure in the US, the [… US authorities] and the licensee ([…]) discovered that the contracts governing the cross-licences with [… third parties] were, for the most part, not transferable. In order to overcome this legal impediment on the **transfer** of vital technology, the [… US authorities] required a "fix-it-first" solution from [… the parties], and searched in detail for a solution to the problem of third party rights. The on-going negotiations to resolve these issues led to serious delays, and [… the licensee] reported that uncertainty from the long delays had virtually halted the business. Consequently, [… the licensee] reported that it had not been able to find any sub-licencees for the […] technology under the limited conditions available.

[210] Example: r74.

[211] Examples: r30; r33.

[212] Example: r96.

[213] r26; r80.

[214] r5; r25; r30; r96.

[215] r11; r31; r44; r59; r63; r72; r80; r96. Examples of serious **know how** issues: r26; r80; r20; r63.

[216] r20; r63.

7. More specifically, as concerns the **transfer** of necessary **know how**, the Study found at least four remedies where **know how** was not included in the **transfer**, or was not sufficiently defined in the commitments text or the Commission's decision.[217] **Know how transfer** issues were less problematic when the key personnel possessing the **know how** were **transferred** with the divested business. But even in these circumstances, it was critical that the **transferred** personnel be allowed to take along all supporting documentation necessary for the proper operation of the divested business.[218] Where the **transfer** did not include all relevant personnel, then the issues surrounding **know how transfer** became more challenging: in such cases, the divested business normally required extensive training and technical assistance to overcome the difficulty of not acquiring the previously trained personnel. Often, the sellers had to provide substantial resources for upgrading the technology documentation that would not otherwise have been in a useable format for the new personnel of the divested business.

> In the **Phase I** remedy […], the parties committed to licence, and/or not assert, overlapping rights over [… the parties' …] technology in order to remove competition concerns of single dominance in this emerging market. The [... US authorities], in its parallel procedure, required that this licensing option be offered to an approved licensor, which was […]. [… The licensor] subsequently complained to both the US authorities and the Commission about the failure of the sellers to make a complete **transfer** of the required **know how**, arguing that the sellers were relying on claimed third party restrictions to justify their failure to **transfer** the […] **know how** fully. In fact, the **SPA** only required the seller to **transfer know how** that it owned and had the right to **transfer**. The issue could not be fully resolved: the complex licensing and **know how** requirements led to several years of delays in the **transfer** of the business and, to date, the [… licensor] has not been able to grant any technology licence […].

8. Other assets analysed in this Study included the following:

(1) permits, licences and authorisations issued by governmental organisations for the benefit of the divested business;

(2) contracts, leases and customer orders; and

(3) customer lists, credit reports and other business records.

9. For such other assets the Study found at least 11 instances underlining their importance for a viable business.[219] In particular, the late or non-**transfer** of customer orders or customer lists and contracts appeared to have led to serious problems and in nine remedies significantly contributed to the remedy most likely being less effective.

> In the **Phase II** case […], the parties committed to divest the […] business that constituted the **overlap** in this market. The Commission (and similarly, the […US authorities]) had expressed concerns regarding single dominance and the possible foreclosure of smaller competitors from [… arrangements], thus raising rivals' costs.

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217 r20; r26; r63; r80.

218 Example: r72.

219 r5; r11; r17; r19; r20; r44; r45; r57; r59; r72; r80.

The **carve-out** and **transfer** steps mainly required the separation of customers from the seller's accounts and their **transfer** to the network of the divested business (which the purchaser would either already possess or would re-create). The **carve-out** became complicated, as a large number of customers for the divested business were also customers for the seller's [… other business], and had thus been bundled together in the seller's records. Thus, the segregation of these customers would have been difficult even in the best of circumstances. But here, the process was made virtually impossible by the subsequent failure of the seller ([…]) to meet its **carve-out** and **transfer obligations**. The purchaser […], who was a new entrant to the market, despite being an experienced player in neighbouring markets, was not in a position to know the extent to which the seller had failed to **transfer** fully the required customer lists. In addition, [… the purchaser] had underestimated the requisite transition costs. As the purchaser lost half of the customers to the divested business during the transition period, it subsequently filed for arbitration and won a compensation payment of US$ […]. Nonetheless, the damage had already been done through the loss of such a substantial volume of customers, and eventually the business filed for Chapter 11 protection, and was sold on the business for a fraction of its original value.

In the **Phase II** remedy […], the parties committed to sell their […] business to resolve single dominance concerns. As the separation of customers proved difficult, [… the parties] also included the [… neighbouring] business in the divestiture package to make the new business attractive and viable. This modification enlarged the divested business by some 60%. However, despite the divestiture of an ostensibly high market share, the buyer found that vital infrastructure assets were missing. Specifically, the seller had failed to **transfer** infrastructure supporting production, international organisation, financial, and other central functions. Without these supporting assets, the divested business was not viable and stand-alone, and consequently was sold to a competitor ([…]). As [… the competitor] was a large competitor already present in the market, this transaction created new competition concerns (collective dominance) in the […] market and triggered an in-depth investigation by the […] competition authorities leading to long delays (approximately 18 months), during which the divested business was unable to establish a competitive presence in the marketplace.

In the **Phase II** case […], the parties committed to resolve single dominance concerns in the market for […] by divesting […] to one or more purchasers. The commitments provided that the purchaser(s) would also be able to offer business customers ([…]) continued participation in existing fidelity […] rebate schemes, by allowing them to use the seller's cards in the [… divested business] as well, but only for a defined period of time (during the re-branding […]). However, following this transitional re-branding period, business customers of the divested business who had not been adequately informed of the transitional arrangements, returned to the seller in order to continue to enjoy their fidelity benefits. Consequently, analysed purchasers lost as much as 30-40% of their market share following the transition period.

10. In one remedy the **transfer** of the divested businesses was reported to have worked out smoothly because of the similar business cultures that the buyer and the divested business shared (in the engineering sector).[220]

3. *Transfer of personnel*

11. The **transfer** of personnel was generally a less important issue in remedies where the divested business had already been operating as a separate legal entity.[221] In such a setting, following national legislation, personnel would automatically **transfer** with the business to the purchaser. However, even when the business was divested with key personnel, the divested business was more often than not also dependent on support from retained personnel operating central functions, some of which were difficult to duplicate or substitute. In particular, implementation issues frequently arose when the **transfer** involved sales personnel, researchers and any holders of **know how**.
12. At least three remedies showed that personnel issues could be critical to the effectiveness of a **divestiture remedy**, because certain individuals possessed critical **know how** and because companies are organic entities in which organisational and motivational factors play an important role.[222] The Study showed that dealing with personnel issues always required good planning and careful implementation. In cases where certain personnel shifts are beyond the control of the purchaser (for example, because he is a small player with a less attractive standing than the parties, or because key personnel have other motives for moving back), the Commission may need to inquire further into what types of additional incentives would be necessary to entice these employees to stay with the new business. Often the **transfer** of pension rights and other social welfare plans involved complex legal issues. Indeed, the uncertainty that resulted among staff during the **transfer** and transition periods often ran the risk of severely damaging the business.
13. Some cases also highlighted the importance of ring-fencing of the key personnel for some period of time after the **closing** of the divestiture transaction. The Study found instances of such periods extending up to three years.[223] Other issues dealing with key personnel (for example, retention programmes) are discussed in Section D on "Interim preservation and holding separate of the divested business", p. 56.

4. *Transitional economic performance provisions*

14. Transitional provisions that were linked to the economic performance of the divested business were included in the **SPAs** of four analysed remedies. These provisions ranged from temporary compensation for losses, to specific liability clauses, or payment clauses for extraordinary expenses (for example, for re-branding procedures).[224] These customised provisions appear to have helped ensure the correct **carve-out** and **transfer** of the business in specific situations.

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[220] r6.

[221] Example: remedy r86.

[222] Examples: r25; r28; r45. The importance of these subjective factors was also highlighted by the **US FTC** study on merger remedies, p. 10.

[223] Examples: r34 (3-6 months); r41 (3 years); r78 (6-12 months).

[224] r52: clause that [… the seller] had to bear the cost of any loss of competitiveness; r37: seller liable for delays; r32: parties paid re-branding costs of purchaser; r6: profit/loss compensation for 3 years if any of the 10 biggest customers were to switch back to the seller.

> In the **Phase II** remedy […], the parties committed to divest their […] business to resolve competition concerns of single dominance. Despite the fact that the seller was developing a new generation product to compete with [… the divested business], the small purchaser ([…]) was happy to buy the old generation product with related **IPRs**, since it was a good strategic fit for its product line. However, the purchaser reported that the due diligence procedures had been incomplete and the seller had failed to **transfer** all necessary assets fully. Whether due to negligence or otherwise, the seller's subsidiary – which had been placed in charge of implementing the **transfer** – had not been sufficiently informed of the sellers' **obligations** to transition customers and, thus, had delayed the **transfer** of customer files which adversely affected the sales and competitive position of the buyer.

15. However, such clauses may create dependencies or present only limited incentives as parties may feel that in the medium-term they will benefit more from reduced competition than what they will suffer from (one-off) loss compensation down-payments.[225] The usefulness of such clauses, thus, should be assessed on a case-by-case basis.

5. *The role of purchasers in the transfer process*

16. To what extent can the Commission rely on purchasers to insist on the "correct" scope of the business, and ensure full **transfer**? Sales contracts are part of everyday business practice. However, sellers may sometimes take actions that prevent purchasers from making informed decisions, *e.g.* when insufficient data is provided in the due diligence procedure. Moreover, the interests of a purchaser typically do not fully coincide with the competition goals of the remedy. For example, purchasers may find it preferable to pay a substantially lower price in return for fewer assets, with the result that they will not be as well-equipped to compete fiercely against the seller. In return, the committing party would be accepting a loss on the sales price of the divested business, in exchange for a longer-term gain (rent) from lessened competition.

17. As discussed above, the Study found 11 remedies in which the purchaser failed to obtain the full **transfer** of required assets – either because it had misjudged the scope of the divested business, or had been unable to enforce contractual safeguards to guarantee timely and full **transfer**, or had underestimated the importance of following-up with the seller on incorrect **carve-outs**. Even sophisticated purchasers complained (in four of these remedies) that the due diligence deadlines had been too short and that they had felt under severe time pressure to conclude the deal.[226] Other problems that purchasers encountered in the **transfer** process were:

    (1) underestimating the efforts required to **transfer** fully all assets connected to the divested business;[227]

    (2) misrepresentations by the sellers regarding the scope of the divested business as set out in the commitments;[228]

    (3) finding out about missing assets only during **transfer**;[229]

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[225] Examples of studied cases are: r45: clause on loss of competitiveness; r6: loss compensation clause.

[226] r37; r41; r63; r72.

[227] r72.

[228] r39.

[229] r30.

(4) being unable to pressure (as a small purchaser) the seller effectively to ensure the proper **transfer** of assets;[230] and

(5) underestimating the amount of technical assistance actually needed.[231]

18. These findings indicate that in at least 10% of all 84 **divestiture remedies** purchasers were not in a position to protect their business interests adequately and, were thus even less able to act according to the purpose of the commitment.

19. Interestingly, a number of remedies seemed to suggest that **transfer** issues may be intrinsically less of a problem when the divested business is being sold to a **JV** partner.[232] This was likely due, in large part, to that fact that the **JV** partner knew the divested business, and had partial control, and was thus fully capable of preventing harmful **transfer** decisions.

6. Monitoring the transfer process

20. The Commission monitors the implementation of a **divestiture remedy** through the oversight of a monitoring trustee. In at least ten remedies, the buyers mentioned in the interviews that the trustee had been discharged too early to monitor the actual **transfer** of the business (assets and personnel) both before and after **closing**. In addition, implementation problems frequently arose when the trustee was not present to monitor the fulfilment of transitional agreements.[233] One purchaser indicated that it should be possible to re-instate the trustee, if **transfer** issues appear after its discharge from duty.[234]

21. The Study found no remedy where the systematic monitoring of the actual **transfer** of the business was carried out post-**closing**, nor was such monitoring explicitly provided for in the commitments or the trustee mandates in the Study sample. The evidence from the remedies analysed suggest that closer monitoring of the **transfer**, including ex-post reviews, would have produced positive effects by enabling implementation problems to be identified, and resolved, in a timely fashion.[235] Two purchasers suggested that commitments should provide for the systematic verification of the completion of the **transfer** at a stipulated later date, for example, one year after the decision.[236] They also pointed to the need for determined oversight efforts by the monitoring trustee through regular contacts with both the purchaser and the seller during the **transfer** process in order to ensure that the process ran smoothly.

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[230] r80.

[231] r56.

[232] r7; r9; r28; r32; r41; r43; r48; r74.

[233] r20; r25; c39; r63; r72; r80; r96.

[234] r63.

[235] r26; r72; r80; r96.

[236] r26; r80.

H. Monitoring trustees

1. The Study's findings on the monitoring trustees' functions with respect to **carve-outs**, interim preservation, **transfer** and purchaser approvals are mainly described in several places:
   1) Section D on "Interim preservation and holding separate of the divested business" under "Monitoring by a trustee", p. 61;
   2) Section F on "Carve-out of the divested business" under "The role of the trustee", p. 77;
   3) Section G "Transfer of the divested business" under "Monitoring the transfer process", p. 86; and
   4) Section I on "Suitable purchasers", p. 98.
2. This Section will focus on the procedural aspects of the monitoring trustee's selection and appointment as well its relationship with the parties, third parties, and the Commission.[237]
3. In all but two of the 68 studied remedies to **transfer** a market position, the appointment of a monitoring trustee was required in the commitment text.[238] In another two remedies, despite being foreseen in the commitment text, no monitoring trustee was actually appointed.[239] In one such instance, the trustee was not appointed because a purchaser was proposed and approved rapidly within three weeks after the date of the Commission's decision, although it later turned out that a trustee would have been necessary.

In the **Phase II** remedy […], no trustee was appointed despite the Commission's power to require the parties to appoint one within four weeks of the decision. This was because the purchaser was approved very expeditiously after the decision. However, the asset preservation efforts and the **transfer** of the business were riddled with problems and, as a result, the divested business was seriously degraded in the interim. For example, vital information was withheld from the buyers, and not all necessary employees were **transferred**. Information gathered during the Study indicated that a monitoring trustee would have been able to prevent at least some of these negative developments that ultimately rendered the **transfer** of the market position less effective.

4. In all four cases in which no monitoring trustee was appointed it appeared that a monitoring trustee would have significantly reduced the risk of ineffective implementation of the commitments as a consequence of inadequate preservation of assets or incomplete information being provided to purchasers.[240] By contrast, none of the remedies for which a monitoring trustee was actually appointed showed clear indications that the trustee was unnecessary.
5. Monitoring trustees were overseeing one or several remedies. In 12 out of the 33 divestiture cases where a monitoring trustee was appointed, the monitoring trustee was mandated to oversee the implementation of a single commitment (36%). In another 17 of the 33 cases

[237] The current practice of the Commission regarding the role of trustees in merger cases is reflected in the **Remedies Notice**, paragraphs 52 and 53, and the **Model Divestiture Commitments**, Section E.

[238] Exceptions: r8; r58.

[239] r66; r72.

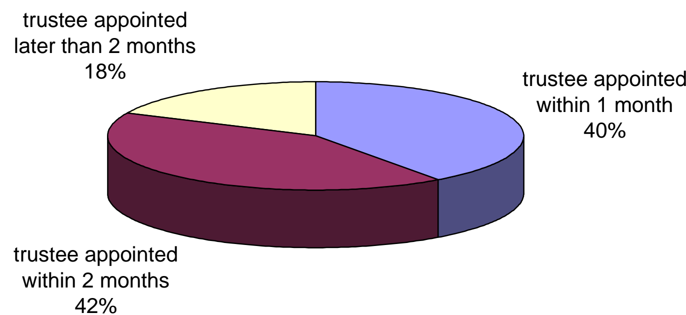
[240] r8; r58; r66; r72.

(*i.e.* 52%), one monitoring trustee was appointed to oversee the implementation of multiple commitments. Finally, in the remaining four of the 33 cases two trustees were appointed to oversee multiple commitments.[241] As trustees were often appointed for the monitoring of more than one remedy, this Section will report on the basis of remedies or on the basis of cases.

6. Overall, in 24 out of the 33 divestiture cases with monitoring trustees (*i.e.* 73%), 14 of which were **Phase II** cases, various issues emerged regarding the selection and appointment of the trustee, as well as the terms of its mandate and its relationship with the Commission, the parties, and third parties.[242] None of these issues can by themselves be considered serious and unresolved in the sense that they have clearly reduced the **competitiveness** of the divested business.

1. *The timing of the appointment of the trustee*

Chart 16: Trustee appointments: 60% of the trustees in all divestiture commitments were appointed later than one month after the Commission's decision



7. In the cases and remedies reviewed in the Study, the time that elapsed until the appointment of the trustee varied considerably from two days after the adoption of the Commission's decision in only one case to (sometimes much) more than one month in most cases.[243]

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[241] The four cases involving multiple trustees were: c2; c5; c26; c30.

[242] Most striking cases: c7; c12; c24; c25; c26; c28; c30; c31; c37; r1; r30; r33; r53.

[243] The Commission's current practice for the appointment of the trustee requires the parties to propose one or more candidates for Commission approval within one week of the adoption of the Commission's decision, together with the full terms of the proposed trustee mandate, the outline of a work plan, and an indication of whether the trustee is proposed to act as "monitoring" or "divestiture" trustee, or both. The parties must then appoint the trustee within one week of the Commission's approval. If none of the parties' proposed candidates are accepted by the Commission, the parties have one week after being informed of the Commission's rejection to make a new proposal. If the parties' new proposal is rejected by the Commission, the Commission may then nominate a trustee. Where the parties' first choice for trustee is approved, the entire selection process typically takes no more than four weeks after the Commission's decision has been adopted.

In the **Phase II** case […], the parties proposed the candidate trustee just two days after the Commission's decision and the trustee was formally appointed within two weeks thereafter. However, the parties pointed out that this swift appointment was only possible because the trustee had acted for the parties before and had been involved in the negotiation of the remedies on their behalf.

8. Of the 67 remedies to transfer a market position in which a monitoring trustee was appointed, the trustee was appointed within four-week weeks in only 40% of these remedies (see Chart 16). More specifically, in 42% of the remedies, the trustee was appointed in less than two months, and in almost 18% of the remedies, the trustee was appointed in more than two months from the Commission's decision. In view of the fact that most divestiture periods were six months long, this meant that in 18% of the remedies there was no effective monitoring of the parties' compliance with the commitments for a third of the divestiture period, and in particular at the outset of the period when supervision would be at its most crucial.

9. The causes for delay in appointing the trustee included failure by the parties to provide all the necessary information, or failure to submit a trustee mandate that met the Commission's approval standards, or the Commission's rejection of the parties' initially proposed candidate, thereby extending the search process into a second round.

In the **Phase I** case […], the trustee for one of the divested businesses was appointed later than three months after the Commission's decision, due to the Commission's rejection of the trustee who was initially proposed.

In the **Phase I** case […], for two separate remedies two trustees were appointed. Although the Commission's decision did not specify a deadline for the trustee approval, both trustees were proposed to the Commission five weeks after the decision. One trustee was appointed within eight weeks after the Commission decision, while the appointment of the second trustee only occurred after three months because the Commission was not convinced of the independence of the trustee and requested additional information about the trustee.

10. The Study found that the Commission often had insufficient information on the initial implementation steps taken by the parties for the divestiture, or had to rely exclusively on the parties themselves for such information. The Commission was thus often not in a position to intervene in cases of questionable implementation. The detrimental effects of such behaviour were difficult to ascertain from the interviews.

11. As long as there was no trustee appointed to oversee implementation and report to the Commission, the parties remained undeterred in pursuing their own interpretation of the commitments and their own interests, irrespective of the objectives and requirements of the commitments as intended by the Commission's decision. They could thus gain access to confidential information of the divested business (particularly relevant where the divested business was from the target), could operate the divested business in a way that would be detrimental to the purchaser's competitive position, or misrepresent the scope of the business to the purchaser.[244]

[244] Examples: r17; r19, where the parties sold products cheaply to customers in order to capture market share before they divested the business, thereby thwarting or delaying the buyer's efforts to compete with their retained business immediately thereafter.

12. Trustees who came into the process late found it difficult to reverse the effects of the parties' conduct, in particular, when faced with commitments involving the complex **carve-out** of assets or **transfer** of **IPRs**.[245] Moreover, certain cases indicated that, even when a trustee was appointed within fairly short deadlines, the complexity of the process and the relatively short divestiture periods could mean that the trustee was starting anyhow too late to have any real impact.

> In the **Phase II** remedy […], although appointed only two weeks after the Commission's decision, the trustee stated that it was brought in too late since by the time it took up its duties, the seller had already put in place certain key arrangements, which were difficult for the trustee to change afterwards. For example, the field of potential buyers had already been narrowed down, while the trustee claimed that he could have worked to keep earlier bidders in the process to ensure that the widest choice of acceptable candidates was preserved. The trustee also stated that he could have better understood what was going on and could have made suggestions on how to improve the divestiture process, had he been given the opportunity to get involved at an earlier stage before the parties had taken such decisive steps.

> In the **Phase I** remedy […], the trustee indicated that he should have been involved much earlier, perhaps even at the stage of the negotiation of the commitments text. The trustee believed that certain problems which were encountered during the implementation of the commitments could have been avoided, had he been involved at the commitments negotiation stage. This concerned in particular the inclusion of necessary [… assets].

2. *Suitability of monitoring trustees*

a) Matching the qualifications of a proposed trustee to its functions

13. The starting point for assessing the suitability of a monitoring trustee is to match its existing skill sets to the specific tasks or functions required to ensure the proper implementation of the commitments, bearing in mind the characteristics of the particular case. The Study found that the monitoring trustee often had to carry out a number of functions that required distinct skill sets, specifically:

(1) an interim preservation monitoring trustee supervises the actual day-to-day operations of the divested business, using a set of pre-determined parameters to measure performance against historical data and/or business plans;[246]

(2) a hold-separate monitoring trustee oversees the hold-separate and ring-fencing arrangements put in place for this purpose; and

(3) a divestiture process monitoring trustee supervises the parties' efforts to find a suitable purchaser for the divested business.[247]

(4) a **carve-out** monitoring trustee oversees the separation of the divested business from the retained business;[248]

[245] r63; r80; r96. See also Section F on "Carve-out of the divested business", p. 73.

[246] See Section D on "Interim preservation and holding separate of the divested business", p. 56.

[247] See Section E on "The divestiture process", p. 68.

14. The Study found that the first three functions identified above require distinct yet complementary skill sets, namely: business management; accounting expertise; information management; and industry knowledge. Interviews with both buyers and sellers indicated that these skill sets were more commonly found in accounting firms, insolvency administrators, and industry consultants, rather than in investment banks. In contrast, the fourth function requires specific corporate finance experience which is generally found in accounting firms and investment banks.

> In the **Phase II** case […], an investment bank was appointed as both monitoring and divestiture trustee. According to the buyer, the trustee had general sector knowledge and financial background information, but lacked understanding of the business and of the legal aspects of the divestiture.

> In the **Phase I** remedy […], the trustee, an investment bank, admitted that it had lacked the industrial expertise to detect any relevant problems.

> In the **Phase I** remedy […], an investment bank was appointed to fill the dual role of monitoring and divestiture trustee. This trustee, who had previously acted as a financial advisor to the seller, stated that it felt that "ensuring viability" was too excessive a task for an investment bank. It also felt that its mandate was too wide and, in practice, interpreted its role as that of a divestiture advisor.

15. The Study further indicated that monitoring trustees without business knowledge in the industry concerned typically encountered difficulties fulfilling their monitoring tasks successfully. In this respect, even accounting firms at times would have benefited from employing additional advisors who have worked in the sector involved, in order to perform this task adequately and not just rely on the parties' information.

16. The Study indicates that the monitoring of the **carve-out** of assets, in particular, required good industry knowledge. Far from being isolated incidents, extensive **carve-out** tasks occurred frequently. Trustees involved in the analysed remedies were ill-prepared for this **carve-out** assignment, in particular when they were investment banks.

17. For a number of reasons, parties had a general preference for the appointment of only one monitoring trustee. While current practice encourages the retention of outside expertise when needed for specialized tasks,[249] the Study found only three cases in which the trustee had sub-contracted a very extensive task to a consultant.[250]

> In case […], the seller reported that they had initially proposed one trustee (an investment bank) to manage the entire remedy process. However, they subsequently decided to propose an accountancy firm as an additional trustee for a particular remedy because they were of the opinion that the investment bank would be "too transaction-driven" to perform this monitoring correctly.

18. The Study indicates that the previous experience of a trustee in performing trustee duties can contribute substantially to the success of its mission. As it is not always possible to

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[248] The Study reveals that this task requires a pro-active and hands-on approach by the monitoring trustee. See Section F on "Carve-out of the divested business", p. 73.

[249] **Model Divestiture Commitments**, paragraph 30.

[250] c2; c28; r90.

appoint a trustee with previous trusteeship experience, however, one trustee recommended that the existence of some form of guidance (such as **Best Practice Guidelines**) for trustees would be useful for both new and old trustees alike as a useful reference tool in understanding the scope of their duties. The Study also found that one trustee has made "trusteeship" a business speciality in its own right.

> In the **Phase II** case […], the monitoring trustee who was a partner in an accounting firm in the United States started a specialized trustee company (mainly for the US enforcement agencies), since he found that acting as a monitoring trustee required a high level of knowledge and independence. In particular, he felt that the monitoring job should not be used as a basis for acquiring new clients, as has often been the case.

19. Overall, the Study found that there was a perception among the interviewed parties, purchasers and also trustees that investment banks are generally not very well-suited to carry out monitoring trustee duties.[251] This was even confirmed by some investment banks which had acted as monitoring trustees, who conceded that they did not possess sufficient skills to carry out more specialised monitoring duties properly.[252]

b) Potential conflicts of interest and the independence of a trustee

20. Several cases in the Study revealed that the relationship between the seller and its **M&A** advisors was incompatible with the functions of a monitoring trustee, including the divestiture process monitoring function.

> In the **Phase II** case […], the monitoring trustee job was carried out by a department of an investment bank. Another department of the same bank was acting as the seller's **M&A** advisor. The trustee reported that, when required to assess whether the divested business was performing well, it had merely relied on information provided to it from its own company's **M&A** department, and did not conduct any independent examination of its own.

> In the **Phase II** case […], the trustee had a dual role acting as the seller's sales advisor and as the Commission's monitoring trustee. The simultaneous activity as a divestiture process monitoring trustee and as an **M&A** advisor can lead to a conflict of interest if the divestiture process monitor has to report critically on the seller's (and therefore its **M&A** advisor's) activities. The purchasers were not aware of the trustee's double role and were under the impression that the trustee was fully independent. This may have affected their negotiating position and thus the optimal outcome of the divestiture process.

> In the **Phase II** case […], the monitoring (and divestiture) trustee, an investment bank, had previously been an advisor of [… the parties] and advised them on how to structure the remedy package. This trustee was also actively involved in the party's divestiture process. Thus, the trustee was perceived, in some respects, as "the parties man", that was careful to maintain its client relationship by carrying out its mandate

251 Examples: c37; r1; r63.

252 Examples: c7; c24; c25 (see descriptions in the following text boxes).

in a manner acceptable to [… them]. This could also explain why there were no reported differences between the trustee and [… the parties], which is unusual.

c) Structure of remuneration of trustees

21. The Study found that an agreed fixed fee tends to limit the amount of time and attention which the trustee can afford to devote to its monitoring activities.[253]

In the **Phase II** remedy […], a flat fixed fee was negotiated with the monitoring trustee at the outset of the process. While at the time of negotiations it was not clear how much monitoring would be involved, the agreed fee was a small amount. It turned out that the trustee performed very limited activities which resulted in inadequate monitoring, in order to ensure that its costs did not exceed the up-front agreed flat fee. The trustee reported that it considered itself lucky that it managed to make any profit out of the appointment.

22. Investment banks usually, although not in every instance, insisted on the payment of a fee that was tied to the sales price. While the Commission does not prohibit incentive payment schemes *per se*, this type of arrangement could raise a conflict between the Commission's interest in a swift sale as against the trustee's desire to take the time to find the highest paying bidder in order to maximise its income.

In the **Phase II** case […], an investment bank was appointed as monitoring and divestiture trustee. The bank proposed a complicated fee structure: the trustee would not accept a mandate for less than […], and at the same time insisted on a monthly retainer of […] not to exceed [… (six months)]. In addition, the trustee also required a payment of 1% of the transaction's value as an incentive to sell the divested business for a good price. The basically flat fee structure for the monitoring task did not create incentives for the trustee to act in a pro-active manner.

In the **Phase I** remedy […], the monitoring trustee, an investment bank, received a percentage of the sales price of the business. This remuneration turned out to be higher than the remuneration of an accountant would have been. The fee structure did not create incentives for the trustee to act in a pro-active manner.

23. The Study also showed that trustees may be expensive when they are required to carry out a comprehensive set of tasks. In two remedies where allegedly excessive trustee costs became an issue, the parties complained to the Commission, which subsequently intervened, *e.g.* by verifying the establishment of an agreed work plan.

In the **Phase II** remedy […], the trustee cost the parties 1 million Euro, and the parties complained to the Commission that in their view the trustee mandate could have been carried out more cheaply and with less involvement from their own management. With hindsight, the parties stated that they would have chosen someone familiar with the industry and would have provided for hourly rates, with monthly budgets and early warnings if the budget proved to be insufficient.

[253] In remunerating monitoring trustees, the **US FTC** also apparently prefers payments based on an hourly rate, as it appears to be more appropriate, since it gives the trustee the flexibility to perform all activities deemed necessary for the proper fulfilment of its monitoring tasks.

> In the **Phase II** remedy […], the issue of trustee costs was resolved by the trustee's setting a cap and providing a three-month up-front budget. The trustee committed to the agreed upon budget unless circumstances changed. The trustee in the case thought this was a good solution: it gave the parties an idea of what expenses to expect, and at the same time the trustee had flexibility to adapt its budget every three months to reflect the actual amount of work that had to be done (which is practically impossible to determine at the beginning of the mandate).

24. Thus, overall, the Study confirms the Commission's current practice of preferring hourly rates instead of fixed fees for monitoring trustees.

3. *The trustee's mandate and its relationship with various stakeholders in the process*

a) The trustee mandate

25. In the interviews, both trustees and sellers voiced concern over the lack of guidance they disposed of when drafting their mandates.[254] As a result, they felt that mandates were often ambiguous as to the trustee's duties and obligations. They felt it was crucial that mandates be tailored to the specific case and, in particular, in cases involving business **carve-outs**.

> In the **Phase I** remedy […], the trustee indicated that there was uncertainty as to the scope of its powers due to the different language used in its engagement letter and the commitments. This led the seller sometimes to contest the extent of the trustee's authority.

> In the **Phase I** remedy […], the trustee stated that it had felt that it needed more guidance on the hold-separate procedure, and generally felt that its mandate was too wide.

26. In only a limited number of remedies, work plans supplemented provisions in the trustee mandates, or were explicitly mentioned and were generally seen as a helpful tool in clarifying the trustee's tasks. A number of trustees recommended systematically establishing such work plans as soon as possible and having them agreed with the Commission's services.[255]

27. Finally, in a number of remedies the trustee was discharged too early to monitor the actual **transfer** of the business/assets/personnel before and after **closing**.[256] One case suggested that it should have been possible to re-instate the trustee if **transfer** issues appear after the discharge of the trustee.[257]

b) The relationship between the trustee and the Commission

28. In all analysed remedies the mandate was a contract concluded between the trustee and the parties, approved by the Commission. The trustee was meant to act as the eyes and the ears

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[254] Today, the **Model Trustee Mandate** specifies the trustee's functions, scope of authority, duties and obligations. See paragraphs 6 to 8 for provisions governing the monitoring trustee; paragraphs 9 to 13, for the divestiture trustee; and paragraphs 14 to 16, for the trustee's reporting obligations.

[255] For example in r33.

[256] c39; r20; r25; r49; r63; r72; r80; r92; r96.

[257] r63.

of the Commission. The Commission was not a party to the contract between the trustee and the seller. Furthermore, the trustee was remunerated by the parties.[258]

29. In the interviews, some trustees indicated that fact that the Commission's involvement was indirect created problems of dependency regarding the trustee's position *vis-à-vis* the seller. Moreover, some trustees indicated that this triangular relationship made it less clear for third parties to determine the trustee's precise role.[259] For example, trustees were often not able to disclose their exact function to purchasers, *e.g.* due to confidentiality provisions vis-à-vis the parties provided for in the trustee mandate.

> In the **Phase II** case […], the trustee indicated that ideally the trustee ought to be appointed (and remunerated) by the Commission and not by the seller. Even if the trustee were to be remunerated by the seller, the trustee thought it would be better to have the Commission draw up a list of possible trustees from which the seller could choose a candidate. They thought that such an arrangement would give the trustee more authority *vis-à-vis* the seller.

> In the **Phase II** case […], the trustee was of the opinion that the position of the trustee would be clearer (especially *vis-à-vis* third parties), and stronger and more independent of the seller, if it held its mandate directly from the Commission.

> In the **Phase I** remedy […], the trustee felt that a trustee should not be directly appointed by the Commission, since the parties might perceive that as an external enforcement and refuse to co-operate.

> In the **Phase II** case […], the seller argued for keeping the current practice for the appointment of trustees, since the parties are better placed to select qualified people/firms with the necessary expertise in specialized fields of activity. They felt that the subsequent requirement that the trustee be approved by the Commission would ensure that the public interest is protected.

> In the **Phase II** remedy […], the trustee stated that it did not feel that the fact that it was being paid by the parties while working for the Commission, created a problem. The seller considered that there is value in the party choosing its own trustee to make sure that it fits their needs. However, it felt that for informational purposes, it might be helpful if the Commission kept a list of trustees that had been retained and had worked successfully in the past.

30. Thus the Study revealed that there are differing views as to whether the current structure for the appointment of a trustee should be maintained.

31. The feedback from trustees also indicated that the role of the trustee could be further clarified by arranging kick-off meetings between the trustee and the Commission early in

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[258] This practice corresponds to the provisions laid out in today's **Model Trustee Mandate**, paragraph 4, stipulating that the trustee "*shall act on behalf of the Commission to ensure the parties' compliance with [their commitments]*" and that the Commission may "*give any orders or instructions*" to the trustee, while the parties are "*not entitled to give instructions to the trustee*".

[259] c5; c17; c20; r83.

the process, so the trustee could be made aware of all the relevant aspects of the assets to be divested, and by ensuring regular follow-up meetings with the trustee, in order to ensure that the trustee fully understands the extent of its functions and role.[260]

32. Finally, the Study indicated that debriefing meetings between the Commission and the trustee at an early stage could provide the trustee with a more complete understanding of the competition problems identified and the ramifications of certain terms of the commitments, in order to appreciate what issues are most vulnerable to potential violations and ensure successful performance of the trustee's duties.[261] Moreover, some interviewees suggested that these factors could be formulated into **Best Practice Guidelines** on the approval of trustees and perhaps in establishing a scoreboard of trustees and their performance.

c) The trustee's relationship with third parties

33. In at least 10 cases reviewed in the Study, one or several purchasers reported that they had no, or very limited, contact with the trustee prior to concluding the **SPA** with the parties,[262] and sometimes did not even know of its existence. The Study identified a number of instances where it could have been very useful for the monitoring trustee (and not just the seller) to liaise with the (potential) purchaser(s) in order to develop a balanced view of the parties' compliance when reporting to the Commission on the divestiture process. This seemed especially critical when the buyer was a new entrant who would likely be less aware of all the issues involved.

> In the **Phase II** case […], the purchaser complained about not having been informed of the precise scope of the assets to be divested. The purchaser stated that it would have liked to have had direct contact with the trustee but had been given the impression that this was not allowed. Similarly, the trustee stated that it, too, would also have liked to have had contact with the purchaser but was prevented by the seller from making such contacts. The lack of information created additional risks to the sales process.

> In the **Phase II** case […], certain purchasers indicated that they had had no contact with the trustee and had, in fact, been unaware of its existence. In this case the trustee could have made the potential purchasers aware of the precise scope of the commitments and perhaps avoided the critical […] issues that were likely due to insufficient **transfer** arrangements between the seller and the purchasers.

> In the **Phase II** remedy […], the trustee was not given any information regarding the progress of the divestiture process. It had no opportunity to check whether [… the parties'] teaser prospectus to potential customers and their statements regarding the divested process was correct. In fact, the trustee mandate in this case did not foresee a trustee role in the purchaser review, but with a more extensive role, the trustee would have been able to inform the purchaser that the divested business was dependent on its main competitor for certain input supplies. The trustee knew that the purchaser

[260] r15; r11; r44; r59; r87.

[261] c28.

[262] c2; c7; c12; c20; c26; c28; c35; c37; r53; r56.

was a new entrant both to Europe and to the economic sector involved, and thus lacked the necessary relationships needed to operate the business successfully from the start. The trustee stated that it could have informed the Commission of these deficiencies had it been better involved earlier.

34. Thus, a number of purchasers stated that they would have benefited from knowing the precise role of the trustee. The trustee would have helped them better understand the details of the business they were acquiring and thus find a more appropriate agreement with the selling parties which would have enabled them to raise compliance issues with the trustee. Some prospective purchasers misunderstood the role of the trustee, thinking that it would guarantee a fair process or would ensure, on behalf of the Commission, that the divestiture would include all necessary assets, which was not the case. A number of purchasers proposed that trustee mandates should be made known to them in a non-confidential version as a basic matter of fairness and transparency.

35. From a number of interviews it also transpired that, without the necessary contact between the purchaser and the trustee, the latter was often not in a position to provide an independent assessment of the suitability of the purchaser.[263]

d) The trustee's relationship with the divested business

36. Many interviewed trustees did not have hands-on experience or regular contacts with the divested business and, as pointed out, often relied exclusively on information provided by the parties. This has proven to be a problem, in particular, where parties needed to observe strict hold-separate **obligations** between the divested business and their retained business.[264] As discussed above, hold-separate managers were not systematically used in the cases analysed in this Study, or they were not clearly independent of the parties in their management of the divested business. By contrast, today's practice requires the trustee to ensure systematically the independent role of the hold-separate manager and monitors its work.[265]

37. It was suggested in the interviews by several trustees that the work of the hold-separate manager would have been more effective, had the trustee been consulted in the appointment process and supervised its work.

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263 The trustee's function in assessing the suitability of purchasers is dealt with in Section I on "Suitable purchasers", p. 98.

264 Example: r48.

265 **Model Divestiture Commitments**, paragraph 7.

I. Suitable purchasers

1. In 40 of the 84 **divestiture remedies** analysed in the Study, *i.e.* 48% of **divestiture remedies**, one or more interviewees raised concerns about the purchaser selection and approval process, but few of these comments related specifically to the suitability of the purchaser.
2. The Study identified two remedies in which the choice of the wrong purchaser was considered the *single most important cause* for the remedy's ineffectiveness.[266] In both instances a more rigorous application of the selection criteria during the purchaser approval process might well have prevented the remedy's ineffectiveness. In addition, there were nine remedies in which the choice of a less than optimal purchaser raised serious issues and may have *contributed* to reducing the **competitiveness** of the divested business, or compromised its effectiveness *in combination with other factors*, in particular the scope of the divested business.
3. Indeed it is sometimes difficult to distinguish between factors affecting the viability of the divested business and factors affecting the suitability of the purchaser. Several **divestiture remedies** included divested businesses of such limited scope that they could only become viable with a purchaser which could bring in very specific assets and skills to the operation.[267] In five of these **divestiture remedies** it transpired that the actual purchasers were not able to succeed in putting together a viable package by contributing the necessary assets.[268]

> In the **Phase II** remedy […], the award of a licence to a specialised sub-system/equipment manufacturer stipulated in addition to the standard purchaser requirements that the licence should enable the licensee to successfully and independently supply the products concerned and that the potential purchaser should have sufficient skills, production and testing facilities in the relevant business area. As the divested business was very specialized, but at the same time outdated and apparently not fully stand-alone and viable, the parties found only one purchaser with limited presence in the **relevant market**. This purchaser had problems with the licensed **IP rights**, as it encountered more difficulties than anticipated complementing the divested business with its own assets and needed extensive start-up support. This purchaser experienced disappointing results and was still using technical support from the seller at the time of the interview many years afterwards.

4. Only once in the reference period did the Commission formally reject a purchaser.[269] In this case the commitments stated, *inter alia*, that "*those operators intending to make a purchase offer . . . must be capable of showing their direct or indirect experience in the operation of a service station network of any type*". In fact, when the parties proposed a group of eight purchasers to the Commission, two of them were rejected because they were not active in the petroleum sector and the Commission determined that these two did not have the capability to maintain the business and to develop it as an effective competitive force. One of the rejected candidates (who was active in the motorway service station restaurant

[266] r67; r80.

[267] Example: r6; r63.

[268] r5; r26; r25; r29; r40.

[269] M.1628 *Totalfina/Elf*, Commission decision of 9 February 2000.

segment) appealed this decision[270] on the basis that the commitments only required the purchasers to have direct or indirect experience in the operation of a service station network. It argued that by rejecting the applicant on the basis that it was "not active in the petroleum sector" the Commission had introduced a new requirement. The CFI held that even though the criterion of actual activity in the petroleum sector was not expressly laid down in the commitments, the text nevertheless stipulated that "*the transferee(s) shall be viable operators, either potentially or currently active on the markets in question, capable of maintaining or developing effective competition*". Therefore, the Commission was entitled to take into account the fact that an applicant was a newcomer to the market for the retail sale of fuels.

1. Purchaser requirements

5. Purchaser requirements are normally incorporated by the parties as part of their commitments, and they are made binding by the Commission's decision, to which the commitments text is usually annexed. To comply with their commitments and to obtain the Commission's approval of the purchaser, the parties must present a purchaser which fulfils these requirements. The Commission will reject a candidate purchaser if the requirements are not fulfilled.
6. The following purchaser requirements were most commonly prescribed in the remedies analysed: a suitable purchaser should (1) have the proven expertise and (2) financial resources deemed necessary; (3) have the incentives to maintain and develop the divested business as an active competitive force in competition with the parties and other competitors; and (4) be independent and unconnected from the parties. Moreover, (5) a suitable purchaser should not create new competition concerns, nor increase the risk that the implementation of the commitments will be delayed. Finally, (6) a suitable purchaser should be expected to receive all necessary regulatory approvals by both competition authorities and other regulatory bodies. These requirements correspond to the current Commission practice.[271]

2. Proven expertise

7. In the analysed **divestiture remedies**, the Commission evaluated whether the proposed purchaser had the proven expertise to operate the divested business successfully. The scope of the expertise required is determined by taking into account the particular circumstances of the remedy and the specifics of the industry concerned. The Study inquired into proven expertise, including all types of **know how** and organisational and management capability, as well as expertise in a specific market and experience with the prevailing business practices in the industry.

In the **Phase I** remedy […], the purchaser requirements specified a range of specific capabilities: licensing expertise, production expertise in the field of the divested products and familiarity with a certain proprietary production process. To meet these requirements the parties had to change a sales process that had already been

[270] The Commission's only rejection of a proposed purchaser was challenged in Court in case T-342/00 *Pétrolessence and SG2R v.Commission*, judgement of the CFI of 17 January 2001.

[271] The Commission's current practice for assessing the suitability of a purchaser for a divested business is set out in the **Remedies Notice**, paragraphs 58, 59, 60 and the Commission's **Model Divestiture Commitments**, paragraphs 14 and 15.

underway at that time. The stricter requirements substantially reduced the number of potential purchasers. However, the Study's analysis indicated that the additional requirements, which led to the formation of a buyer consortium, were crucial for contributing to the future success of the business.

In the **Phase II** remedy […], the parties committed to remove the **overlap** (single dominance) in the world-wide […] market by divesting their […] division. The purchaser, […], was a small and inexperienced new entrant into the market. Although the purchaser acquired the entire business, the seller failed to **transfer** all of the necessary assets. During interviews, the buyer reported that, even three years after the transaction, vital assets had not been **transferred**. Missing assets included certain key personnel, as well as crucial **IPRs**, supply and sales contracts, and support functions, such as marketing. The seller ([…]) remained a competitor in the market, and at the same time, continued to control the orders, product development, and financials of the divested business. In addition, the sales operations of the divested business were carried out by [… the seller's] sales force and the production assets physically remained on [… the seller's] premises. [… The purchaser] claimed that it was too small and that it did not possess the financial resources to effectively ensure enforcement of its contractual rights in the courts. [… The purchaser] continued to be dependent on [… the seller] until it acquired another company active in the same market […a few] years after the divestiture. Even after this acquisition, the market position of the purchaser remains precarious.

8. Some purchasers and sellers also highlighted the importance of identifying purchasers who have good market knowledge and are familiar with the dynamics of the market and the regulatory environment in the **EEA**.

In the **Phase II** remedy […], the […] business of […] was sold to a new market entrant for US$ […]. The entrant was active in the US market, but not yet present in the **EEA**. Three and a half years later, the buyer sold on the business to a European player for only [… less than 5% of the original price]. This steep decline in the value of the business suggests that the buyer probably overpaid and did not have the resources to continue supporting the business. In addition, the buyer did not have the necessary market knowledge and was not familiar with the dynamics of the market and the regulatory environment in the **EEA**.

9. In some cases, the Commission required that the purchaser should already be operating a business in the same or in a neighbouring market.

In the **Phase II** remedy […], the parties committed to divest the entire business to a single purchaser that would be a viable, existing competitor in the […] industry. These requirements were considered necessary as a suitable purchaser in this industry would need to have an established European-wide after-sales network and the capability to develop new types of machines to compete successfully in the market. The parties found only one potential purchaser who met the requirements. It subsequently encountered difficulties in competing effectively in the market.

10. The Study also found indications that certain industrial sectors generally require a greater degree of specialised expertise than others. It found that in these sectors, a suitable purchaser should possess the expertise beforehand, as it may often be difficult if not impossible for the purchaser to acquire such expertise later in the job market. Such sectors

would include, for example, certain innovation-driven markets that require very specific **R&D** expertise, which is rarely available in the job market.[272]

> In the **Phase II** remedy […], the purchaser needed extensive engineering experience and a high degree of cutting-edge technical knowledge to maintain and develop the divested business as an active market force in competition with the parties and other major competitors. Such demanding expertise requirements were found to be typical for the industrial sector involved here ([…]). The divested business needed close integration into a wider industrial infrastructure of supply and marketing operations which, again, would only be available with a well-established incumbent.

11. In the interviews, several purchasers (as well as a number of sellers and trustees) highlighted the unforeseen difficulties that purchasers experienced because they had themselves underestimated the level of expertise required to operate the divested business.[273]
12. The Study confirmed that such expertise issues arise less frequently in relation to divestitures of a stand-alone business. Indeed, in those cases there may be less of a need for the purchaser to supplement specific expertise.
13. For these types of stand-alone divestitures financial investors, which typically do not have operational experience in an industrial business, appear to have been suitable purchasers. In two remedies with such financial investors the Commission evaluated the expertise of both the financial investor and the proposed management (*i.e.*, the existing management) of the divested business, in assessing the suitability of financial investor as a purchaser.

> In the **Phase I** remedy […], a financial investor acquired the divested business by way of a leveraged management buy-out. As the management of the divested business was very experienced, there was no need to require additional industrial experience. Initially, there were concerns (on the part of the sellers and the employees of the divested business, as well as its suppliers and customers) that the financial investor might not be sufficiently committed to the business and that it might reduce the workforce. However, the purchaser not only managed to run the business successfully, but to expand it considerably. According to the management of the divested business, this type of growth would not have been possible with an industrial purchaser because there would have been existing business rivalries and the inevitable search for synergies between the two combining entities.

> In the **Phase I** remedy […], the […] business was sold to an investment company. The Commission thoroughly assessed the details of the investment company's business plan and asked for supporting information regarding its further intentions for developing the business. The major concern was whether a financial investor would maintain and develop the business. Contrary to some initial concerns, the financial investor proved to be an effective and viable operator and actually managed to increase the turnover of the divested business.

14. Inasmuch as the business model for financial investors typically involves holding acquired businesses for only a certain (often pre-determined) length of time, the interviewees stated

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[272] Examples: r25; r45; r66.

[273] Examples: r5; r6; r25; r63; r72; r92.

that exit plans would be the single most important factor to consider in assessing the suitability of a financial purchaser in a given transaction.

3. *Financial resources*

15. The Study found that access to adequate financial resources was critical to ensuring the uninterrupted development of the divested business. The Commission's assessment of the financial strength of a potential purchaser is based on an examination of the adequacy of the proposed business plan taking account of the particular requirements of the divested business. Financing requirements may be particularly demanding in cases where the divested business requires sustained future investments, where the business is dependent on constant investment in efficiency producing assets or processes, or where innovation-driven markets require high up-front **R&D** expenditure.

16. The issue of financial resources was important in at least four remedies where the purchaser was a small company.[274] In these cases, the purchasers lacked the financial resources to maintain and develop the business, or to ensure the full **transfer** of the business as provided in the **SPA**.

> In the **Phase II** remedy […], the small purchaser […] was not able to maintain and develop the business due to lack of financial resources. [… The purchaser] had bought the business for one Euro and received technical assistance worth several million Euro, but in the three years until the interview, it had not even acquired one single sales contract. As discussed in the respective Sections of this Study, this failure was mainly due to the inappropriate scope, **carve-out**, and **transfer** of the divested business, but also to the purchaser being unsuitable.

> In the **Phase II** remedy […], described above under "proven expertise", the small purchaser […], an inexperienced new entrant, described itself as being "too small" and lacking the financial means to ensure effective enforcement of its contractual rights in disputes with the seller. As described, the purchaser was unsuitable to operate the business in competition with the parties' retained business and other market participants.

4. *Incentives to compete actively*

17. The Commission assesses the incentives of a proposed purchaser to maintain and develop the divested business in competition with the parties and other competitors, primarily on the basis of a business plan which should set out detailed plans for the operation of the divested business by the proposed purchaser. The Commission also regularly requires an opinion of the trustee. The purchaser will normally be invited to present its plans directly to the Commission and the trustee. While the specific proposals of the business plan are extremely important in evaluating the buyer's incentives, the Commission also considers other objective factors, such as, the competitive context in which the purchaser will operate

[274] r5; r25; r57; r80.

and the purchaser's own economic interests in competing in the market.[275] The Study highlighted the complexities which the Commission faces in making these assessments.

18. The Study found a number of remedies in which the lack of incentive to compete may have been decisive in leading to the remedy's ineffectiveness.[276] Most obvious instances were those where the purchaser rapidly ceased operation of the divested business shortly after its acquisition.

> In the **Phase II** remedy […], in a matter involving both re-branding issues as well as a plant divestiture, the purchaser presented a business plan which included an option to drop some of the acquired brands, a step which it subsequently took. Prior to the divestiture, the seller had had plans to drop the same products, but had not reported these intentions to the Commission. Based on this demonstrated lack of commitment to the divested assets, the purchaser should have been declared unsuitable at the time of the purchaser assessment, as it lacked the incentive to maintain and develop the business in one of the **relevant markets** involved in the remedy. Indeed, it is only in the markets where the acquired brands were subsequently dropped that prices have increased significantly since divestiture.

19. The purchaser's incentives were also questionable and damaged the remedy where the purchaser quickly sold on the divested business, which happened in at least three remedies. This also rendered the Commission's purchaser approval process useless. In some **divestiture remedies** the purchaser had acquired the undesired business as part of a bundle with other related businesses, which were the ones the buyer was actually interested in.

> In the **Phase I** remedy […], a re-branding remedy discussed above, the Commission required the divestiture of a brand business in the small […] markets. The purchaser acquired the licence to the […] brand business within a bigger package of businesses and sold it on to a subsequent purchaser. As the licence had a defined expiry date, this effectively meant that the rebranding period was considerably reduced for the subsequent purchaser. This, and the refusal of the original seller to provide certain assets, led to the result that the subsequent purchaser was unable to effectively compete.

20. Finally, the incentives of the purchaser also seemed questionable and in fact the remedies were less effective in at least three **divestiture remedies** where the purchaser had acquired the divested business for free, or at a negative price.[277]

> In the **Phase II** remedy […], the parties were unable to find a suitable buyer for the divested business because it was not considered an attractive investment. Even when the parties modified the initial divestiture package and offered it for free, they still had difficulties finding a purchaser. There was only one potential purchaser identified and the analysis suggests that this buyer had limited incentives to continue the business beyond the short term. The buyer was an investment company with no track

[275] In certain markets, an incumbent operator as purchaser could entail the risk of co-ordination among equally strong competitors. This may have been the situation in remedy r39, where specific industry experience was required from a purchaser and subsequently a large customer was approved. It transpired from interviews in the Study that, after the divestiture, the purchaser competed only half-heartedly with the merged entity. In fact, the purchaser may have simply replaced one of the two players in the pre-merger (collusive) duopoly.

[276] r5; r40; r56; r57; r67.

[277] Examples: r5; r25; r40.

record in the industry. Even after receiving the divested business for free, the buyer filed for bankruptcy as he could not operate profitably after holding the business for little more than one year.

In the **Phase I** remedy […], the required **divestiture remedy** presented difficulties, as the plant to be divested was a loss-making operation and none of the established market players showed any interest in acquiring it. Eventually, the parties proposed a new market entrant who was a customer of the parties with plans to integrate upward and utilise [… a portion] of the plant capacity for its captive use. The buyer presented a business plan, but only with help from the sellers. The parties agreed that no up-front price was payable. The business performed very poorly afterwards.

21. Normally, the Commission is interested in the sales price only insofar as it might impact on the success of the remedy, *e.g.* by not creating sufficient incentives to compete (sales price too low), or by disabling the purchaser from making necessary investments in the business (sales price too high).

22. The Study identified many remedies where purchasers seemed to have never presented a business plan to the Commission. Their incentives to maintain and develop the business could not, therefore, have been clearly established by the Commission when it approved the purchaser. Some of these remedies subsequently encountered serious problems.[278] Business plans are of course not binding, as they are always subject to modifications and adaptation where needed, and sometimes they may simply be wrong. With a plan in hand, however, the Commission could at least have checked the assumptions on which the plans were based so as to better assess whether there was sufficient evidence of the purchaser's capability and incentives to compete actively in the **relevant market**.

In the **Phase II** case […], the purchaser, […], was a major multinational company who was considered a sophisticated buyer. [… The purchaser] paid a very high purchase price for the divested business ([…]) and was approved by the Commission […] without producing a business plan or any detailed transition planning before deciding to purchase the divested business. […] As a result, the purchaser entered the market with very little knowledge of the business and suffered a long and difficult integration process which nonetheless failed, as the business went bankrupt.

23. Interestingly, one purchaser stated that closer scrutiny by the Commission of its business plans would have helped it clarify its perspective on the divested business and its likely development in the market.

In the **Phase II** remedy […], the purchaser stated that a more thorough "grilling" by the Commission would have prevented it from making certain mistakes in its overly optimistic assumptions.

24. Some of the cases seemed to indicate that small and/or new entrant purchasers may sometimes have more incentives to operate and develop a product in competition with the merging parties, as opposed to a large established market player. In one of these cases, a small new entrant even helped to gradually change the market structure from a concentrated market with a few large players to a market with many smaller competitors.

[278] Striking example: r72.

In the **Phase II** case […], the parties committed to divest the […] businesses. The Commission approved a new entrant as the purchaser in a market where other players were well established and co-ordinated […]. The purchaser established itself firmly in the market and competed effectively against the larger established firms. In fact, the buyer successfully used the divested business as a platform to support its bidding for new contracts, thus successfully participating in the simultaneous general transformation of the market structure.

5. *Independent and unconnected purchaser*

25. Commitment texts generally provided that suitable purchasers should be independent of, and unconnected to, the parties. Some commitments were more specific on this point, detailing the types of links suitable purchasers should not have.

In the **Phase II** remedy […], the Commission decision required the purchaser not to have any direct or indirect links with the parties. For this reason, it concluded that the purchaser should not be a […] company with any contractual relationship with the parties through an exchange contract for […] products in […], nor should it be a financial investor without activities in the field of […]. The decision specified [... what] could be potential purchaser candidates.

26. In general, the Study has not identified any remedy where there was an on-going ownership/control or financial connections between the parties and the respective purchasers.

27. However, on-going connections and links were created by transitional agreements (see under "Transitional agreements", p. 44, in Section A on Scope of the divested business), which were generally of a temporary nature, such as temporary supply agreements or transitional IT support.[279] The Study also found that later dependency was more likely when the scope of the divested business was not stand-alone at the outset and required specific additions by the purchaser.[280] To illustrate this, in one remedy a former distributor merely acquired a [… multiple year] marketing and distribution licence, including a corresponding supply agreement, this "purchaser" was unable to develop "the business" as foreseen in the commitments.

In the **Phase I** remedies […], some of the divested assets were sold to companies that pre-merger were the parties' distributors for the products. After acquiring the divested assets, which did not include any production facilities or necessary **IPRs**, the purchasers continued to be dependent on the exclusive supply of products by the parties at conditions dictated by the parties. The purchasers regretted not being able to enhance the products or expand their operations into neighbouring geographic markets.

[279] Examples: r72; r75; r80.

[280] Example: r65; r91.

6. *Unlikeliness of creating new competition problems or delays in implementation*

28. The acquisition of the divested business by a particular purchaser must neither be likely to create new competition problems nor give rise to delayed implementation.[281] The approval of a purchaser by the Commission does not pre-judge the outcome of any merger control proceedings carried out either under the **ECMR** or under national competition laws, but the choice of a suitable purchaser will be affected by potential competition problems that can be anticipated in other jurisdictions.[282] Delays caused by interventions from other governmental authorities (both competition and other regulatory bodies) may often be longer than anticipated. Consequently, an up-front assessment of potential regulatory problems is crucial in facilitating a timely divestiture.

29. In one remedy reviewed in the Study, the approval of a certain purchaser created competition concerns in a national market, where the **NCA** was required to carry out an in-depth investigation.[283] The authority's review delayed the implementation of the divestiture for a considerable period of time, and the Commission suspended its purchaser approval pending the outcome of the national investigation.

30. In addition, certain purchasers who appear to be suitable from a competition viewpoint might eventually fail to obtain necessary approvals from other national regulatory authorities of Member States, *e.g.* in the field of health and consumer protection, national security, or other areas where certification is required. In at least two remedies, these additional regulatory requirements delayed implementation of a proposed transaction or reduced the choice of potential purchasers:

> In the **Phase I** remedy […], the purchaser of a […] business needed to satisfy certain criteria to obtain the requisite approval of the […] health and consumer protection authority. In particular, the purchaser needed to be established in […], to offer financial guarantees and have experience in the […] sector. The parties made the Commission aware of these facts and a purchaser meeting these criteria was chosen.

> In the **Phase II** remedy […], the […] national defence ministry required that the divested business be acquired by a European purchaser. This requirement left the parties with only one potential candidate and consequently significantly delayed the sale of the divested business because the purchaser was aware of its exclusive position and in long negotiations requested favourable contract terms.

31. In some markets, the competitive situation and existing market structure required that the divested business be acquired by a smaller player in order to avoid creating new competition concerns.[284]

> In the **Phase II** remedy […] the parties divested an old-generation product, which was at a late stage in its lifecycle. The product was acquired by a small firm, which operated it as an important product in its portfolio. According to the purchaser, the parties had neglected the product in the run-up to the divestiture (mainly because of the discovery of new […] as an alternative product). On the other hand, the purchaser

281 **Remedies Notice**, paragraph 49.

282 Example: r45.

283 r45.

284 c12; r37; r41.

had the incentive to devote a great deal of attention and resources to the development and marketing of the product, which figured more importantly in the buyer's portfolio than it had in the seller's product line. Indeed, the buyer was so successful that it was even able to develop new sub-formulations and to obtain new regulatory approval for further uses of the product.

7. *Up-front buyers*

32. An "up-front buyer" remedy provides for the parties not to complete their notified concentration before having entered into a binding agreement with a purchaser for the divested business, which must be approved by the Commission.[285] The purpose of such a provision is to avoid the risk that a notified transaction, once implemented, would later need to be dissolved, if no suitable purchaser were to be found for the divested business. In current practice, the use of up-front buyer provisions is foreseen in situations where the viability of the divestiture package depends to a large extent on the identity of the purchaser.[286]

33. There was only one remedy in the Study sample that included an up-front buyer provision.

In the **Phase II** case […] the investigation concluded that for effective competition to be restored the Commission had to ensure that the purchaser was a strong competitor. The results of the Commission's market testing of the proposed commitments revealed industry concerns that the sellers, who had very strong customer relations in the industry, would later be so powerful that they would be able to take back the market share held by the divested business, if the business were to be sold to a weaker purchaser. This threat was particularly strong because of the high degree of substitutability between the products in the divested and retained businesses, as well as the strong position of the parties in an **upstream** product market, which was an essential input into the divested business. In view of these concerns, the parties proposed a purchaser even before the Commission issued its decision.

34. Statements from interviews with trustees and purchasers highlighted several important positive aspects of up-front buyer provisions. They tend to speed up the divestiture process, thus reducing the risks of maintaining the viability of the divested business and shortening the transitional period during which competition is not yet fully restored. Apart from probably speeding up the divestiture process, the use of up-front buyer provisions provide a strong assurance to the enforcement agency that a potentially problematic mergers will not be consummated until the competition concerns are resolved. Moreover, reduced risk of degradation of the divested business during the interim period is likely, in particular, where the divested business belonged to the target company in an acquisition and thus the merging parties never acquired any rights over the divested business before the divestiture takes place.

35. On the other hand, some interviewed sellers and purchasers pointed out that requiring an up-front buyer could sometimes produce unwanted negative side-effects on the overall effectiveness of the remedy. As the consummation of the notified transaction depends upon the parties finding a suitable purchaser, the seller might be tempted to carry out the sales

[285] **Remedies Notice**, paragraph 20; **Model Divestiture Commitments**, paragraph 1.

[286] **Remedies Notice**, paragraph 20.

process in an inordinate rush. They noted that, in seeking to present a purchaser too quickly, the seller might fail to pursue an adequate sales procedure, grant too little time to the purchaser to review the information regarding the divested business which may lead to the purchaser being unable to carry out a proper due diligence, or end up proposing a problematic purchaser which may ultimately lead to delays in the purchaser approval process, which could in turn affect the future viability and **competitiveness** of the divested business.

36. In the interviews, two other sellers were more emphatic in expressing their unhappiness with up-front buyer provisions. They stated that they would have preferred to refrain from undertaking the notified transaction altogether, rather than offering an up-front buyer provision. For them, the costs of such a provision were considered too high.

J. Divestiture deadlines

1. *Current practice*

1. **Divestiture commitments** have to be implemented within a fixed time period,[287] the length of which is considered by the Commission on a case-by-case basis and should in general be as short as feasible.[288] Long implementation periods would unnecessarily prolong the uncertainty hanging over the divested business, affecting its viability and ability to compete in the market and thus reduce the chances of effective competition being restored by the remedy. Other drawbacks of long periods confirmed in this Study are the uncertainty on the side of the personnel of the divested business, as well as customers and business partners, which may all adopt a wait-and-see attitude until they are convinced that a suitable purchaser will continue the divested business as before, or worse abandon the divested business or stop contracting with it. In addition, long divestiture periods regularly multiply the opportunities for the merging parties to voluntarily or negligently degrade the business and thus limit its competitive potential. Finally, if divestiture periods are long, the Commission has long-standing monitoring responsibilities with associated costs both to the parties and the Commission. Also, after a long divestiture period it becomes increasingly difficult to roll-back the original transaction in case the divestiture fails.
2. Because of these serious negative consequences, the Commission systematically insists that divestiture deadlines are **conditions** to its clearance decisions and, if time runs out, it expects the parties to pass on the divestiture process to an independent divestiture trustee who has the task of selling the business within a short extra period of time, if necessary, at no minimum price in a so-called "**fire-sale**". Nowadays, the Commission considers **fire-sale** provisions standard practice for **divestiture commitments**.[289]
3. Excessively short divestiture periods could also pose a problem: the parties may not have enough time to find a suitable purchaser, or candidate purchasers may have more scope to act strategically with delaying tactics to improve their bargaining position artificially, knowing that parties are faced with a forced-sale scenario at the end of the deadlines. Equally, prospective purchasers may not have sufficient time to carry out their due diligence and may end up offering too much for the divested business or they may unwittingly miss out on obtaining some vital assets.
4. The Commission has recently issued its **Best Practice Guidelines** which specified a standard divestiture period of six months for the initial stage in which to sign a binding **SPA**, with provisions for adaptation to the particular circumstances of every individual case.[290] Currently, standard review clauses that would allow for an extension of the deadlines are included in the **Model Divestiture Commitments**.[291]

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[287] The **Remedies Notice** specifies in paragraph 48: "*The divestiture has to be completed within a fixed time period agreed between the parties and the Commission, which takes account of all relevant circumstances. The package will specify what kind of agreement - binding letter of intent, final agreement, transfer of legal title - is required by what date. The deadline for the divestiture should start on the day of the adoption of the Commission decision.*"

[288] **Remedies Notice**, paragraph 44.

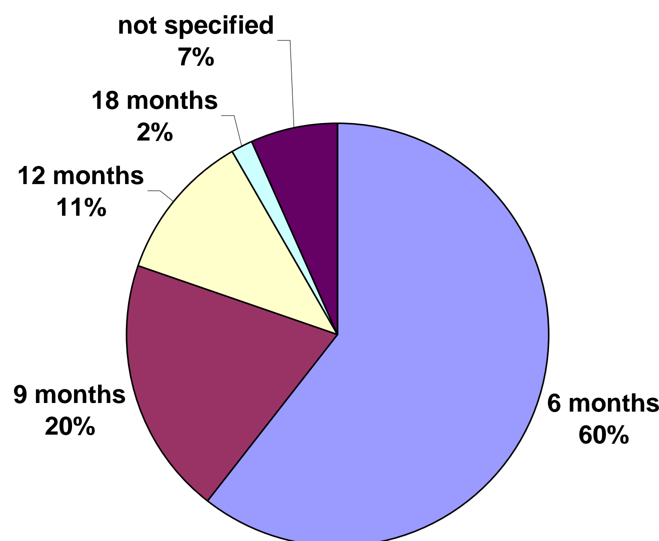
[289] **Remedies Notice**, paragraph 54, **Model Divestiture Commitments**, paragraph 24.

[290] The Commission's practice of beginning with a relatively short period of six months with possibilities of extension for good cause is similar to the current US practice. The **US FTC** study concluded that their

2. Divestiture deadlines provided for in commitments to transfer a market position

5. In the analysed commitments to transfer a market position,[292] a divestiture deadline of 6 months was the most common period stipulated. It was provided for in 60% of the analysed commitments as shown in Chart 17 below. The above ratios are in line with those revealed in a stocktaking of all commitments accepted by the Commission in the reference period 1996-2000, where about 60% of the deadlines foreseen in commitments to transfer a market position were also six months. Some early commitments did not specify any period, however, and relied on formulations, such as "without undue delay".

Chart 17: Divestiture deadlines in the analysed remedies to transfer a market position



6. The average divestiture period in the sample of analysed commitments to transfer a market position was 7.6 months.

7. **Fire-sale** provisions were already common features of commitments to transfer a market position in the reference period 1996-2000 where they were included in about 40% of the remedies. In the analysed sample of remedies in the Study, half of all the analysed commitments to transfer a market position (*i.e.* 30 commitments) included a **fire-sale** provision (50%).

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previously long deadlines (in many cases 12 months or more) had been counter-productive in achieving timely and effective divestitures.

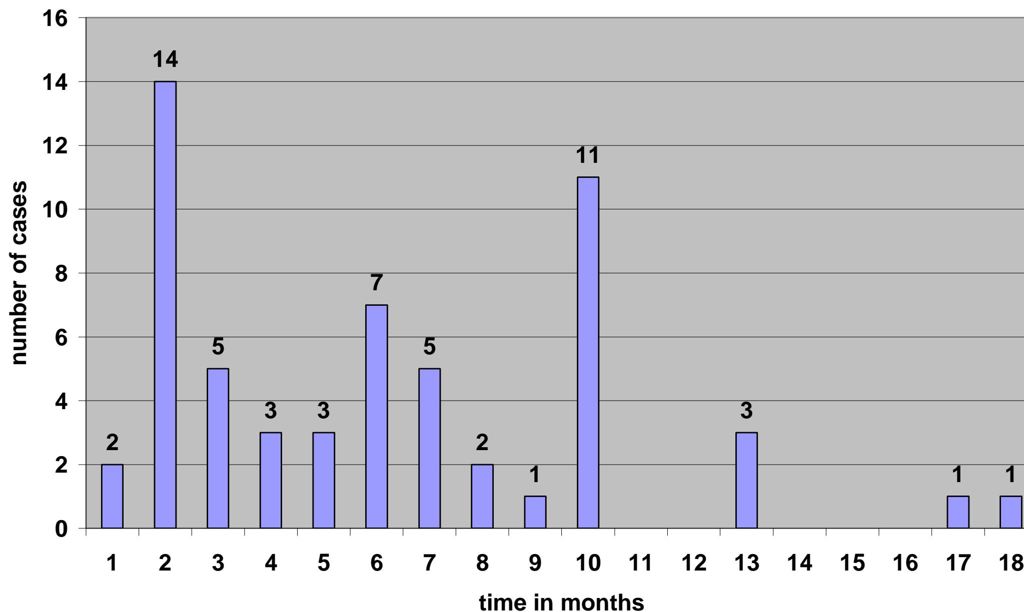
[291] Section F, paragraph 34 of the **Model Divestiture Commitments**: "*The Commission may, where appropriate, in response to a request from [X] showing good cause and accompanied by a report from the Monitoring Trustee: (i) Grant an extension of the time periods foreseen in the Commitments, or (ii) …. Where [X] seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall [X] be entitled to request an extension within the last month of any period.*"

[292] Sixty remedies were involved. This excludes eight commitments to grant a long-term exclusive license, which were also classified as commitments to transfer a market position. See Annex 3: List of analysed cases and remedies (by type of remedy) – [confidential], p. 176.

8. In the interviews with committing parties and purchasers different, often opposing, views were collected as to the appropriate length of the divestiture periods. Trustees rarely commented on this aspect.

3. *Actual implementation periods of commitments to transfer a market position*

Chart 18: Actual divestiture periods of the analysed remedies to transfer a market position[293]



9. The average *actual* time to implement (*i.e.* until signature of a binding sales and purchase agreement (**SPA**)[294]), the analysed commitments to transfer a market position was 6.2 months, which is considerably shorter than the average foreseen deadlines of 7.6 months. Chart 28 shows the breakdown among the different actual lengths, with peaks in the two-month, six-month, and the 10-month range (18%) (see Chart 18).
10. Overall, of the analysed remedies where six months deadlines were foreseen, two-thirds (68%) were achieved within the deadline. This corresponds with the ratio for all respective commitments to transfer a market position accepted by the Commission in the reference period 1996-2000, where two-thirds of the six-month divestiture periods were fulfilled.
11. Two remedies experienced exceptionally long actual divestiture periods. In one case it took 18 months to divest the business because the Commission's purchaser approval was withheld until a **NCA** had concluded its competition investigation. Another long process of 17 months involved difficulties with a third-party owner of parts of the business involving **IPRs**.

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[293] Not including seven commitments to grant long-term exclusive licenses. The 15 commitments to exit from a **JV** are discussed below.

[294] The Study has not analysed in any further detail the length of the **closing** period, *i.e.* the time between the concluding of the binding **SPA** and the actual **transfer** of the business. **Closing** is considered under Section G on "Transfer of the divested business", p. 80.

12. In 18 of the analysed remedies (30%) deadlines were extended once or several times. The ratio is in line with the ratio in the respective statistics for all remedies in the reference period 1996-2000. Most extensions were only for one or two months to complete an already advanced sales process. However, in four instances the extension was for more than six months.
13. Extensions of deadlines are usually granted under a review clause in the commitment text which would normally require the parties to demonstrate "good cause" for their request. In several analysed remedies there was no review clause at all. In the rest of remedies, the clauses contained different wording. […]
14. The Study did not generate enough evidence to judge the appropriateness of such extensions. A number of interviewed committing parties underlined the importance of flexibility on the side of the Commission, not least as market developments are particularly unpredictable in some industries.[295]

4. Divestiture periods in commitments to exit from a JV

15. In principle, commitments to exit from a **JV** call for similar deadlines as those in commitments to transfer a market position. However, for the 15 commitments to exit a **JV**, deadlines were on average longer than for commitments to transfer a market position, *i.e.* 8.5 months instead of 7.6, but shorter deadlines were also foreseen in some cases, *e.g.* four months in a remedy in a fast-moving industry.

> In the **Phase I** remedy […], the parties committed to divest their controlling minority stake […] to eliminate duopolistic dominance concerns on the […] market for […]. The divestiture period was only four months, which reportedly put strong pressure on the seller and lowered the sales price. As stated in the interviews, there would have been less pressure had there been a review clause. However, the parties also stated that in fast-moving markets short periods are important to prevent a loss of momentum and because market conditions can change rapidly in the industry. In fact, the stock valuations for […] plunged shortly after the divestiture in this case. As the divestiture was itself notifiable under the **ECMR**, regulatory approval prolonged the divestiture period to seven months.

16. The actual average implementation period for commitments to exit a **JV** was 7.7 months which is longer than the 6.2 months for commitments to transfer a market position.
17. In four of the 15 cases the Commission granted deadline extensions. The main reasons for granting deadline extensions were issues of third-party rights connected to the divestiture where the parties had underestimated the extent of the resistance and the time required to overcome them.[296]

> In the **Phase II** remedy […], the parties agreed to **transfer** to […] (the original rights holder) the whole of [… the parties'] **EEA**-wide […] business. The parties also agreed to supply inputs to [… the original rights holder] for production. [… The original rights holder] is a small **R&D** company based in […] with a relatively small subsidiary in […] and distribution network in the **EEA**. It therefore had to find a marketing and distribution partner in order to carry on the business. Despite the fact

[295] Example: r33.

[296] r32; r48; r75; r86.

that it acquired the business at no cost, [… the original rights holder] delayed signing the **SPA** because the parties were obliged pending **closing** to pay for product registration renewals in each Member State in which the product had been marketed. The negotiations were protracted and the signing of the **SPA** took place *18 months* after the Commission's decision. The delay effectively meant that the divesting parties had to finance registrations in the meantime.

In the **Phase I** remedy […], the Commission accepted a commitment that [… the parties] would divest [… their] 50% stake in its 50/50 **JV** in […] with […], who had a right of first refusal on the shares of [… the JV]. [… The JV partner] used its leverage to delay signing the letter of intent beyond the three-month initial divestiture period. An extension of one month was required. This relatively short extension, however, does not appear to have had any significant market impact.

III. IMPLEMENTATION OF COMMITMENTS TO GRANT ACCESS AND OTHER COMMITMENTS

A. Access commitments

1. The commitments to grant access that were analysed in the Study were designed to maintain actual or potential competition in the **relevant market** by preventing foreclosure to critical inputs, infrastructure or technology that would have lead to consumer harm.
2. The **Remedies Notice** discusses the use of access remedies in appropriate circumstances:[297]

   "First, there may be situations where a divestiture of a business is impossible. [298] *Second, competition problems can also result from specific features, such as the existence of exclusive agreements, the combination of networks ("network effects") or the combination of key patents. In such circumstances, the Commission has to determine whether or not other types of remedy may have a sufficient effect on the market to restore effective competition."*
3. The Study sample included 10 remedies where access commitments were the primary remedial measure imposed to resolve the competition concerns identified, that is, they were not simply supplementary measures to a **divestiture remedy**.[299] Within this group of 10 primary access remedies, four commitments dealt with granting access to infrastructure,[300] five concerned access to technology or **IPRs**,[301] and one concerned the termination of an exclusive agreement.[302] The Study distinguished such "stand-alone and on-going" access commitments from transitional arrangements ancillary to a divestiture, such as temporary supply arrangements designed to give the purchaser of the acquired business certain limited start-up assistance.[303]
4. As the sample of analysed cases was very small and as for half of all access commitments later market developments have not confirmed the necessity of the remedies, the Study provides only limited generalised findings on access commitments. Moreovcr, in reviewing access commitments, the Study faced the problem of identifying the appropriate companies to interview. Unlike the situation in **divestiture commitments** where the identity of the purchaser is known, access commitments often do not have an obvious beneficiary, being offered unilaterally to the world at large or to an open ended category of beneficiaries that are not always known to the Commission.

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297 Paragraph 26 of the **Remedies Notice**.

298 "In Case IV/M.877 *Boeing/McDonnell Douglas*, the Commission's investigation revealed that no existing aircraft manufacturer was interested in acquiring Douglas Aircraft Company (DAC, the commercial aircraft division of McDonnell Douglas) from Boeing, nor was it possible to find a potential entrant to the commercial jet aircraft market who might achieve entry through the acquisition of DAC."

299 r4; r20; r27; r42; r50; r61; r64; r68; r79; r92.

300 r4; r61; r64; r68.

301 r20; r42; r50; r79; r92.

302 r27.

303 See under "Transitional agreements", p. 44, in Section A "Scope of the divested business", in Part II.

1. Access to infrastructure

5. The Commission has discussed the rationale for remedies granting access to infrastructure and key technology in the **Remedies Notice**:[304]

> *"The change in the market structure resulting from a proposed concentration can lead to major barriers or impediments to entry into the relevant market. Such barriers may arise from control over infrastructure, in particular networks, or key technology including patents, know how or other intellectual property rights. In such circumstances, remedies may aim at facilitating market entry by ensuring that competitors will have access to the necessary infrastructure or key technology."*

6. Three of the four remedies containing commitments to grant access to infrastructure involved sellers with a strong market position thus enabling them to foreclose competition in related emerging markets.[305] In these three instances, actual market developments turned out substantially differently from what had been anticipated by the parties and the Commission at the time the commitments were offered. Indeed, in these cases, the rapid growth of the emerging market that had been predicted failed to materialise. Thus, it could be argued, with the benefit of hindsight, that these commitments could be considered unnecessary from today's perspective.

In the **Phase I** remedies […], the Commission was concerned that [… the parties] would leverage their dominant positions in certain […] markets into the markets for […]. [… The parties] undertook to open access to their [… infrastructures] to third party […] providers by giving the […] users/subscribers the choice of [… provider]. Moreover, [… the parties] undertook, assuming that technology would allow it to let other […] operators access to its [… infrastructures].

As the market evolved, it transpired that the [… infrastructures] never acquired a significant market position in the market and, indeed, the market did not develop as fast as anticipated. [… in both remedies, the] commitments remained in effect for a period of three years. As regards [… one of the commitments], it was foreseen that at the end of the three-year period, [… the parties] and the Commission should review whether there was still a need to implement it. The commitment was not renewed.

In the related **Phase I** remedy […], the Commission was concerned that [… the parties' infrastructure] (which was potentially dominant […]), could foreclose other [… competitors] from offering their [… products …], and thus, that [… the parties] could leverage their possible future market dominance in […] into the market for […]. The parties committed to offer open and non-discriminatory access to [… the infrastructure], which they jointly controlled with [… the JV partner]. Difficulties arose in attempts to implement the commitment, since it required the active co-operation of [… the JV partner] who was operating [… the infrastructure]. The monitoring trustee had no contact with [… the JV partner], and instead had to rely on compliance reports from [… the parties]. However, the trustee lacked any control over the compliance process within [… the JV], and worse still, it had no leverage over [… the JV partner], which – as a non-signatory to the commitments – was not bound by the undertakings. However, in the end these difficulties made little

[304] **Remedies Notice**, paragraph 28.

[305] r4; r61; r64.

difference since the competition concerns anticipated by the Commission were not realised. Therefore, with hindsight, the remedies turned out to be unnecessary. In fact the Commission, agreed to discharge the parties from their commitment earlier than was anticipated in the original decision.

7. In some of these remedies there was the possibility to review – and if necessary, to modify or rescind – the commitment at a later date (*e.g.*, one or two years after implementation). This flexibility meant that such commitments – if shown to be excessive or no longer necessary because of market circumstances – could be altered with fairly minimal disruption to the parties or the marketplace.[306] In fact, interviewed parties consistently pointed out the need for review clauses in commitments involving the grant of access.

8. The fourth infrastructure access commitment analysed was part of a package of commitments to resolve concerns of collective dominance. This commitment proved to be effective and highlighted, in particular, the importance of affordable access fees.

In the **Phase II** remedy […], the Commission raised collective dominance concerns that after the merger, [… the merging parties] together with [… few third parties] would control well over 80% of the market in […]. In addition to selling a number of stakes in [… competitors] the parties offered two commitments to open up access to competition: (1) the commitment to abandon [… an infrastructure fee, which] *de facto* foreclosed smaller competitors' access to the [… infrastructure]. This situation would have become worse after the merger with fewer remaining competitors; and (2) the commitment to publish the prices charged for […infrastructure usage] contracts, thereby allowing remaining competitors to request access to the [… infrastructure] which belonged to the merging companies under the same conditions as the parties themselves and thus making the supply of [… the input] more accessible to competition. These commitments were fully implemented and thanks to the remedy [… infrastructure] fees significantly decreased.

2. *Access to technology or IPRs*

9. Remedies granting access to technology normally involve intangible proprietary assets such as **IPRs**. They are required where without such access, the concentration would enable the parties to foreclose access to competitors, including potential purchasers, who, in order to compete in the market in question, need access to certain proprietary assets to facilitate **R&D**, production, marketing, sales, servicing, or any other important functions in their value chain and may lead to consumer harm. While patent, **know how** and design rights are particularly important considerations in remedies dealing with the manufacturing sector, trademarks and copyright are often more central to remedies involving the retailing and service sectors.

10. Access to critical assets is usually granted *via* licences, which may grant varying degrees of rights to and impose countervailing obligations on the licensee. An exclusive licence grants access rights only to a single licensee, who is then assured that no other competitor (normally including the licensor) will receive the same rights, within the same territory for the duration of the licence. A co-licensing arrangement provides that both the licensee and the licensor have the right to exploit the **IPRs** in the same territory at the same time. A non-exclusive licence grants the use of the **IPRs** to more than one licensee, and a non-

[306] r4; r61; r64.

discriminatory non-exclusive licence grants the use to all licensees in the same territory and for the same timeframe under comparable contractual conditions. The foregoing are broad distinctions made for the purposes of the Study, in reality the precise nature of the licence may be a hybrid of these categories since much will depend on the precise terms of the licence in question.

11. Exclusive licences are typically designed to transfer a market position to a competitor, at least for a given period of time and/or in a given territory. Where the licence is exclusive and its duration irrevocable, then it can have the same competitive effect as an assignment of the underlying **IPRs**, *i.e.*, it effectively bestows rights akin to ownership provided that the licensee has sufficient protection in case the licensor sought to rescind the licence.

12. The Commission has issued guidance as to when a licensing arrangement may be acceptable *in lieu* of an outright divestiture:[307]

> *"Where the competition problem is created by control over key technology, a divestiture of such technology*[308] *is the preferable remedy as it eliminates a lasting relationship between the merged entity and its competitors. However, the Commission may accept licensing arrangements (preferably exclusive licences without any field-of-use restrictions on the licensee) as an alternative to divestiture where, for instance, a divestiture would have impeded efficient, on-going research. The Commission has pursued this approach in mergers involving, for example, the pharmaceutical industry.*[309]*"*

13. The Study analysed five primary "stand-alone" technology or **IPR** licensing remedies.[310] Two of these remedies proved "unnecessary" for similar reasons as the ones discussed above (point 6) for the three infrastructure remedies where the actual market developments turned out substantially differently from what had been anticipated by the parties and the Commission at the time the commitments were offered.[311] The Study also assessed a number of licensing remedies that were supplementary to commitments to transfer a market position or to exit from a **JV**.[312] Licensing commitments – whether supplementary to **divestiture commitments** or stand-alone remedies – can raise the same implementation issues. The following description focuses on the "stand-alone" technology licensing or **IPR** remedies.

14. Two remedies concerned non-exclusive licenses. These remedies, in particular, raised important issues relating to the formulation of licensing remedies: determining the optimal scope of the licence and its terms, foremost among them, the price (including down-payments and royalties).

In the **Phase II** remedy […], [… the parties] committed to grant access to […] technology by offering world-wide licences for […] to all interested market participants on a non-discriminatory basis. […].

[307] Paragraph 28 of the **Remedies Notice**.

[308] "Commission Decision of 1 December 1999 (COMP/M.1601 *Allied Signal/ Honeywell*); Commission Decision of 3 May 2000 (COMP/M.1671 *Dow Chemical/ Union Carbide*)."

[309] "Commission Decision of 28 February 1995 (IV/M.555 *Glaxo/Wellcome*; OJ C 65, 16.3.1995, p. 3)."

[310] r20; r42; r50; r79; r92.

[311] r50.

[312] Remedies where the licensing commitments were supplementary measures and not the primary remedy were: r18; r25; r28; r31; r32; r47; r80; r81; r94.

Regarding the effectiveness of the remedy, it must be noted that more […] licenses than expected were granted. However, in the interviews several licensees reported that the scope of the […] licences was too restrictive to offer competitors a sound basis upon which to compete in this field of […] technology. Moreover, the high prices for the […] licences actively deterred potential purchasers from attempting to enter the market. [… One licensor] reported that it remained unsure of whether the **IPRs** which it acquired were complete and complained that, even now, it cannot yet compete in the market. Meanwhile, [… the parties have] continued the development of the […] technology, which has become the *de facto* industry standard (and which remains controlled by [… the parties]).

In the **Phase I** remedy […], the selling parties committed to enter into non-discriminatory supply agreements to grant access to […] technology to all third parties on a non-discriminatory basis on the same terms as provided to their […subsidiary]. [… The parties] created an arbitration committee (composed of both in-house and independent members) to oversee the implementation of this commitment […]. These non-discrimination provisions were designed to complement the parties' agreement that, for a five-year period, they would hold separate the acquired [… business] from the rest of their business. Consequently, the remedies in combination were designed to open up sales to competitors and thus prevent them from being foreclosed from the […] market.

As to the effectiveness of the remedies, interviewees pointed out that the arbitration protections were adequate to safeguard the few interested companies in the sector. Indeed, the [… interviewed head of the committee] pointed out the arbitration panel was never convened because none of the competitors felt threatened by the market position of the new company and thus did not need to resort to arbitration to do business.

15. As regards the access terms, the costs of the licence were reportedly the single most essential element affecting the effectiveness of licensing remedies. Onerous financial terms can discourage, or hinder access, thereby deterring market entry and not achieving the purpose of the remedy. Certain payment schemes may convey commercially sensitive information to the licensor or contain in-built disincentives to licensees to compete. The case example above shows that pre-determined prices may also pose problems in attracting new licensees over time, as the date for the expiration of the patent draws closer. The Commission has accepted non-discrimination clauses, commitments to licence at the going market rate, or fair market value, and sometimes insisted on free licences or licences on cost basis or on a cost-plus basis. Given that **IPRs** are by definition monopoly rights and the fact that licences are often tailor-made to the needs of individual licensees, it is generally not easy to determine what amounts to non-discrimination or fair market value in particular circumstances. Interviewees stated that it would therefore have been helpful for such commitments to include appropriate dispute resolution mechanisms which would have allowed the parties to resort to an expert determination in the event of disputes.
16. The other two analysed commitments to grant access to technology aimed at creating one specific new competitor through the use of co-licensing agreements.[313] In all instances, the

[313] r20; r92.

committing parties also retained ownership rights themselves under the co-licensing provisions and have thus continued competing with the co-licensee.

17. The following effects were observed as regards implementation: in each case, the respective licensee was never able to compete, and in one case, the licensee was not even able to sell a single product. The analysis revealed that the scope of the licences was not sufficient to recreate a viable competitor. As a result of this failure, the co-licensor had to provide substantial start-up assistance with the result that there were strong and on-going exchanges of information between the committing parties and the licensees.

> In the **Phase II** remedy […], the parties committed to grant a single non-exclusive technology licence to […] technology to eliminate concerns of single dominance and foreclosure of [… one customer], the primary customer in the [… national] market for […]. The small licensee […], a former **JV** partner, needed substantial technical assistance over a period of two-and-a-half years, in particular as no personnel was included in the remedy package, but only technology **know how**. The licence was basically granted for free, and [… the licensee] never managed to obtain any commercial contract or orders. The licensor had to spend [… a significant amount] in providing upgraded technical information and estimated that the overall cost of fulfilling the commitment was [… a significant amount]. In the meantime, [… the primary customer] had plans to develop the […] technology itself thus removing the need for the remedy.

> The **Phase II** remedy […], involved the grant of a non-exclusive licence. [… The parties] committed to grant to a specialised sub-system/equipment manufacturer, or, in the absence of any such suitable manufacturer, to any other suitable licensee, a non-exclusive "long-term" licence covering all relevant […] **IPRs** to manufacture and sell […]. The commitment provided for such **IPRs** to encompass technology, **know how**, manufacturing processes, procedures and the relevant patents. There was only one other competitor in the market: […]. In addition, [… the only competitor] was also the major customer in this market, as well as the main complainant in the investigation. In the end, [… the only competitor] itself received the licence, but did not use it. The licence was only used to strengthen [… the only competitor's] bargaining position against [… the parties].

18. The Study found that licensors usually have many means to restrict access to technology through a variety of technical requirements in the licence. This seemed to require particularly careful monitoring of the implementation of licensing commitments, ideally with a trustee monitoring compliance throughout the entire licence period.

19. The Study also found that just in the case of assignments, the licensing of **IPRs** frequently required careful monitoring to preserve the value of the assets in the interim period. Preservation monitoring was particularly important in the case of **know how** where delineating the **know how** into a transferable form and preserving its confidentiality is essential to preserving its competitive value. Several issues also arose with the effective **transfer** of **IPRs** following completion of the assignment or licence. It may take several months after the completion of the transaction for full and effective **transfer** to be achieved, during which time the purchaser or licensee of the technology may be dependent on the seller for technical assistance before it can fully exploit the **transferred** assets.

20. Finally, the Study shows that licensed **IPRs** can be encumbered by third party rights that could hinder or delay the implementation of the commitments thereby raising the associated costs or, in some cases, frustrating implementation altogether.[314] **JV** partners as well as other co-right holders often have contractual or statutory rights *vis-à-vis* **IPRs** and/or infrastructure making their consent or co-operation necessary if not indispensable for effective implementation of the commitments.

21. Summing up, the Study tends to suggest that remedies to have accesss to technology or IPRs have only worked in a limited number of instances. The Study suggests that, in order to be effective, licenses:

    (1) are offered and granted to a sufficient number of (potential) licensees;

    (2) have the field of use defined sufficiently broadly for (potential) licensees;

    (3) have the correct territorial scope for (potential) licensees;

    (4) are granted for a sufficient period of time to make access to the assets worthwhile;

    (5) are granted under terms that make access commercially attractive, in particular, ensuring that the costs of the licence allow the licensee to effectively compete in the market;

    (6) are not encumbered by third party rights or restrictions;

    (7) do not convey new competitive advantages to the licensor, such as the dissemination of commercially sensitive information on sales volumes of the licensee; and

    (8) do not facilitate co-ordination between the licensor and the licensee (*e.g.* co-licensing in an oligopolistic market structure).

3. *Termination of exclusive relationships*

22. The Study found one remedy that involved the termination of an exclusive agreement as a “stand-alone” remedy geared towards solving by itself a market power concern.[315] The remedy did not produce its intended result, *i.e.* suppliers did not use the new sales opportunities, mainly because of lacking economic incentives due to design flaws of the remedy.

> In the **Phase II** case […], the parties […] committed to [… remove the exclusivity] of an existing supply agreement […]. Despite implementation of the commitment, the remedy must be considered a failure. Indeed, there were very few [… producers] interested in supplying products to other customers than the parties. […]. The simple possibility of being able to sell to [… another customer] was not a sufficient incentive for […producers] to compete more actively, because of technical problems linked to the transport of [… the product] and the complicated upfront notification system.

314 Examples: r57; r63; r80. See Section B on “Remedies that directly affected third parties”, p. 46, in Part II of the Study.

315 r27.

B. Other commitments

1. Commitments to sever influence in a competitor

1. Commitments to sever influence in a competitor are measures that remove the links between the merged entity and a former competitor so that the latter is no longer encumbered from competing freely with the merged entity. The Study analysed measures including the termination of agreements with competitors, the surrender or restriction of representation or voting rights in a competitor, and commitment the to divest a non-controlling (minority) stake in a competitor. Commitments to sever influence in a competitor are effective if and when the influence of the merged entity in the competitor is eliminated and the competitor can and does compete freely on the **relevant market**.
2. In the Study only one case was analysed in which the commitment to sever influence in a competitor was used as the principal remedy to resolve the competition concerns.[316] This commitment raised concerns of third party dependence (see separate discussion above) and highlighted the importance of clearly formulated **obligations**.

> In the **Phase I** case […], [… the merging parties] committed to remove existing links between themselves and [… a competitor] to alleviate competition concerns on the market for […]. [… The parties] had previously sold their […] business to [… the competitor], while holding a […%] equity participation in the company (as a partial payment in lieu of cash), and at the same time entering a five-year non-competition agreement. Consequently, [… the parties] undertook that they would "*enter into negotiations with [... the competitor] to annul their non-competition clauses*". […]. These negotiations were to be finished before the merger could be closed. This was an up-front solution, somewhat comparable to an up-front buyer clause. [… The parties] could not obtain [… the competitor's] agreement [… but were despite this able to fulfil their commitment with some delay].

3. In addition, the Study's sample included several instances, where commitments to sever influence in a competitor were supplementary to another main commitment. Such commitments were particularly relevant in situations where the Commission had concerns of co-ordinated effects among a few strong competitors and where the influence that competitors have over each other or the information they exchange enables them to better co-ordinate their market behaviour or to better penalise deviations.[317]

[316] Other similar remedies were not assessed in detail in this Study: In case c17, the parties committed to sell a sufficient ownership stake in [… a JV], so that the transaction would lead to their acquiring control over [… the JV]; In case c28, [… the parties] committed to sell [their …]% interest in […] and to reduce certain voting rights in […]; The parties also committed to use their reasonable efforts to obtain the agreement of the other shareholders in […] to reallocating a certain percentage of the voting rights currently held by [… the parties] to such shareholders so that [… the merged entity] would hold less then 50% of the voting rights; In case c35, the parties committed to sever all structural links with a competitor; In case c13, other links with [… large competitors] were to be cut by selling off shares in […] held directly and indirectly by [… the parties], and shares in […]; In case c16, [… the parties] committed to divest their minority stake in […]. The parties also committed to prevent that anyone which is member of the board of directors or has an executive role in another company in [… the same relevant market] or in a company which controls a company in [… the same relevant market], become member of [… the merged entity's] Executive Committee.

[317] c13; c25; c28.

2. *Collective dominance-specific commitments*

1. Most collective dominance concerns were dealt either through divestiture commitments or commitments to sever influence in a competitor, described above. In situations where a market structure warranted concerns of co-ordinated behaviour, the Commission has, however, also exceptionally accepted specific commitments to stop information flow between competitors that would have allowed them to better coordinate or increase their potential for detection and retaliation.

Table 6: Number of analysed commitments in six collective dominance cases

Type of remedy / Case	Transfer a market position	Exit from a JV	Sever influenc e (*)	Grant access	Specific: prevent co-ordi-nation	**total number of rem.**
c13	2	1	(4)	1		4/(4)
c25	1		(1)	1	1	2/(1)
c28		2	(2)			2/(2)
c32		1				1
c34		1				1
c35	1					1
total	**4**	**5**	**(7)**	**2**	**1**	**12/(7)**

(*) Remedies in brackets were not analysed in detail in this Study.

2. The analysed sample contained six cases with concerns over collective dominance, including a total of 12 analysed remedies (plus seven that were not analysed) (see Table 6). 11 of these 12 remedies fell within the other categories (types) of remedies analysed in this Study, *i.e.* commitments to transfer a market position (four), commitments to exit from a **JV** (five), commitments to grant access (one). One single commitment to remove price transparency fell within none of the other categories. We note that in the sample of cases of the Study there were also seven commitments to sever influence in a competitor (not analysed), making it the most frequent commitment in collective dominance cases.
3. The commitment to remove price transparency was properly implemented, but its effectiveness in removing the competition concern was only partial. It must be noted, though, that the measure was part of a package with two further commitments to prevent co-ordination.

> In the **Phase II** remedy […], the Commission's concern of a collective duopolistic position of the parties on the [… national] market for […] was removed by a bundle of commitments, which included the abandonment of the […] price quotation system so as to remove price transparency that was conducive to tacit collusion. Moreover, the parties would dissolve the co-ownership of […], in which the [… few] remaining competitors ([…]) had minority shareholdings. Finally, the parties would ensure that [… the remaining competitors] would receive the full value of their stake in the co-owned […] company, should they decide to exit the company. Only the first remedy to abandon the […] price quotation system will be further described here.
>
> The price quotation system was a […] national quotation system by the [… national] trade association […]. A price committee (composed of the chairman and the managing director of each of the […members]) fixed each week a price per kilo

which, according to the corresponding agreement ad hoc, was to be paid by the co-operatives to their members. The price for […] was a weighted average of the sales prices […] achieved on the various domestic and export markets. Price changes on the […national] market for […] took therefore place via price changes on the **downstream** […] markets abroad.

The common price quotation system creating price transparency was formally abandoned but in practice price co-ordination seemed to continue in a less formalised scheme. There is thus still quite a lot of price transparency. According to the usual practice nowadays, […the parties] publish their quotation […] and the only other competitor ([…]) acts as a price taker that settles basically at the same quotation, with only very slight modifications.

In terms of effectiveness, it appears that the weekly price quotation system was abandoned, but that price transparency continued through other means.

3. *Other commitments*

4. The Study analysed one commitment which concerned the withdrawal of a product with significant market presence from a market. The decision explained that the measure would "*eliminate the overlap*".

In the **Phase I** remedy […], the parties committed to withdraw from the [… national] market their [… brand], which possessed [10-20]% market share at the time, which was also positioned in a higher quality market segment where [… the parties] were the only remaining competitor in a branded business with relatively high market entry barriers. The Study case team could not find out any reason, why the Commission did not insist on a divestiture or at least a licensing solution.

5. The Study arrives at a negative appreciation of this remedy. While it may have to a limited degree strengthened competitors (although there is no guarantee that the market share freed through this withdrawal did not go partly or entirely back to the merging parties), the withdrawal also definitely reduced customer choice and destroyed commercial value. Its effectiveness must therefore be viewed critically, in particular because the option to divest or licence the brand and the product seemed feasible, judging from the information obtained in the Study.

IV. EFFECTIVENESS OF THE ANALYSED REMEDIES

1. The focus of the Study is the detailed examination of the design and implementation of individual merger remedies, which has been described in Parts II and III. In most cases, this analysis generated a first indication of how effective a remedy was in meeting the competition objective identified in the Commission's decision, *i.e.* in preserving effective competition by preventing the creation or strengthening of a dominant market position.
2. In this Part, the Study attempts to reach some conclusions as to the overall effectiveness of the remedies assessed, by taking the analysis a step further from the specific analysis conducted in previous Parts. The first Section summarises the number and types of design and/or implementation issues analysed in this Study. The second Section examines some measurable indicators that provide a raw indication as to the impact of the remedy in the market in question. The findings on design and/or implementation issues are then assessed together with the market indicators, taking account also of any other relevant information obtained during the Study, to make an overall evaluation of the effectiveness of each of the remedies assessed.
3. The Study, however, did not include a detailed ex post assessment of the evolution of all of the markets concerned, which would have been necessary in order to reach firm conclusions as to the real impact of the remedies assessed and, therefore, of their effectiveness. Therefore, the findings in this Part have to be taken as an approximate evaluation of the effectiveness of the Commission's remedy practice, which would need to be completed in the future through more detailed case studies in order to reach more definitive conclusions.[318]

A. Summary of the number and types of serious design and/or implementation issues

4. Parts II and III of the Study analysed the design and/or implementation issues arising during the various implementing steps of the analysed remedies in detail. This Section presents the quantitative results, first for commitments to transfer a market position and commitments to exit from a **JV** and, second, for access commitments and other commitments.

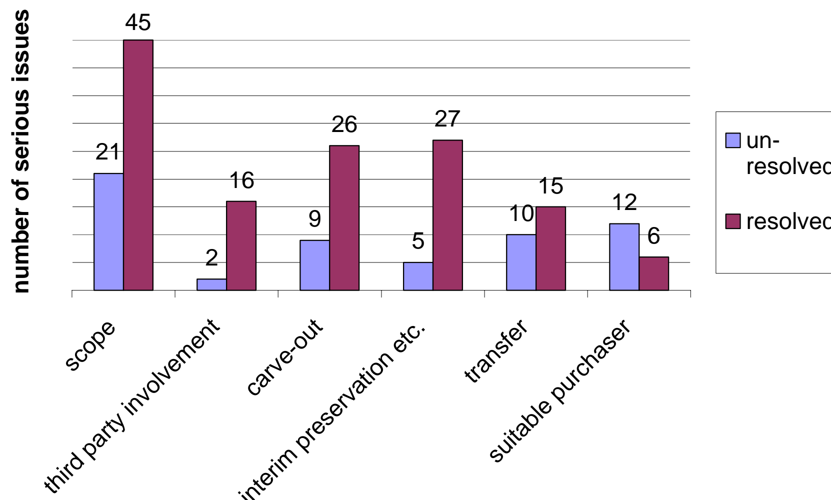
1. Commitments to transfer a market position and commitments to exit from a JV

5. The following Chart 19 presents the number and types of analysed serious design and/or implementation issues that arose in all 84 **divestiture remedies**, broken down into resolved and unresolved issues.[319]An issue was considered "serious", if leaving it unresolved would significantly reduce the competition effectiveness of the remedy as a whole.

[318] Methodological limits of an ex post analysis are discussed in "3. Limitations of the methodology", p. 16, in Section B. Methodology, under Part I. Introduction.

[319] The number of remedies in Chart 19 and Chart 20 count a remedy several times if it raised a serious issue in several of the implementation steps. However, in cases where several unresolved serious issues occurred in one remedy within one and the same implementation step (*e.g.* two scope issues or two **carve-out** issues,) they were counted as one.

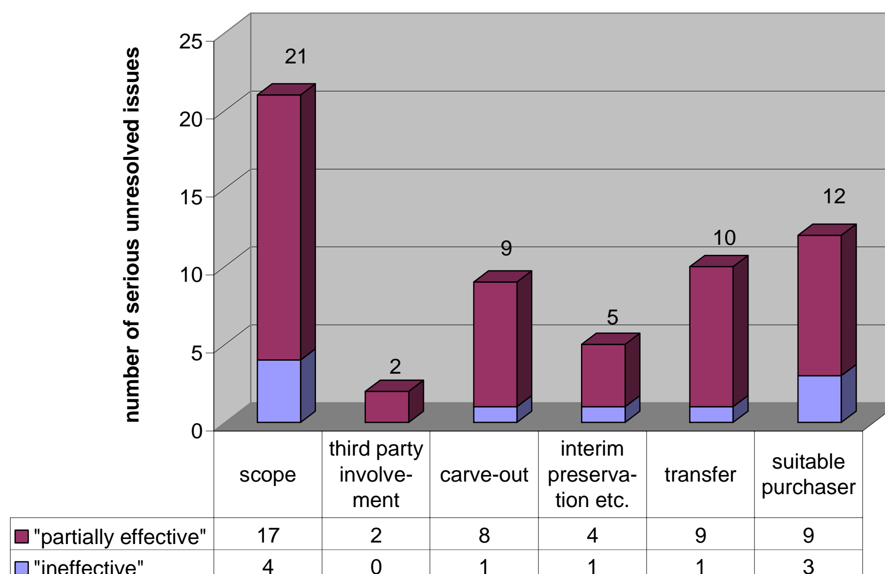
Chart 19: Number of serious design and/or implementation issues (resolved and unresolved) in divestiture remedies



6. Chart 19 illustrates:
   (1) **divestiture remedies** raised an important number of design and/or implementation issues (194 serious issues);
   (2) 70% of serious issues were resolved during the implementation process (135);
   (3) 59 serious design and/or implementation issues remained unresolved (30%); and
   (4) the most frequent issue was the inadequate scope of the divested business.

7. The following Chart 20 focusses on the unresolved issues and shows that, here too, an inadequate scope of the divested business was the most frequent unresolved design and/or implementation issue, followed by situations where an unsuitable purchaser had been approved.

Chart 20: Number of serious unresolved design and/or implementation issues in the analysed divestiture remedies



	scope	third party involve-ment	carve-out	interim preserva-tion etc.	transfer	suitable purchaser
"partially effective"	17	2	8	4	9	9
"ineffective"	4	0	1	1	1	3

8. When one or several serious issues remained unresolved this contributed to a remedy being "ineffective" or only "partially effective", which is discussed in Section C on "Overall effectiveness assessment", page 132. Chart 20 shows that 48 issues contributed to **divestiture remedies** being considered only "partially effective", while 11 issues contributed to four **divestiture remedies** being considered "ineffective".
9. The four divestiture remedies considered "ineffective" were due to both the inadequate scope of the divested business and situations where an unsuitable purchaser had been approved.[320]
10. The 17 **divestiture commitments** that were considered "partially effective" suffered from serious design and/or implementation issues in the following areas:
    (1) in all 17 **divestiture remedies** serious issues of the scope of the divested business remained unresolved;[321]
    (2) in two remedies serious issues with affected third parties remained unresolved;[322]
    (3) in eight remedies serious issues with the carving-out of assets remained unresolved;[323]
    (4) in four remedies serious issues with the interim preservation and holding separate of the divested business remained unresolved;[324]
    (5) in nine remedies serious issues with the **transfer** of the divested business remained unresolved;[325]
    (6) in nine remedies serious issues of purchaser suitability remained unresolved;[326]
    (7) most remedies experienced serious issues in more than one design and implementation step that remained unresolved.
11. All problematic remedies are described in further detail in Annex 9: Summary descriptions of "ineffective", "partially effective", "unclear", remedies and those classified as "unconfirmed necessity" – [confidential], at p. 233.[327]

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320 r5; r57; r67; r80.

321 r2; r11; r24; r26; r39; r44; r59; r60; r63; r65; r72; r74; r90; r91; r92; r95; r96. These issues and remedies are discussed in Part II, Section A. on "Scope of the divested business", p. 23.

322 r31; r63; r90. These issues and remedies are discussed in Part II, Section B. on "Remedies that directly affected third parties", p. 46.

323 r20; r25; r26; r34; r37; r63; r72; r96. These issues and remedies are discussed in Part II, Section F. on "Carve-out of the divested business", p. 73.

324 r31; r43; r45; r72. These issues and remedies are discussed in Part II, Section D. on "Interim preservation and holding separate of the divested business", p.56.

325 r11; r20; r25; r26; r45; r44; r59; r63; r72. These issues and remedies are discussed in Part II, Section G. on "Transfer of the divested business", p. 80.

326 r25; r26; r29; r40; r60; r65; r90; r91; r92. These issues and remedies are discussed in Part II, Section I. on "Suitable purchasers", p. 98.

327 Annex 9: Summary descriptions of "ineffective", "partially effective", "unclear", remedies and those classified as "unconfirmed necessity" – [confidential], p. 233.

2. *Access remedies and other remedies*

12. One access remedy was classified as "ineffective" as the intended release of suppliers from their obligations under an exclusive sales agreement was not much used in practice.[328]
13. Two access remedies were only "partially effective" as non-exclusive licences were used only to a limited extent and provided only limited access.[329]
14. One other remedy was considered "ineffective" because it merely resulted in the withdrawal of a major brand with a 13% market share from the market.[330]
15. One other remedy was considered only "partially effective" because a price quotation system creating price transparency in a collective dominance scenario was not fully abandoned in practice.[331]

B. Market indicators

16. For most of the **divestiture remedies** assessed, the following measurable parameters were examined:
    (1) whether the purchaser was still in business;
    (2) market share evolution of the divested business, as well as market share evolution of the retained businesses, allowing in some cases a comparison between the evolution of the divested and the retained business;
17. The continued operation of the divested business by the original or a subsequent purchaser – a parameter sometimes labelled as "divested business mortality"- is a necessary, but not sufficient condition, to ensure that a **divestiture remedy** has been effective. Indeed, the fact that the divested business is still operating in the market does not necessarily mean that the purchaser is actually competing effectively in the market to the extent intended by the Commission's conditional clearance decision, thus restoring effective competition.
18. The evolution of market share data can provide a better indication of the performance of the divested and retained businesses, respectively, and therefore, of the effectiveness of the remedy in question. However, such an indicator does not take into account other exogenous factors that may nevertheless have an important impact on the evolution of market shares. Moreover, a business may be an effective competitive constraint even if it temporarily loses market share.
19. Finally, the Study also quantified replies by interviewed purchasers as to the performance of the divested business, which provides some indications as to whether, from their point of view, the remedy was successful. However, this parameter reflects subjective views by the buyers and therefore some bias could not be excluded. Moreover, depending on the price paid for the divestiture, a buyer could consider a business successful from a financial point of view even if such a business would not provide the same competitive constraint after the divestiture as compared to before the divestiture.

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[328] r27.

[329] r79; r92.

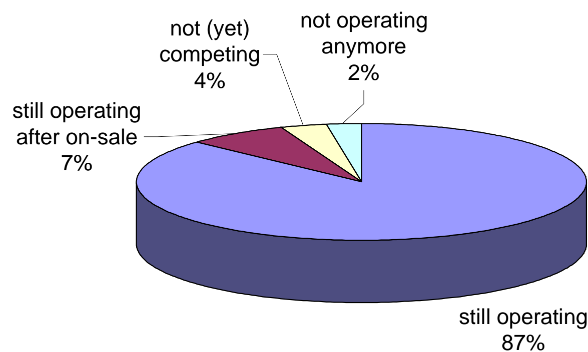
[330] r76.

[331] r24.

1. *Divested business still operating in the market*

20. The Study found that 87% of all purchasers of the 84 **divestiture remedies** (73 purchasers) were still operating the divested business three to five years after divestiture, and another 7% of the purchasers had sold on the divested business to a new buyer which was still operating it ("still operating after on-sale") (6 purchasers) (see Chart 21). Thus, in total, 94% of the divested businesses were still operating and therefore exercising some degree of competitive constraint on the merged entity.

Chart 21: Was the divested business still operating three to five years after divestiture?

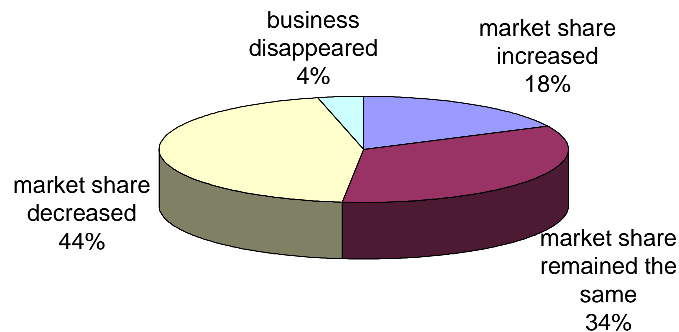


21. In two remedies, the divested business went bankrupt or closed down and the business disappeared from the market ("not operating anymore"). In three other remedies, the buyer retained ownership of the assets but had not sold any product or service since the divestiture and therefore could only be considered as exercising a potential competitive constraint on the merged parties ("not (yet) competing"). These latter cases typically involved products with a long development phase; for example, one remedy involved the satellite industry, which is a market characterised by infrequent customer orders.

2. *Market share evolution of the divested business*

22. The Study examined the evolution of the market shares of the divested businesses in the three to five years following divestiture (see Chart 22). It obtained data for 56 remedies, *i.e.* 67% of the 84 **divestiture remedies**.

Chart 22: Evolution of the divested business' market share



23. The market shares of the divested businesses decreased more often (44%) than they increased (18%). Market shares remained stable in 34% of the remedies and they disappeared in 4% of instances. The Study thus identified a substantial number of remedies (48%) where the divested business lost market share after divestiture – some moderately (up to 10%),[332] others rather dramatically (more than 50%)[333] - or even went bankrupt.[334] Most of these losses in market share concerned situations where the divested business was not able to claw back the initial drop in market share that it experienced when it acquired the divested business. The Study found only a relatively small number of remedies where the divested business managed to increase market shares in the three to five years following divestiture.[335]

[332] Moderate loss of market share: r6; r11; r17; r18; r19; r21; r22; r26; r44; r57; r59; r60; r63; r74; r80; r81; r95; r96.

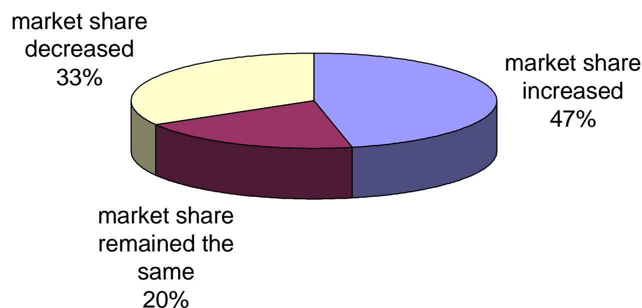
[333] Dramatic loss of market share: r32; r37; r72; r93.

[334] r5; r58.

[335] Examples of increase in market share are: r90, where a new product was launched and the initial market share was zero. In r17; r75; r88, an increase was eventually achieved in mid-term after initial market share losses of the purchasers.

3. *Market share evolution of the retained business*

Chart 23: Evolution of the retained businesses' market share

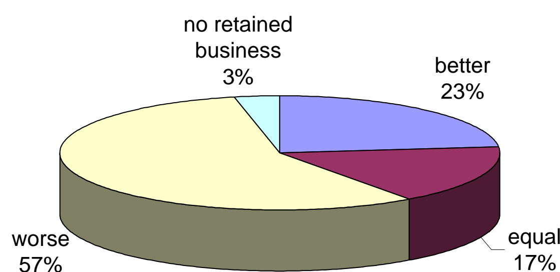


24. The Study also reviewed the evolution of the market share of the retained businesses (see Chart 23). On this issue, the Study obtained reliable data only for 30 of the 84 **divestiture remedies** (36%). Three to five years after divestiture, retained businesses had increased market shares more often (47%) than they saw them decrease (33%). Market shares of the retained businesses had remained stable in the remaining 20% of remedies.

4. *Comparison of the market share evolution of the retained and divested businesses*

25. When comparing the market share evolution of the divested businesses with that of the retained businesses for each of the 30 remedies (36%) for which both data sets were available, it appears that the retained businesses very often outperformed the divested business (57%) three to five years after divestiture in terms of market shares, while the reverse only infrequently occurred (23%). In a further 17% of remedies the market share evolution was similar (see Chart 24).

Chart 24: Evolution of the divested business' market shares as compared to the retained business'



26. More specifically, the Study found the following market share evolutions:

    (1) Where the market share of the divested business decreased, the market share of the retained business also decreased in only two remedies (7%), but remained stable in two remedies (7%), and actually increased in 12 remedies (40%).

    (2) Where the market share of the divested business remained stable, the market share of the retained business decreased in three remedies (10%), also remained stable in three remedies (10%) and actually increased in two remedies (7%).

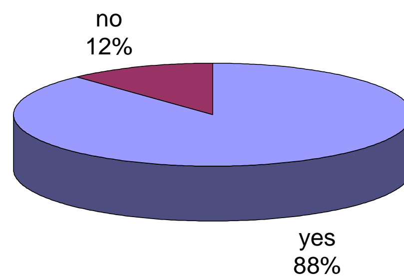
    (3) Where the market share of the divested business increased, the market share of the retained business decreased in three remedies (10%), it remained stable in one remedy (3%), and did not increased simultaneously in any remedy.

    (4) In one of the two remedies where the business went bankrupt[336] the retained business strongly expanded its market share and regained all the customers of the divested business. The other remedy concerned a customer foreclosure case where the only customer then acquired the divested business but closed it down later on.

5. *Purchasers' own assessment*

27. The Study considered the assessment of purchasers of their own business performance and quantified the replies to the question on whether they would "do it again"; (*i.e.* would they purchase the divested business again) (see Chart 25).

Chart 25: Would the purchaser do it again?



28. Purchasers' own assessment of whether they would do it again turned out significantly more positive than the assessment of market share data would suggest.[337] Of the replies collected for 68 out of the 84 **divestiture remedies** (71%), indeed, 88% of the purchasers indicated that they would do it again.[338]

[336] r5; r58.

[337] Note also that some of the unclear answers may relate to other market circumstances, for example, situations where the buyer was not enthusiastic about the performance of the acquired business but preferred to remain silent about it. These types of responses may have slightly distorted the data.

[338] The buyers of the following remedies replied that they would not do it again: r2; r6; r8; r23; r26; r33; r72; r80.

C. Overall effectiveness assessment

29. On the basis of the data presented above as well as the findings of the previous Parts of the Study and taking account of numerous other facts from the case file, the statements of purchasers, the parties, trustees and sometimes other third parties collected in the interviews, a tentative overall evaluation of the effectiveness of each remedy has been developed.

30. This effectiveness indicator attempts to classify the remedies assessed on the basis of the extent to which they have fulfilled their competition objective (*i.e.* preserving or restoring effective competition by preventing the creation or strengthening of a dominant market position). The following four categories have been established:

    (1) "effective" remedies. They clearly achieved their competition objective. For commitments to transfer a market position and for commitments to exit from a **JV** this meant that the divested entity remained a viable and effective competitor. Access remedies were considered "effective" where the foreclosure concerns appear to have been eliminated. Remedies can be classified as effective even if design and/or implementation problems had arisen, provided that these were successfully resolved at the time of analysis, *i.e.* three to five years after the Commission's decision;

    (2) **"**partially effective**"** remedies. These experienced design and implementation issues which were not fully resolved three to five years after the divestiture and which may have partially affected the **competitiveness** of the divested business. For access remedies in this category access was not granted to the extent determined in the Commission's conditional clearance decision and may have led to a situation where the foreclosure concerns were not fully resolved.[339]

    (3) "ineffective" remedies failed to restore competition as foreseen in the Commission's conditional clearance decision, either because the divested business was no longer operating or did not even begin competing within three to five years, or because market access was not granted during the evaluation period.

    (4) "unclear" means that it remained overall unclear as to whether the remedy has achieved its stated objective, either because the Study generated too little information to make a determination, or because it was impossible to disentangle the impact of the remedy from the impact of other exogenous factors with simultaneous temporal effects (such as, for example, liberalisation measures in the **relevant market**).

31. In the following paragraphs the results of the overall effectiveness evaluation are presented in several configurations: total results, results by type of remedy, and results by type of investigation phase (**Phase I** or **Phase II**).

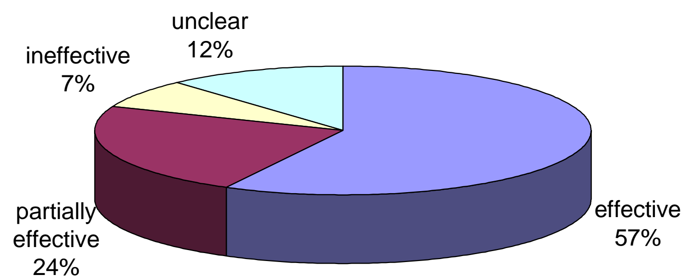
32. All remedies in the categories "partially ineffective", "ineffective", and "unclear" are described in detail in Annex 9: Summary descriptions of "ineffective", "partially effective", "unclear", remedies and those classified as "unconfirmed necessity" – [confidential], p. 233.

[339] There was only one such access remedy: r79.

1. *Total results*

33. The overall effectiveness evaluation was possible in 85 of the 96 analysed remedies.[340] The total results are presented in Chart 26.

Chart 26: Was the remedy effective in reaching its competition objective?



34. Thus, 57% of the 85 remedies were considered to have achieved their stated competition objective (49 “effective” remedies); 24% raised design or implementation issues that were not resolved during implementation and most likely reduced the **competitiveness** of the divested business (20 “partially effective” remedies); and 7% were “ineffective” (six remedies). For 12% of the analysed remedies the Study was not able to determine whether they had achieved their goal (10 “unclear” remedies), either because the impact of the remedies could not be disentangled from the impact of concurrent liberalisation measures; or because the Study had not obtained sufficient information in the interviews to arrive at a clear result.

2. *Results by type of remedy*

35. The Study analysed the competition effectiveness of the three most frequently imposed types of remedies: transfer of market positions, exit from a **JV**, and access remedies (see Charts 27, 28, 29, and Table 7).

[340] The assessment was carried out for all remedies, except for 11 remedies for which effectiveness could not be determined since market developments made the remedy unnecessary. If a remedy’s necessity is not confirmed by subsequent market developments, this means that the market would have remained competitive in any event even without the remedy. Assessing the impact of a remedy in such a situation is pointless. These 11 unnecessary remedies are further described in Annex 9: Summary descriptions of “ineffective”, “partially effective”, “unclear”, remedies and those classified as “unconfirmed necessity” – [confidential], p. 233. Five of the 11 remedies were access remedies (half of the ten access remedies). Most of these remedies occurred in rapidly evolving high-tech industry, specifically the internet as a medium for business-to-consumers online sales. These 11 remedies are analysed, however, as regards all the implementation issues discussed in the Parts II and III of this Study.

Chart 27: Effectiveness of 64 evaluated transfer remedies

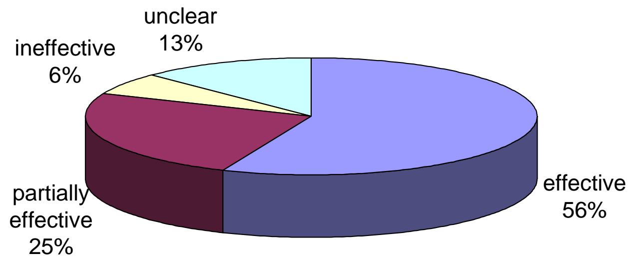


Chart 28: Effectiveness of 13 evaluated JV remedies

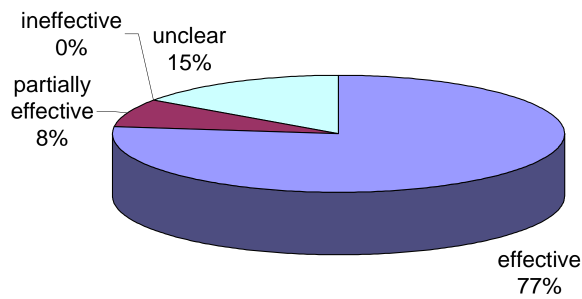


Chart 29: Effectiveness of five evaluated access remedies

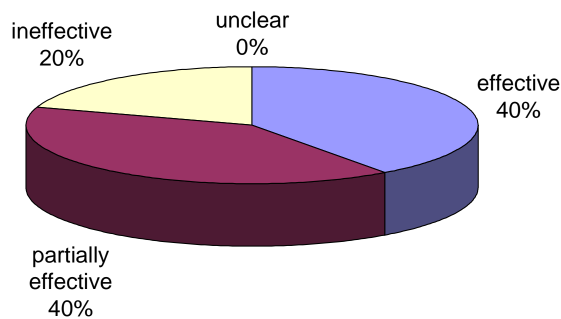


Table 7: Overview of the number of "effective", "partially effective", and "ineffective" remedies according to type[341]

effect \ type	Transfer		Exit from JV		Access	
	#	%	#	%	#	%
effective	**36**	56	**10**	77	**2**	40
partially effective	**16**	25	**1**	8	**2**	40
ineffective	**4**	6	**0**	0	**1**	20
unclear	**8**	13	**2**	15	**0**	0
Total:	**64**	100	**13**	100	**5**	100

36. The preceding Table 7 and Charts 27, 28, 29 indicate that, overall, **JV** remedies were the most effective type of remedy. On the other hand, the effectiveness of access remedies was weak. However, the sample of access remedies was small (10 remedies, of which five were considered "unnecessary" and therefore excluded from the sample).

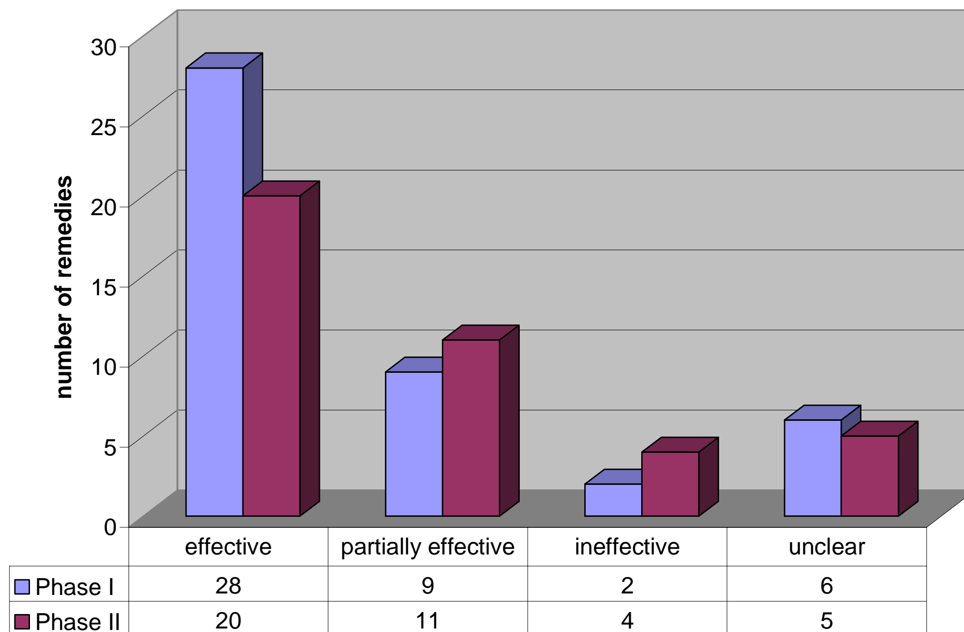
37. The reasons for the effectiveness of **JV** remedies may be varied: first, **JV** remedies raise fewer scope and **carve-out** issues; and second, even though **JV** remedies are often more complicated to implement (as discussed in Section II.B. on "Remedies that directly affected third parties", p. 46, in Part II), once they are implemented, the **JV** usually is in a good position to operate successfully. A major reason for the high success rate is that the purchaser is often the other **JV** partner, and thus knows the business well, can effectively preserve it in the interim and is able to exert an effective competitive constraint as soon as the transaction is completed or even before.

3. *Results by investigation Phase*

38. **Phase II** investigations differ from **Phase I** investigations in view of the drastically different timeframes involved (six weeks *versus* four months under the old **ECMR**). In recognition of the short deadlines in a **Phase I** investigation, Commission practice requires remedies proposed in **Phase I** to be clear-cut and straightforward. The Study sought to determine whether this distinction meant that **Phase I** remedies have tended to be more far-reaching and were therefore more effective overall. In view of the fact that a **Phase I** investigation is less extensive that a **Phase II** investigation, the Study also sought to determine whether the more comprehensive nature of a **Phase II** investigation led to more effective remedies.

[341] The table excludes the three other remedies as they were very heterogeneous and no general conclusions can be drawn: one was effective, one partially effective, and one ineffective.

Chart 30: Effectiveness of the 85 analysed remedies broken down by type of investigation (Phase I or Phase II)



39. Chart 30 shows that more **Phase I** remedies have been effective as opposed to **Phase II** remedies. It also shows that more **Phase II** remedies have been “partially effective” when compared to **Phase I** remedies.

40. The Study did not provide proof as to why **Phase II** remedies appear to have been less effective and to have caused unresolved design and implementation issues more often than **Phase I** remedies. It is probably due to the greater complexity of **Phase II** cases and remedies as opposed to the relatively more clear-cut and straightforward nature of **Phase I** remedies.

V. SUMMARY AND CONCLUSIONS

A. Introduction

1. Background and objectives of the Study

1. The Study reviewed the design and implementation of merger commitments offered and accepted by the Commission between 1996 and 2000. The object of the Study was to identify with the benefit of hindsight (*i.e.* three to five years after the Commission's conditional clearance decision) the:

   (1) serious issues arising in the design and implementation of remedies;

   (2) effectiveness of the Commission's merger remedies policy during the reference period; and

   (3) areas for further improvement of the Commission's existing merger remedies policy and practice.

2. The Study findings have confirmed various aspects of the Commission's merger remedies practice introduced since 2000, such as the **Remedies Notice**, the **Model Texts** and the **Best Practice Guidelines**. Nevertheless, they have also identified a number of serious issues regarding the design and implementation of the analysed remedies which require further attention.

2. Methodology

3. The Study analysed 40 decisions, with 96 different remedies, adopted by the Commission in the five-year reference period. The 40 decisions selected account for 44% of the 91 merger decisions involving remedies adopted by the Commission during the five-year reference period. The 96 remedies analysed in the Study, account for 42% of the 227 remedies adopted by the Commission during the same reference period. The selected sample aimed at creating a balance of three criteria, namely the:

   (1) types of remedies;

   (2) number of remedies accepted in **Phase I** or after an in-depth **Phase II** investigation; and

   (3) different industrial sectors involved.

4. The Study did not attempt to carry out fully fledged new market investigations for each remedy assessed. Instead, it opted for analysing the processes involved in the design and implementation of a relatively large number of remedies. Therefore, the Study opted for the "interview method" based on sample questionnaires tailor-made for each of the following types of interviewees:

   (1) the committing parties or sellers, licensors and grantors;

   (2) the purchasers or buyers, licensees and grantees; as well as

   (3) the trustees.

5. Interview teams reviewed the case files and discussed them with the case team who had conducted the merger investigation and had been involved in the design and implementation of the remedies. They conducted 145 interviews with the relevant individuals in the companies concerned based on a sample questionnaires of 120 questions

The 145 interviews were structured yet open ended allowing the interviewee to comment freely on various aspects of the remedies process. For a number of cases, interviews were followed-up with written questions and for 10 remedies (six cases) detailed quantitative follow-up questionnaires were sent out to 25 recipients. The interview teams drafted remedy reports for each remedy in accordance to a standard format. The remedy reports were submitted for comment to the case team who had conducted the merger procedure at the time, and were discussed both within the interview team and in wider panels including other members of the Study team.

3. *Types of analysed remedies*

6. The Study distinguished between:
   (1) commitments to transfer a market position (68 remedies);
   (2) commitments to exit from a **JV** (15 remedies);
   (3) commitments to grant access (10 remedies); and
   (4) other commitments (three remedies).
7. Commitments to transfer a market position aim at re-creating the competitive strength of a business in the hands of a suitable purchaser who exercises a sufficient competitive constraint on the merging parties. Such remedies were divided into four groups:
   (1) divestiture of a controlling stake in a company that was already a viable stand-alone business (15 remedies);
   (2) divestiture of a business unit that needed to be carved out extensively from a greater company structure (37 remedies);
   (3) divestiture of a package of assets that combined the assets of more than one of the parties (so-called "mix and match") (eight remedies); and
   (4) grant of a long-term exclusive licence with indefinite duration or until expiration of patent protection (eight remedies).
8. Commitments to exit from a **JV** requires the committing parties to sever permanently their **joint control** over a business by transferring it to a suitable purchaser. Normally the purchaser in these cases is an existing **JV** partner. The Study inquired in particular into the implementation problems deriving from the rights of the other **JV** partner(s).
9. Commitments to grant access are measures to provide other market participants with access to key assets and thus reduce barriers to entry. The Study identified three types of such access remedies:
   (1) access to infrastructure;
   (2) access to technology; and
   (3) termination of exclusive agreements.
10. "Other" remedies included one which aimed at severing the influence of the merging parties in a competitor, one which aimed at separating two collectively dominant competitors, and one which involved the withdrawal of a brand from a market.
11. This Study also refers to "**divestiture remedies**" or "**divestiture commitments**", which consist of: all 68 commitments to transfer a market position, including eight commitments to grant a long-term exclusive licence, and all 15 commitments to exit from a **JV**, as well as

one "other" commitment. Thus, the Study analysed in total 84 **divestiture commitments** and 12 non-divestiture commitments (10 "access" and two "other" commitments).

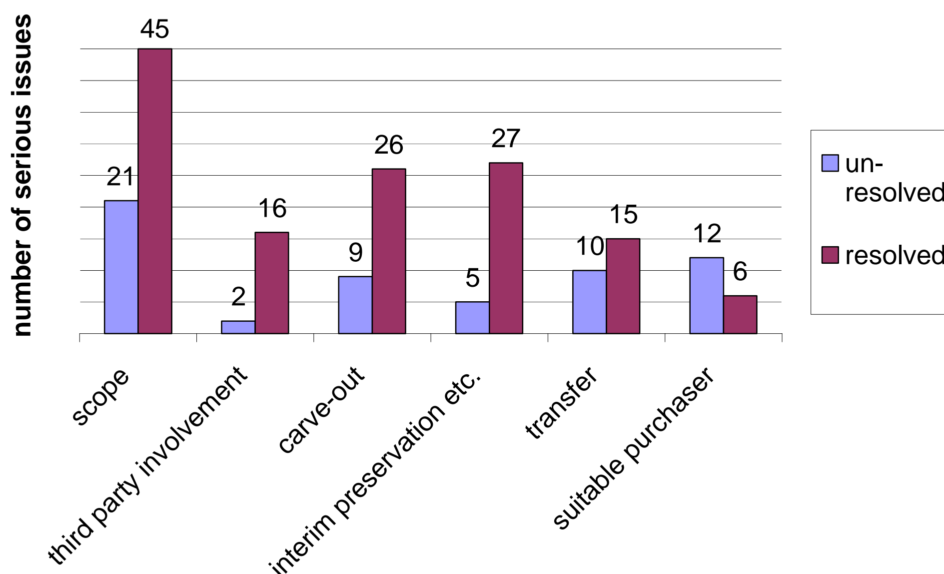
4. Types of analysed competition concerns and theories of harm

12. Of the 96 analysed remedies, 80% involved **horizontal competition concerns**, (*i.e.* the undertakings concerned were actual or potential competitors in the same **relevant market**). A further 14% involved horizontal and **vertical concerns** (*i.e.* such as potential foreclosure **downstream** or **upstream** of the market in which the merging firms were combining their activities), while 6% involved pure **vertical concerns**.
13. **Horizontal concerns** were commonly addressed by commitments to transfer a market position. The picture is similar for cases involving both horizontal and **vertical concerns**, except that access remedies were relatively more frequent (15%), and remedies to exit from a **JV** remedies, relatively less so (8%). **Vertical concerns** were mainly addressed by commitments to grant access (83%). Access remedies were also accepted to resolve competition concerns in cases involving a combination of horizontal and **vertical concerns**.
14. Moreover, 84% of the analysed remedies aimed at preventing a single dominance situation post-merger. 12% aimed at preventing a collective dominance situation, (or "co-ordinated effects"). The remaining 4% do not fit squarely within either of these two categories and related to co-ordination of the parent companies of a **JV** similar to Article 81 **EC** concerns, or the strengthening of the dominance of a third player (one remedy).
15. Whilst single dominance concerns were most commonly addressed by commitments to transfer a market position, collective dominance concerns were more generally addressed by commitments to exit from a **JV** as well as by commitments to transfer a market position.

B. Findings on design and implementation of divestiture commitments

1. The key findings of the Study are the identification of the different types and frequency of serious design and/or implementation issues affecting the effectiveness of remedies. Whenever such issues remain unresolved the Commission's merger control effort is rendered pointless and the competition concerns likely remain partially or fully unaddressed.
2. Chart 31 gives an overview of how often such serious issues arose during the design and implementation of the 68 analysed commitments to transfer a market position and the 15 commitments to exit from a **JV**. The Chart illustrates that more than two-thirds of these serious issues (135 out of 194, *i.e.* 70%) were actually resolved in the three to five years following the Commission's decision. However, 59 serious issues remained unresolved.

Chart 31: Number of serious design and/or implementation issues (resolved and unresolved) in divestiture remedies



3. Of the resolved serious design and/or implementation issues, the inadequate scope of the divested business was the most frequent issue, followed by issues of interim preservation and carving out of the divested business.
4. Of the unresolved serious design and/or implementation issues, also the inadequate scope of the divested business was the most frequent unresolved issue, followed by situations where an unsuitable purchaser had been approved. However, the carving-out of the divested business and the **transfer** of the assets also raised many unresolved issues, as did, to a lesser extent, the interim preservation and holding-separate of assets.

1. Scope of the divested business

5. The inadequate scope of the divested business was the most frequent of all design and/or implementation problems. One or more serious issues were identified in 79% of the 84 **divestiture remedies**. A high number of these issues remained unresolved during the implementation process (48 serious issues in 21 remedies) and led, by themselves or in conjunction with other implementation issues (in particular the choice of a suitable purchaser), to four remedies being "ineffective" and 17 "partially effective". Thus, all "ineffective" and all "partially effective" **divestiture remedies** suffered from problems related to the inadequate scope of the divested business.
6. Among the analysed remedies, inadequacies in the scope of the divested business consisted mainly in the omission of key assets that were necessary for the viability and **competitiveness** of the divested business (*i.e.* ability to constrain the merged entity's market power post-merger).
7. The Study identified the following considerations which need to be fully analysed by the Commission before it can determine the correct scope of the divestiture package:
   (1) **upstream** and **downstream** links between the divested business and parts of the parties' retained business;
   (2) geographic scope of a viable and competitive divested business as compared to the geographic scope of the **relevant market** which may not be the same;

(3) critical size or mass of the divestiture package;

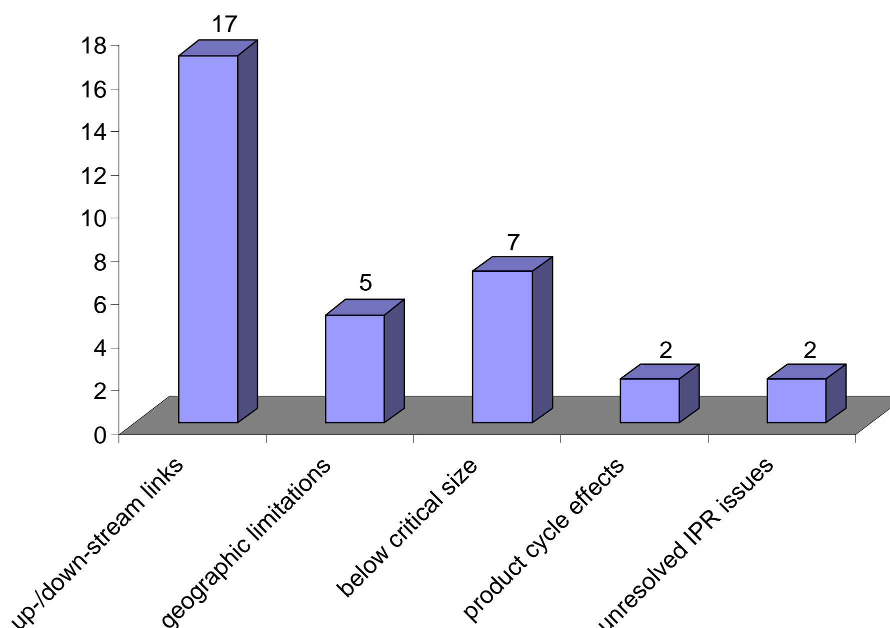
(4) considerations of product cycle effects such as the divestiture of mature products to compete against the parties retained innovative new generation products; and

(5) **IPR** issues.

8. The Study found that the straightforward approach of divesting solely the **overlapping** business has at times resulted in insufficient consideration of these critical commercial issues pertaining to the key requirement of viability of the divested businesses without which its **competitiveness** can be seriously impaired.

9. Chart 32 illustrates the frequency of these insufficiencies.

Chart 32: Number of identified insufficiencies in the scope of a divested business



10. Ultimately, the viability and **competitiveness** of a divested business is dependent on finding a "suitable purchaser". In the Commission's practice, the purchaser is typically unknown at the time of the decision (except in very rare circumstances, where the seller identifies an upfront buyer). Therefore, the viability of the divested business in terms of its scope and potential attractiveness to as many "suitable purchasers" as possible is particularly important at the design stage. In the analysed **divestiture remedies**, the Study found that the Commission designed the scope of the divested business flexibly: sometimes the package was clearly viable and suited to many purchasers; sometimes it was not as viable and could only fit a few potential purchasers.

11. Transitional agreements may also lead to the temporary dependence of the purchaser on the parties, thus influencing their competitive behaviour, creating information links, and making the divested business vulnerable to misconduct or neglect by the parties. These arrangements were not considered problematic if the links they created did not continue beyond reasonable time limits. However, a number of cases showed, even longer transitional periods may be accepted if such arrangements were necessary for the successful

implementation of the remedies.[342] One re-branding case suggested that if transition is made too quickly merely for cost reasons this risked destroying part of the commercial (and competitive) value of the divested business.[343]

12. In the analysed **divestiture remedies**, purchasers regularly pointed out that the pricing of transitional agreements needs to be cost based, otherwise the economic viability of the divested business would be undermined, in particular if circumstances required longer than foreseen transitional periods.

13. Furthermore, the mixed experience of purchasers in a number of **divestiture remedies** showed the importance of properly drafted sales and purchase agreements, including ancillary transitional agreements in providing the necessary means for purchasers to enforce their rights to the divested business.

14. The **Remedies Notice** already comprises some of these principles. First, it stipulates that the divested business must consist of a viable business that can compete effectively with the merged entity on a lasting basis and is normally an existing business that can operate on a stand-alone basis.[344] Second, the Notice mentions as an essential feature of **divestiture commitments** the precise and exhaustive description of the divested business, containing all elements that are necessary for the business to act as a viable competitor in the market.[345]

15. The **Model Divestiture Commitments** have partly addressed these findings by requiring:
    (1) a definition of the divested business and a description of the its legal and functional structure;[346]
    (2) transitional agreements to be on terms and conditions equivalent to those afforded to the divested business;[347] and
    (3) the sale and purchase agreement ("**SPA**") to be on terms approved by the Commission.[348]

16. However, there is potential for further improvements in the Commission's current processes:
    (1) whilst the parties must define the business they intend to divest they are not obliged to disclose on what parts of their retained business the divested business may rely for its viability and **competitiveness**, making it difficult for the Commission to assess whether the scope of the divested business as defined is indeed sufficient;
    (2) whilst the Commission must approve the **SPA**, there is no provision for the Commission to approve the terms of transitional agreements where they are not already part of an **SPA**, which are often essential for the viability and **competitiveness** of the divested business during the crucial start-up phase and sometimes beyond;

342 Examples: r38; r43; r78; r90.

343 r57.

344 **Remedies Notice**, paragraph 14 and following.

345 **Remedies Notice**, paragraph 46.

346 **Model Divestiture Commitments**, paragraph 4(a) to (d) and Schedule referred to therein.

347 **Model Divestiture Commitments**, paragraph 4(e).

348 **Model Divestiture Commitments**, paragraphs 1 and 15.

(3) when the assessment of the scope of the divested business reveals serious shortcomings regarding its viability and **competitiveness** which are not addressed by adding more assets from the parties, the Commission should consider the use of an up-front buyer condition, or require the parties to offer alternative **divestiture commitments** or **crown-jewels**; and

(4) in cases where the migration of a brand is likely to lead to considerable loss of market share, this needs to be specifically considered when determining the required scope of the business to be divested.

2. *Remedies that directly affected third parties*

17. The Commission's conditional clearance decisions involving remedies may affect the rights of third parties, yet the Commission cannot require the implementation of commitments by such affected third parties. The Commission does, however, normally require the parties offering the commitments to implement the remedy fully, regardless of third party rights. It is therefore the responsibility of the parties to the concentration to ensure, prior to offering their commitments, that there are no insurmountable risks or uncertainties related to third party approval that may undermine the effective implementation of a particular commitment.

18. The most frequent such situation which raised the greatest number of concerns from interviewees involved the requirement for the consent of a **JV** partner to the committing party's exit from the **JV** and/or to the entry of a purchaser. Nevertheless, third-party rights also hindered implementation of a variety of contractual agreements, as in the case of the **transfer** of supply agreements, the most complex and risky of which were **transfers** of IP licences and **know how**. The **transfer** of licences involving shared intellectual property rights or **know how** was found to be especially complex and to require particular attention. Other instances of third party dependence included requirements to obtain approval of works councils, trade unions or even individual employees (for example, if key employees were to be **transferred** with the divested business). Such cases did not, however, raise particular issues in the Study.

19. In none of the 10 analysed **divestiture remedies**, where third parties' consent was required for implementation, did this ultimately lead to any reported failed remedies. However, the Study found that interference, or non-co-operation, by third parties regularly delayed implementation by several months and caused the parties to incur additional implementation costs. However, in only two remedies did this lead to the remedies being "partially effective".[349] In all other remedies concerned, the involvement of third parties increased the costs of implementation for the parties without having a significant effect on competition in the **relevant market**, because the third parties concerned were able to protect the viability and **competitiveness** of the divested business in the interim.

20. The Study found that parties offering commitments either overlooked or underestimated the difficulties associated with third party dependence, and often counted on the Commission granting extensions to the divestiture deadlines to deal with such dependence issues at some point later on in the proceedings, rather than tackling them at the design stage.

21. Although remedies involving third party dependence were implemented successfully, the issues identified in the Study demonstrate that the committing parties and the Commission

[349] r31; r63; r90.

cannot necessarily rely on the co-operation of third parties whose active involvement is nonetheless crucial to the successful implementation of such remedies. This is all the more so since third parties are often competitors of the parties to the concentration for whom co-operation is not necessarily a rational response.

22. The **Remedies Notice** and the **Model Divestiture Commitments** make explicit reference to third party rights only in the context of alternative **divestiture commitments**.[350]

23. Thus, the rights of third parties and their likely impact on the implementation of the remedy require careful consideration during the "design stage" of the remedy process on the basis of "worst case scenario" hypotheses, particularly since the difficulties in securing their agreement to implementation is frequently underestimated.[351] This is in particular the case where the parties to a concentration offer a commitment involving assets or obligations over which they have only partial or **joint control**.

24. In particular, where the parties offer commitments involving the **transfer** or unwinding of agreements with third parties, the Commission should systematically require the parties to provide the relevant provisions of the relevant agreements relating to **transfer** or termination so as to ascertain the extent and likely impact of third party rights on implementation. Moreover, third parties ought to be systematically consulted on any commitments offered by the parties which may affect their commercial or legal interests. In cases where the risks associated with full and timely implementation may be judged too high, the parties ought to be requested to offer alternative **divestiture commitments** or **crown-jewels**.

3. *Alternative divestiture commitments and crown jewels*

25. The Commission accepted alternative **divestiture remedies** in cases where the parties' preferred divestiture package would be acceptable, if implemented, but where the complexities of the particular case indicated that implementation of the "first choice" remedy might not be possible. Alternative remedies were not used very often in the Study sample. They were included in only four remedies, of which three involved exits from **JVs**, and the fourth concerned the divestiture of a pipeline product. In three of these four remedies, the alternative commitment or **crown-jewel** were divested.[352]

26. Beyond those remedies, the Study identified at least eight non-**JV** remedies (10% of all **divestiture remedies**) where an alternative divestiture, or crown-jewel commitment, could have potentially improved the remedy[353] by:

    (1) increasing the parties' incentives to implement fully their "first choice" commitments;

    (2) reducing the implementation risks associated with an inadequate scope of the "first choice" divested business; and/or

    (3) avoiding stalemate situations in case the parties divestiture efforts fail.

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[350] **Remedies Notice**, paragraph 22. The **Remedies Notice** stipulates, however, that "*In assessing whether or not a remedy will restore effective competition the Commission will consider all relevant factors relating to the remedy itself, […], together with the likelihood of its successful, full and timely implementation by the parties.*" (paragraph 7).

[351] Not surprisingly, the Study found that where clearly drafted exit provisions existed in agreements with third parties, the negotiation process between a committing party and third party was generally facilitated.

[352] r1; r43; r74.

[353] r3; r31; r39; r63; r72; r75; r76; r96.

27. For some of the remedies where alternative remedies were not feasible (or were not offered by the parties) the possibility of including up-front buyer provisions could have also been a viable option. Such an option would be particularly suitable where the Commission found that there were serious threats to competition in the interim, or that assets could be degraded, because they were difficult to preserve in the interim.

28. The **Remedies Notice** already considers alternative **divestiture commitments** where "*the parties' preferred divestiture option might be uncertain or difficult in view of, for instance third parties' pre-emption rights or uncertainty as to the transferability of key contracts, intellectual property rights or employees, as the case may be.*"[354] Furthermore, the alternative remedy is designed to ensure unequivocal removal of the Commission's competition concerns and, must therefore be "*at least equal, if not better suited*" to restoring effective competition.[355]

29. It ought to be borne in mind that where the alternative remedy is pursued after an unsuccessful attempt to comply with the first proposed option, then the alternative remedy prolongs the divestiture period. Such a delay carries with it all associated risks of negative consequences for effective competition and the interim preservation of the divested business. In such instances, interim preservation and holding separate of all assets included in both divestiture alternatives is unavoidable for the duration of both divestiture periods and therefore inevitably increases the uncertainty and costs associated with implementation. To mitigate such effects for all concerned, the Commission and the parties could consider shorter divestiture periods in these situations.

4. Interim preservation and holding separate of the divested business

30. The preservation of the viability, marketability and **competitiveness** of the divested business in the interim period caused a significant number of actual problems and created an even greater number of implementation risks, thus confirming the crucial role of monitoring during this stage. The Study found that particular damage could be caused when investment programmes for the divested business are stopped, or customer and supplier relationships neglected. Collecting hard evidence on these points proved particularly difficult. The Study may thus under-report the harm caused by insufficient interim preservation or hold-separate measures.

31. Of the 84 **divestiture remedies** analysed, at least 31 remedies (37%) raised questions of whether faulty procedures for asset preservation might have reduced the effectiveness of the remedy. At least 14 remedies (18%) presented issues concerning the preservation of the business, at least 26 remedies (34%) presented issues concerning the hold-separate implementation, five remedies (7%) raised problems concerning ring-fencing provisions, and one remedy presented issues concerning the non-solicitation of personnel. In at least one remedy, the parties had run down the business before the sale and thus significantly impeded the effectiveness of the remedy.

32. The Study showed that when the parties neglected the existing needs of the divested business during the interim period (such as necessary investment programs or customer relationship management), the divested business could suffer serious harm.[356] The risks caused by the inevitable uncertainty surrounding a proposed divestiture – including the

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[354] **Remedies Notice**, paragraph 22.

[355] **Remedies Notice**, paragraph 23.

[356] r31; r43; r45; r72.

typical disruptions for customers and suppliers – were substantial.[357] Indeed, many of the cases examined showed that the longer the divestiture period and thus the period of uncertainty, the greater the need for effective interim preservation and hold-separate measures.

33. The Study therefore concluded that interim preservation periods should remain as short as possible in view of the difficulties in preserving the divested businesses' viability, as well as the challenges of implementing and monitoring hold-separate and ring-fencing provisions especially since lost **competitiveness** during the interim period could turn out to be irrecoverable in many circumstances.[358]

34. As regards asset preservation, the Study confirmed the importance of three **obligations** on the parties that are already included in the **Remedies Notice**[359] and the **Model Divestiture Commitments**,[360] namely to:

    (1) maintain the business and not to carry out any act (or omission) that might have significant negative impacts on its value, management or **competitiveness**;

    (2) finance the divested business to allow the continued development of the business on the basis of the existing business plans; and

    (3) retain key personnel by offering, if necessary, appropriate incentive schemes for key personnel to remain with the divested business in the interim.

35. However, neither the **Remedies Notice** nor the **Model Divestiture Commitments** offer more specific guidance to the parties and the monitoring trustess of how to implement these provisions.

36. Hold-separate provisions in the commitment texts of the analysed remedies did not follow any standard format and frequently, the parties and trustees thought them not to be clear enough. As for "ring-fencing" **obligations**, with some exceptions, the intensity of implementation was judged low by the Study team, which made it difficult to draw any conclusions as to their effectiveness.

37. At the time that the Study sample of cases was decided, the notion of a hold-separate manager was just beginning to emerge. In some cases, the management of the divested business was not separately operating. In other cases, the existing management of the divested business simply stayed in place.[361] There were cases where the interim management was recruited from the outside to ensure independence. In some cases it was the monitoring trustee who selected the hold-separate manager.[362]

38. The Study found hold-separate managers, with responsibility for the interim preservation and holding-separate of the divested business answering to the trustee in that regard, and who are expected to stay with the divested business until well after the **transfer** was completed, would have been beneficial in virtually all **divestiture remedies**, particularly where the merging parties were capable of significantly degrading the divested business in

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[357] Examples: r9; r31; r43; r45; r96.

[358] r31; r43; r45; r72.

[359] **Remedies Notice**, paragraphs 50-52.

[360] **Model Divestiture Commitments**, paragraphs 5-9.

[361] r15; r32; r45; r46; r54; r67; r71.

[362] r30; r43; r48; r74.

the interim period (*e.g.* where the interim period was long).[363] In particular, the Study found that hold-separate managers play a crucial role in ensuring the independence of the divested business, its interim preservation from the parties and its holding separate.

39. The **Remedies Notice** does not refer to the concept of hold-separate managers. However, the **Model Divestiture Commitments** stipulate that: *[The parties] shall appoint a Hold Separate Manager who shall be responsible for the management of the Divestment Business, under the supervision of the Monitoring Trustee. The Hold Separate Manager shall manage the Divestment Business independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by the Parties."*[364]

40. In addition to these principles in the **Model Divestiture Commitments**, the Study found that the most effective hold-separate managers were those who:
    (1) were independent from the parties;
    (2) closely co-operated with the trustee;
    (3) had undivided loyalty to the divested business;
    (4) remained with the divested business beyond the interim period;
    (5) were adequately experienced, and prepared for the tasks ahead;
    (6) were sufficiently senior to deal with the sellers' top management; and
    (7) were capable of solving problems and communicating effectively to resolve potential issues as quickly as possible.

41. As regards the monitoring of the interim preservation and hold-separate provisions, the Study found that the appointment of a monitoring trustee was already common practice in almost all analysed **divestiture remedies**, with only few exceptions.[365] In all four cases in which no monitoring trustee was appointed it appeared that a monitoring trustee would have significantly reduced the risk of serious implementation issues as a consequence of inadequate preservation of assets or incomplete information being provided to purchasers. On the contrary, several cases confirmed that a monitoring trustee can be instrumental in preserving the economic viability, marketability and **competitiveness** of the divested business, *e.g.* by helping to bring factories back up to technological standards.

42. The Study noted a high degree of variation in the intensity of how interim preservation and hold-separate provisions were monitored by the monitoring trustees and noted the following issues:
    (1) in most cases the trustees limited their performance monitoring to financial performance indicators;
    (2) in five or more cases the trustee appeared to be considerably less active in its preservation monitoring than was necessary;[366]
    (3) in four or more cases the trustee was appointed late in the process and, thus, could only perform limited preservation monitoring;[367]

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[363] Examples: c39; r1; r15; r48; r87.

[364] **Model Divestiture Commitments**, paragraph 6.

[365] Not required in the commitment text: r66; r72. Not appointed: r8; r58.

[366] r8; r30; r39; r45; r53; r63;.

[367] r11; r43; r44; r53; r59; r78.

(4) in two or more cases it would have been crucial to extend the trustee's mandate until the **transfer** to ensure proper and full **transfer** of the divested business;[368]

(5) As regards the monitoring of hold-separate provisions, trustees did not routinely verify that instructions were, in fact, dispatched to all personnel concerned and other business divisions regarding the limitations on the exchange of information, nor did they check to see whether key employees had given written commitments to implement the hold-separate **obligations**, to adhere to the information rules, and to confirm their compliance regularly;

(6) trustee mandates did not provide sufficient clarity as to the procedures to follow to ensure asset preservation and holding separate;

(7) few trustees followed a detailed work plan. In one remedy, the trustee and the parties agreed on a code-of-conduct and established specific implementation checklists, which were very helpful in ensuring proper implementation and monitoring of interim preservation and hold-separate provisions.[369] Trustees pointed out that in this context, many developments cannot be foreseen from the outset, which means that trustee mandates and work plans have to be sufficiently flexible to allow the trustee to react appropriately to all emerging situations;

(8) many trustees did not feel qualified to carry out meaningful evaluation of asset preservation and hold-separate measures, which would have required access to auditing expertise and some industry knowledge. The analysis showed that even with industry knowledge, the requirements for interim preservation and hold-separate monitoring can be a challenging task in a complex business **transfer** involving the carving out of the divested business;

(9) the Commission's case files did not systematically include final trustee reports with an assessment of the functioning and success of the interim preservation and hold-separate monitoring obligations; and

(10) in some remedies the trustee's independence was compromised which may have reduced its incentives to carry out its monitoring function rigorously.[370]

43. The **Remedies Notice** and to a greater extent the **Model Divestiture Commitments** now specify some of the functions of a monitoring trustee, the appointment procedures and the relationship between the trustee and the parties.[371] However, a number of the above issues remain unaddressed.

5. *The divestiture process*

44. The divestiture process is usually up to the parties/sellers to arrange as they see fit at least during the initial divestiture period.[372] The Study has found instances where this freedom has undermined the effective implementation of remedies in the following ways:

[368] c39; r80.

[369] r33.

[370] Examples: r39; r53.

[371] **Remedies Notice**, paragraphs 50-57, **Model Divestiture Commitments**, paragraphs 16-33.

[372] In only one of the analysed remedies did the Commission object to the parties' proposal to launch an IPO of the shares to be divested on the stock exchange: r8.

(1) some sellers may have abused a lack of transparency in the divestiture process to favour a weak purchaser to limit future competition. These sellers may have preferred foregoing a higher divestiture price for potentially higher longer term anticipated gains resulting from a weaker competitor;[373]

(2) some sellers used exclusionary or discriminatory conduct vis-à-vis a potential purchaser who may potentially be a stronger competitor;[374]

(3) some sellers organised very short due diligence procedures and used short deadlines to restrict the number of potential purchasers;[375] and

(4) in at least two remedies, the potential purchasers received incomplete or inaccurate information regarding the divested business and the sales process;[376]

45. In the analysed remedies, **SPAs** have not always included all necessary terms, and purchasers did not always diligently ensure their protection.[377] One purchaser remarked that it did not know exactly what the scope of the commitment was and therefore "had to take what was offered" and that the seller had used this advantage to obtain some last-minute concessions, and had generally dominated the sales process.[378]

46. What is more, the Study confirmed that also the interests of the purchasers typically do not fully coincide with the intended goals of the remedy in maintaining effective competition on the **relevant market**. For example, purchasers may also find it preferable to pay a substantially lower price in return for fewer assets, with the negative result that they will not be as well-equipped to effectively compete against the seller.

47. However, a purchaser who is well-informed about the scope of the business and who is sufficiently attentive to the existing state of the business from an early stage in the sales process may be an additional warranty for the Commission that the selling parties will carry out all necessary actions and that their **SPA**, as well as all supporting arrangements, contain all necessary terms and legal protections.

48. An issue in which purchasers and sellers had conflicting interests was the extent to which information contained in the confidential versions of the Commission's decisions (including the commitments) should be made available to potential purchasers over and above what may be contained in non-confidential versions of the decisions made available to the public.

49. The Study thus shows that only when and if the right potential purchasers receive timely and adequate information on the divested business are they able to make informed decisions about the acquisition and future prospects of the divested business. It would be advisable, therefore, that the Commission ensures to the extent possible that purchasers receive all necessary information from parties and the trustee (see remarks on due diligence in the Section on "purchasers"). In particular, sellers must clearly understand that they are required to include all necessary provisions in the **SPAs** that flow from the commitments they have given to the Commission.

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[373] Examples: r5; r26; r75; r80.

[374] Example: r80.

[375] Examples: r72; r84.

[376] r37; r72.

[377] r39: seller distorted divestiture package with […]; r84: more time to purchasers, trustee should verify; r37: purchaser of […] business was not aware of hold-separate clauses.

[378] c12.

50. The Study also found three remedies where the reduced number of purchasers slowed down the divestiture process, mainly because potential purchasers would bargain harder after finding out that they are the only interested candidates for the divested businesses.[379] Such situations regularly lead to the parties requesting an extension of the divestiture deadline, with all the negative consequences which prolonged divestitures entail. Most analysed commitments have sought to minimise the scope for opportunistic behaviour of purchasers by keeping confidential certain additional aspects of the commitments, such as for example, the timetable for divestiture or the nature of an alternative remedy.

51. Overall, although the wisdom of the Commission's current practice of leaving the divestiture process to the sellers in the initial stages is not queried, the Study does suggest a need for a minimum standard of what constitutes a proper divestiture procedure so as to counter-balance the tendency of sellers to steer the purchaser selection process strategically by excluding or discriminating against candidate purchasers perceived as potentially stronger competitors. On the one hand, the **obligation** on sellers to provide full, frank and timely information regarding the scope of the divested business would go a long way towards equipping potential purchasers to assess the likely future prospects of the divested business. On the other hand, sellers should be entitled to protect their legitimate financial interests in obtaining a competitive price by keeping certain information confidential from potential purchasers at least in the initial phases of the divestiture process, such as the scope of any alternative **divestiture commitments** or **crown-jewels**, for instance.

6. Carve-out of the divested business

52. The ratio of **carve-out** to stand-alone divestitures was three to two in the Study sample, which highlights the importance of **carve-out divestiture remedies**. Thus, despite the Commission's stated preference for stand-alone divestitures, this was applied flexibly in practice.

53. **Carve-out** issues led to serious unresolved implementation problems in nine remedies (18% of the 50 remedies where significant **carve-outs** were necessary).[380] Another five remedies led to longer term dependence of the divested business on the sellers.[381]

54. **Carve-outs** in **Phase II** cases tended to raise implementation problems twice as often as those in **Phase I** cases, which may have been due to the greater complexity of **Phase II** remedies and the fact that, on average, they included a greater number of remedies.

55. In 14 of the 50 remedies where significant **carve-outs** were necessary, the divested business belonged to the acquirer. In only three remedies it belonged to the target and in the remaining 33 remedies the divested business belonged to one of the merging parties or **JV** partners.

56. **Carve-out** issues involved the division of both tangible and intangible assets, as well as the allocation of personnel between the divested and retained businesses. The Study focused on remedies in which substantial efforts were required to separate assets (particularly both tangible and intangible shared assets), including networks, **IPRs** and the allocation of personnel. The Study found that not all eventualities could be foreseen beforehand, by the parties or the Commission, at the remedy design stage, since what needed to be done to

[379] Examples: r5; r26; r75.

[380] r20; r25; r26; r34; r37; r63; r72; r80; r96.

[381] r20; r34; r38; r45; r78.

implement the proper carving out of assets invariably emerged during the implementation of these **obligations**. The Study found that in the process of separating shared assets and allocating shared personnel, it was crucial to ensure that the divested business received in one form or another all necessary assets and personnel which it used, even where these assets may have been employed by another part of the retained business.

57. Often the main problem with allocating such shared assets is that they not only have to be split, but that certain portions may have to be replicated, which can require a significant commitment of resources and investment that sellers often underestimate beforehand. Moreover, difficult management decisions must be made as to whether the original shared assets – involving infrastructure, software, central functions, or services – should be allocated to the divested business or should stay with the retained business. The separation of IT systems was often cited in interviews as a challenging issue and implementation problems occurred in at least five remedies.[382]

58. Assessing and resolving the separation and/or allocation of **IP rights** entailed a very complex set of procedures.[383] In particular, the splitting up of **know how** could take several months sometimes occurring even post-**closing** and posed major problems in a number of cases.[384]

59. The Study found that the allocation of personnel was critical for the effectiveness of the divested business and needs to be anticipated by the parties and the Commission at the design stage. It also confirmed that after the selection of the divestiture package, personnel may need to be offered incentives to stay with the divested business. Personnel allocation worked best when complemented by provisions ring-fencing key personnel during **carve-out**, imposing an **obligation** on the parties to make key personnel available to the buyer, and providing for compensation schemes to secure their retention in the meantime.

60. When the business to be divested was not fully stand-alone, the Study found that the Commission could neither rely solely on market forces during the divestiture process, nor on the purchaser, to steer the **carve-out** process in a way that would ensure an adequate competition outcome. The use of oversight mechanisms, such as hold-separate managers and monitoring trustees, was shown to be extremely valuable in helping to monitor the preservation processes and to create the right incentives for the correct and timely **carve-out** of the divested business.

61. The carving-out of the divested business, as its preservation and holding-separate, was sometimes carried out by a hold-separate manager appointed for that task, who was expected to stay with the divested business until well after the **transfer** was completed.[385] The Study underlined the importance of having such a hold-separate manager in place to defend the interests of the divested business from the moment that the Commission's decision is adopted, particularly during the **carve-out** process and until **transfer** is completed.

62. As regards monitoring trustees, the Study found that the commitments and trustee mandates rarely contained sufficiently clear and explicit provisions for the monitoring of the carving out of assets. Moreover, regardless of whether explicit provisions were included in the

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[382] r6; r43; r66; r90; r96.

[383] Examples: r20; r63.

[384] r20; r26; r63; r80.

[385] Examples: c39; r15; r48.

commitments or in trustee mandates, trustees reported that they invariably found that their role was not made sufficiently clear in their mandate regarding their **carve-out** function in particular with regard to their authority to opine over the designation of **carve-out** assets.[386] Several trustees interviewed for the Study stated that they felt (or would have felt) overwhelmed by a requirement to monitor the proper **carve-out** of the divested businesses. Indeed, the Study shows that, even trustees with specific compliance, industry and business management knowledge face a challenging task when overseeing a complex **carve-out** process.

63. Moreover, in several cases, trustees reported difficulties in gaining direct access to the divested business.[387] In addition, in many cases the trustee had not been required to supervise the hold-separate manager or any other manager or officer responsible for the **carve-out** of the divested business.

64. At least four out of the 50 analysed remedies clearly suffered from the trustee being appointed too late to intervene in the **carve-out** process.[388]

65. Proper oversight by the trustee is all the more important since purchasers – particularly the smaller firms and new entrants – were often not able to safeguard their interests by enforcing vital provisions in their **SPAs** with the sellers.[389]

66. The Study also found that transitional arrangements, such as non-compete, licensing or supply arrangements, between the parties and the purchaser could not only offer critical start-up help to the purchaser but be useful in facilitating the effective **carve-out** of assets between the parties' retained and divested businesses.

67. Purchasers in three remedies indicated that implementation risks could be reduced in **carve-out** remedies if the Commission were to discuss and determine the consequences of a possible failure of a **carve-out** up-front with the parties.[390]

68. None of the analysed remedies included provisions that would have allowed the trustee and/or the Commission to determine which assets belonged to the divested and/or retained businesses. Moreover, the parties had not committed to carry out a timely, complete and best effort **carve-out** in any of the analysed remedies.

69. Indeed, there are currently no detailed provisions regarding the principles that should govern the **carve-out** of assets and allocation of personnel either in the **Remedies Notice** or the **Model Divestiture Commitments**.[391] There is room for further improvement in this regard by:

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[386] Examples: r1; r32.

[387] r25 trustee dealt only with the parties' lawyer; r65; r91 [… sellers] allowed trustees only *ex post* control; r2 the parties did not reply to information requests by the trustee; Also: c39; r38; r78.

[388] r63; r80; r96. One remedy led the purchaser to conclude that the trustee should have become active in the process even before the Commission's decision, as one of the parties had already commenced critical parts of the **carve-out** process during the merger proceedings: r30.

[389] For example: r5; r26; r80.

[390] r21; r25; r72.

[391] Whilst the **Remedies Notice** is principally based on the premise that the parties divested business is "*an existing one that can operate on a stand-alone basis*" (paragraph 14), it nonetheless provides that the description of the divested business in the commitments "*has to contain all the elements of the business that are necessary for the business to act as a viable competitor in the market …. [and that]…. assets that are used within the business but that should not, according to the parties be divested, have to be identified separately*" (paragraph 46). These requirements are reflected in the **Model Divestiture Commitments**, paragraph 4(a), paragraph 3 of the

(1) spelling out the principles governing the **carve-out** of assets and personnel that are shared between the divested and retained businesses;

(2) providing the trustee (in consultation with the hold-separate manager) with specific powers not only to monitor but also to make recommendations to the Commission on the splitting and/or allocation of assets and/or personnel between the divested and retained businesses; and

(3) requiring the parties to commit to carry out a timely, complete and best effort **carve-out** and to compensate the purchaser for any loss of viability or **competitiveness** resulting from the delayed, incomplete or improper **carve-out** of assets and/or personnel.

70. The Study thus found a high proportion of serious issues arising from the many **carve-out** processes necessary in **divestiture commitments**, which would have been avoided had the remedy consisted in the divestiture of a stand-alone business. The **Remedies Notice** has already taken this into consideration by expressing a preference for the divestiture of businesses that can be operated on a stand-alone basis.[392] But as the Study shows, in many circumstances an equivalent stand-alone business would not exist or a certain amount of **carve-out** would be unavoidable.

7. *Transfer of the divested business*

71. The Study found that the physical or actual **transfer** of tangible and intangible assets often occurred long after **closing** of the divestiture, in particular in cases where the **transfer** of **know how** was involved. In at least 10% of all 84 **divestiture remedies** purchasers failed to obtain the full **transfer** of required assets.[393] Serious **transfer** problems were reported in at least 15 of the 68 commitments to transfer a market position (22%) but never in the 15 commitments to exit from a **JV**. In particular, **transfer** issues proved to be less of a problem when the divested business is being sold to a **JV** partner.[394]

72. Serious issues involved the **transfer** of tangible and intangible assets, such as **IPRs**, **know how**, government permits, supply contracts, and customer records, and personnel. They most often appeared in connection with **carve-outs** of the assets and personnel of the divested business.

73. As regards tangible assets, the Study analysed two remedies, where certain machines were not **transferred** even though they were dedicated to the divested business (and in one case even paid for).[395] In a further four remedies, it became apparent during **transfer** of the business that the tangible assets belonging to the business were in poor condition or incomplete.[396]

74. As regards intangible assets, including **IPRs**, the Study found 16 **divestiture remedies**, in which the purchasers reported that the **transfer** of intangible assets was incomplete or that the **transfer** was significantly delayed. More specifically, the Study found at least four

Schedule, together with a requirement on the trustee to monitor the splitting of assets and allocation of personnel, (paragraph 23(ii)(d)).

392 **Remedies Notice**, paragraph 17.

393 r30; r37; r41; r39; r56; r63; r80; r72.

394 r7; r9; r28; r32; r41; r43; r48; r74.

395 r26; r80.

396 r5; r25; r30; r96.

remedies where **know how** was not included in the **transfer**, or was not adequately defined in either in the commitments text and/or the Commission's decision.

75. Other assets analysed in this Study included the following: (1) permits, licences and authorisations issued by governmental organisations for the benefit of the divested business; (2) contracts, leases and customer orders; and (3) customer lists, credit reports and other business records. For such other assets the Study found at least 11 instances underlining their importance to the viability of a business.[397] In particular, the late or non-**transfer** of customer orders or customer lists and contracts appeared to have led to serious problems and in nine remedies significantly contributed to the remedy being less effective.

76. The **transfer** of personnel raised serious issues. In particular, implementation issues frequently arose when the **transfer** involved sales personnel, researchers and any holders of **know how**. The Study showed that dealing with personnel issues always required good planning and careful implementation. Often the **transfer** of pension rights and other social welfare plans involved complex legal issues. The Study indicates that often the following would have been necessary to ensure the effective **transfer** of personnel:
    (1) ring-fencing the personnel of the divested business from the parties both during the interim preservation period and following their **transfer**;
    (2) providing for effective non-solicitation mechanisms (so that personnel do not move back to the retained business immediately after their **transfer**); and
    (3) waiving of any rights of the parties which might inhibit, increase the costs or reduce the likelihood of the **transfer** of personnel to the purchaser (*e.g.* issues related to notice periods, bonuses, or pension rights);

77. In at least seven remedies, the buyers mentioned in the interviews that the trustee had been discharged too early to monitor the actual **transfer** of the business (assets and personnel) both before and after **closing**.[398] The Study found no remedy where the systematic monitoring of the actual **transfer** of the business was carried out post-**closing**, nor was such monitoring explicitly provided for in the commitments or the trustee mandates in the Study sample. Indeed, there is no provision for such monitoring in the Commission's current practice according to which the trustee is normally discharged after the **closing** of the divestiture save for cases were the trustee is required to monitor transitional arrangements between the parties. Two purchasers suggested that commitments should provide for the systematic verification of the completion of the **transfer** at a stipulated later date.

8. Monitoring trustees

78. The Study's conclusions with regard to the monitoring trustees' functions in the interim preservation and holding separate, the divestiture process, **carve-out**, **transfer** and purchaser approvals are described under Sections 4 to 7 and 9 of these conclusions. The following parts focus on the procedural aspects of the selection and appointment of the monitoring trustee, its required qualifications, as well its relationship with the parties, third parties, and the Commission.

[397] r5; r11; r17; r19; r20; r44; r45; r57; r59; r72; r80.

[398] r20; r25; c39; r63; r72; r80; r96

79. All but two of the 69 **divestiture remedies** in the sample required the monitoring of the commitments by a trustee.[399] Monitoring trustees were always appointed where provided for in the commitment text, except in two instances, where a purchaser was rapidly found.[400] In all four cases in which no monitoring trustee was appointed it appeared that a monitoring trustee would have significantly reduced the risk of ineffective implementation of the commitments as a consequence of inadequate preservation of assets or incomplete information being provided to purchasers. By contrast, none of the remedies for which a monitoring trustee was actually appointed showed any indications that the trustee was unnecessary.

80. Monitoring trustees were often overseeing one or several remedies. In 12 out of the 33 divestiture cases[401] where a monitoring trustee was appointed, the monitoring trustee was mandated to oversee the implementation of a single commitment (36%). In another 17 of the 33 cases (*i.e.* 52%), one monitoring trustee was appointed to oversee the implementation of multiple commitments. Finally, in the remaining four cases with multiple commitments, two trustees were appointed to oversee multiple commitments.

81. In 24 remedies the role of the trustee raised issues regarding the selection of the trustee, its appointment, the scope of its functions, its mandate, its relationship with the parties, third parties and the Commission.

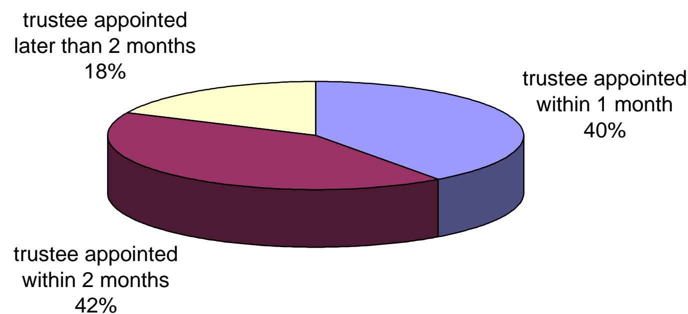
82. As regards the trustees' appointment, of the 67 **divestiture remedies** in which a monitoring trustee was appointed, the trustee was appointed within four-weeks in only 40% of these remedies (see Chart 33). More specifically, in 42% of the remedies, the trustee was appointed in less than two months, and in almost 18% of the remedies, the trustee was appointed in more than two months from the Commission's decision. In view of the fact that most divestiture periods were six months long, this meant that in 18% of the remedies there was no effective monitoring of the parties' compliance with their commitments in the first third of the divestiture period, when supervision was at its most crucial.

399 Exceptions: r8; r58.

400 r66; r72.

401 The total of 40 cases, minus 3 non-divestiture cases (which are dealt with in the next Part of the Study), minus 4 cases where no trustee was required or not appointed.

Chart 33: Trustee appointment: 60% of the trustees in all divestiture remedies were appointed later than one month after the Commission's decision



83. The causes for delay in appointing the trustee included failure by the parties to provide all the necessary information, or failure to submit a trustee mandate that met the Commission's approval standards, or the Commission's rejection of the parties' initially proposed candidate, thereby extending the search process into a second round.[402]

84. The Study's findings were not sufficient to gauge the extent to which the lack of monitoring or the actions of monitoring trustees presented a risk to implementation or even thwarted the effectiveness of a remedy. The Study found that the Commission often had insufficient information on these initial implementation steps taken by the parties, or had to rely exclusively on the parties themselves for such information. The Commission was thus not in a position to intervene in case of questionable implementation, although the detrimental effects (if any) of such behaviour were difficult to ascertain from the interviews.

85. What is clear from the Study is that as long as there was no trustee appointed to oversee implementation and report to the Commission, the parties remained undeterred in pursuing their own interpretation of the commitments and their own interests, irrespective of the objectives and requirements of the commitments as intended by the Commission's decision. They could thus gain access to confidential information of the divested business (particularly relevant where the divested business was from the target), could operate the divested business in a way that would be detrimental to the purchaser's competitive position, or misrepresent the scope of the business to the purchaser. Trustees who came into the process late found it difficult to reverse the effects of the parties' conduct, in particular, when faced with commitments involving the complex **carve-out** of assets or **transfer** of **IPRs**.[403] Moreover, certain cases indicated that, even when a trustee was appointed within fairly short deadlines, the complexity of the process and the relatively short divestiture

[402] Examples: c26; c30. These problems occurred likewise in **Phase I** and **Phase II** remedies.

[403] r63; r80; r96.

periods could mean that the trustee was in any event starting too late to have any real impact.[404]

86. As regards the trustees' qualifications, the Study revealed a wide divergence in the trustees' performance of their duties. In half of the 36 *cases* where a monitoring trustee was provided for and where the Study collected sufficient information on its performance (*i.e.* 18 cases, 21 remedies), the monitoring trustee did not perform its role adequately and, thus, certain implementation problems went unaddressed. In a typical **divestiture commitment**, monitoring trustees were responsible for monitoring four functions:

    (1) the **carve-out** of the divested business;

    (2) overseeing the interim preservation of the divested assets;

    (3) the holding-separate of the divested business from the parties' retained business; and

    (4) the parties' divestiture process, including an assessment of the suitability of the purchaser.

87. The Study found that the first three functions identified above require distinct yet complementary skill sets, namely: business management, accounting expertise, information management, and industry knowledge. Interviews with both buyers and sellers indicated that these skill sets were more commonly found in accounting firms, insolvency administrators and industry consultants, rather than in investment banks.[405] In contrast, the fourth function requires specific corporate finance experience which is generally found in accounting firms and investment banks.

88. Further, the Study revealed that a balance may have to be struck between the different functions of a trustee which may require different professional qualifications and the preference for the appointment of one single trustee.

89. The Study indicated that the previous experience of a trustee in performing trustee duties can contribute substantially to the success of its mission. As it is not always possible to appoint a trustee with previous trusteeship experience one trustee recommended that the existence of some form of guidance (such as **Best Practice Guidelines**) for trustees would be useful for both new and old trustees alike as a useful reference tool in understanding the scope of their duties and how to go about implementing them.

90. A number of buyers, sellers, and trustees interviewed did not understand the role of the trustee in merger proceedings, as viewed by the Commission.[406] Many interviewees stated that there was a need to inform all parties that, although the trustee was appointed by the parties *via* the trustee mandate, it received its instructions only from the Commission.

91. The Study found that where the role and independence of the trustee was unclear, the carving-out, interim preservation, and hold-separate processes were often put at risk, as were the interests of the buyers of the divested business. In the Study, a number of trustee appointments raised clear questions of potential conflicts of interest. When the seller's **M&A** advisor acted as divestiture trustee in the **fire-sale** phase of the divestiture process, this normally did not create a conflict of interest. However, a conflict of interest arose where the parties **M&A** advisors acted as monitoring trustee;[407] and a conflict also arose

[404] Examples: c37; r30.

[405] Examples: c37; r1; r63.

[406] Examples: c5; c17; c20; r15; r83; r87.

[407] c7; c24.

where the parties **M&A** advisors acted as divestiture process monitor during the first divestiture period.[408] Similarly, a conflict of interest would arise if the seller's auditors were to act as monitoring trustee or divestiture trustee. Finally, a conflict may arise where the trustee has a dual role as monitoring trustee and replacement of a board member.[409]

92. As regards the relationship between the trustee and the divested business, few trustees had close enough contact with the divested business and/or monitored the hold-separate managers.[410] For these reasons, the Study found that detailed work plans, agreed to by the Commission, the trustee and the parties, setting out how the trustee was meant to fulfil its functions, provided a good complement to the trustee's mandate.

93. In at least 10 cases reviewed in the Study, one or several purchasers reported that they had no, or very limited, contact with the trustee prior to concluding the **SPA** with the parties.[411] The Study identified at least four cases where it could have been very useful for the monitoring trustee (and not just the seller) to liaise with the (potential) purchaser(s) in order to develop a balanced view of the parties' compliance when reporting to the Commission on the divestiture process and on the suitability of the purchaser.[412] This seemed especially critical when the buyer was a new entrant.[413]

94. The Study confirmed the Commission's practice of preferring hourly rates instead of fixed fees for monitoring trustees.

95. Finally, monitoring trustees rarely monitored the actual **transfer** of the business following the **closing** of the **SPA**. In view of the findings of the Study it would be preferable if the trustee remained in place until the divested business was fully **transferred**, just as is currently the case for the monitoring of important transitional arrangements, for instance.

96. Overall, in view of the findings of the Study it would be desirable that:

    (1) monitoring trustees are appointed in all **divestiture remedies**;

    (2) monitoring trustees must be appointed as early as possible, but in any case earlier than in the analysed remedies where most appointment periods extended to more than one month after the Commission's decision;

    (3) monitoring trustees must possess the necessary qualifications to carry out the monitoring of the **carve-out**, interim preservation, and hold-separate process. The Commission should pay particular attention to the following skill sets: business management, accounting expertise, information management, and industry knowledge.

    (4) kick-off meetings between the trustee and the Commission should be arranged early in the process, to brief the trustee on the intended remedial objectives of the Commission's decision, so that the trustee can appreciate what is most important for effective implementation and what is most vulnerable to potential violations;

    (5) regular follow-up meetings should subsequently be held by the Commission with the trustee, in order to ensure that the trustee understands fully the extent of its functions

408 c25.

409 Examples: r32; r53.

410 Examples: r1; r48.

411 c2; c7; c12; c20; c26; c28; c35; c37; r53; r56.

412 c12; c20; c28.

413 c12; c28.

and role and receives adequate instructions from the Commission on how to react in the light of evolving circumstances;

(6) the trustee should give its approval to the appointment of the hold-separate manager; and the hold-separate manager should report to the trustee;

(7) the trustee's functions should extend to the monitoring of the **transfer** of the assets and personnel of the divested business;

(8) de-briefing meetings should be held between the Commission and the trustee at the end of the trustee's mandate to assess both sides' satisfaction with the other sides' performance and draw lessons for future cases.

9. Suitable purchasers

97. Overall, 40 of the 84 **divestiture commitments** analysed (48%) raised issues regarding the suitability of the purchaser. Of these, there were nine remedies where the choice of a purchaser contributed to reducing the **competitiveness** of the divested business, or compromising its effectiveness either alone or in combination with other factors, such as the scope of the divested business ("partially effective" remedies).[414] For these remedies the Study concluded that the purchaser should not have been accepted as a better purchaser could have been found. In addition, there were two instances in which the choice of an inadequate purchaser rendered the remedy "ineffective".[415]

98. In most of the remedies analysed certain basic purchaser requirements were commonly prescribed, specifically, that a suitable purchaser should:

(1) have the financial resources and proven expertise deemed necessary;

(2) have the incentive to maintain and develop the divested business as an active competitive force in competition with the parties and other competitors; and

(3) be independent and unconnected to the parties;

(4) not create new competition concerns, nor increase the risk that the implementation of the commitments will be delayed; and

(5) be expected to receive all necessary regulatory approvals by NCAs and other regulatory bodies.

99. These requirements correspond to the Commission's current practice.[416]

100. In the analysed **divestiture remedies**, there were a number of purchasers which were approved but which, in hindsight, would be considered unsuitable, as in practice they failed to meet one or another of the basic purchaser requirements noted above.[417] The Study found one case in which the purchaser failed to meet the first three main requirements referred to above.[418]

101. As regards proven expertise, the Study found indications that certain industrial sectors, such as innovation-driven markets that require very specific **R&D** expertise, generally require a greater degree of specialised expertise than others. It found that in these sectors, a

[414] r25; r26; r29; r40; r60; r65; r90; r91; r92.

[415] r67; r80.

[416] **Remedies Notice**, paragraph 49, and **Model Divestiture Commitments**, paragraph 14.

[417] r25; r26; r29; r40; r60; r65; r90; r91; r92;.

[418] r80.

suitable purchaser should possess the expertise beforehand, as it may often be difficult if not impossible for the purchaser to acquire such expertise later on by recreuitment of appropriate personnel.

102. As regards financial resources, the Study found that access to adequate financial resources was critical to ensuring the uninterrupted development of the divested business. The Commission's assessment of the financial strength of a potential purchaser is based on an examination of the adequacy of the proposed business plan taking account of the particular requirements of the divested business. Financing requirements may be particularly demanding in cases where the divested business requires sustained future investments, where profit margins are dependent on constant investment in efficiency producing assets or processes, or where innovation-driven markets require high up-front **R&D** expenditure. The issue of financial resources was a decisive factor in the success of the remedy in at least four remedies where the purchaser was a small company.[419] In at least two cases this was decisive in the failure of the remedy.[420]

103. The Study found that a potential purchaser's capability and incentives to maintain and develop the divested business are often difficult to assess. In current practice, the Commission assesses the incentives of a proposed purchaser to maintain and develop the divested business in competition with the parties and other competitors, primarily on the basis of a business plan which should set out detailed plans for the operation of the divested business by the proposed purchaser. The Commission now regularly requires the trustee's opinion on the business plan.

104. The Study identified a number of remedies where purchasers had not presented a business plan to the Commission, making it difficult to assess the future plans and thus incentives and capabilities of the purchaser to maintain the business in competition. Business plans are of course not binding, as they are always subject to modifications and adaptation where needed, and sometimes they may simply be wrong. Nevertheless, with a plan in hand, the Commission could at least have checked the assumptions on which the plans were based so as to better assess whether there was sufficient evidence of the purchaser's capability and incentives to compete actively in the **relevant market**.

105. The Study found at least seven remedies in which the lack of incentive to compete may have been decisive in leading to the remedy's ineffectiveness. Particularly suspect cases involved remedies where the purchaser rapidly ceased operation of the divested business shortly after its acquisition. Another category of remedies in which the purchaser's incentives could be questioned are those where the purchaser quickly sold on the divested business. In some **divestiture remedies** the purchaser had acquired the divested business as part of a bundle with other related businesses, which were the ones in which the buyer was actually interested. Finally, the incentives of the purchaser also seemed questionable in at least two **divestiture remedies** where the purchaser had acquired the divested business for free, or at a negative price.[421]

106. Regarding the requirement that suitable purchasers should be independent of, and unconnected to, the parties, some commitments were more specific on this point, detailing the types of links suitable purchasers should not have. The Study identified no remedy where there were on-going ownership/control or financial connections between the parties

[419] r5; r25; r57; r80.

[420] r25; r80.

[421] r5; r40.

and the respective purchasers. Nevertheless, on-going connections and links were created and/or maintained through transitional arrangements, which were generally of a temporary nature, such as temporary supply agreements or transitional IT support.

107. As for the requirement that the acquisition of the divested business by a particular purchaser must neither be likely to create new competition problems nor give rise to delayed implementation, generally, whilst the Commission's approval of a purchaser does not pre-judge the outcome of any merger control proceedings under the **ECMR** or national competition laws, nonetheless, the Commission's assessment of the purchaser's suitability will be affected by potential competition or other regulatory (*e.g.* in the field of health and consumer protection, national security, or other areas where certification is required) problems that can be foreseen in other jurisdictions because of the delays involved and their likely effect on achieving a timely divestiture.

108. One final consideration regarding the delay in implementation had to do with the expected ease in integrating the divested business with the purchaser's existing business, which can be facilitated by the fact that the purchaser is not yet operating in the same **relevant market** and thus no integration between the old and the new management becomes necessary.

109. Two categories of purchasers were found to raise special questions as to their potential suitability: financial buyers and small players (companies with limited presence in the market or new entrants). The Study's findings showed that all categories make suitable purchasers, provided that particular attention was paid to assessing their suitability on a case-by-case basis.

110. In the two remedies in the sample involving financial buyers, the remedies were judged effective and their performance in the market was successful.[422] Nonetheless, financial buyers typically did not have extensive hands-on experience in a given industrial sector prior to the transaction, an assessment of whether they would be a suitable purchaser had to focus on their investment track record in general, their existing portfolio and past investment experience in the industry, as well as the most likely exit scenario that they would adopt. The Study found where the proposed purchaser was a financial buyer, the assessment of capabilities and incentives of the proposed management of the divested business should therefore also be carried out as part of the purchaser assessment. The financial purchasers who were interviewed stated that the envisaged exit strategy of the particular financial investor should always be scrutinised as they typically have less of a long-term development perspective for the divested business than industrial players. On the other hand, in the two remedies analysed in the Study the shorter term perspective of the financial buyers may well have contributed towards the increased **competitiveness** of the divested business in the short term. Moreover, financial buyers have the advantage that the divested business does not need to be integrated into an existing company, which can considerably reduce integration costs.

111. The Study showed a mixed picture as regards small companies. They performed satisfactorily in a number of commitments but were less suited in other cases. In particular, small purchasers were suitable purchasers in at least three **divestiture remedies**, where in addition to the requisite industry knowledge and experience, they had sufficient financial resources to operate the assets effectively in the market.[423] In some other remedies, small

[422] r66; r96.

[423] r15; r37; r41; r87.

companies did not possess the expertise to operate the business, were not able to finance the needs of the divested business, and sometimes encountered difficulty in becoming independent of the parties.[424] In fact, of the six "ineffective" remedies identified in the Study three involved either new market entrants or small purchasers.

112. The Study included only one commitment with an up-front buyer clause, it was the first such decision made by the Commission.[425] Review of that remedy showed that an up-front buyer requirement could help to ensure that merging parties make all necessary efforts to implement the divestiture effectively within the requisite time-frame and alleviate the risk that the main transaction is implemented without a suitable purchaser having been found, but that it could also produce negative side-effects if parties were to try to rush the divestiture process.

10. Divestiture deadlines

113. In 60 analysed commitments to transfer a market position, a divestiture deadline of six months was the most common period stipulated. It was provided for in 60% of the analysed commitments. These ratios are in line with those revealed in a stocktaking of all commitments accepted by the Commission in the reference period 1996-2000, where about 60% of the deadlines provided for in commitments to transfer a market position[426] were also six months.

114. The length of an average divestiture period in the sample of analysed commitments to transfer a market position was 7.6 months. In commitments to exit from a **JV**, typically, divestiture deadlines provided for in the commitment text were longer than those for commitments to transfer a market position (average 8.5 months).

115. In the interviews, an almost equal number of respondents stated that they found that the divestiture deadlines were either sufficiently long or that the periods were too short. In practice, issues that frequently led to delays in the sales process included staff/personnel issues and the alleged strategic bargaining of purchasers.

116. In at least 18 **divestiture remedies** (30% of the 60 commitments to transfer a market position analysed here), deadlines were extended once or several times. Most extensions were granted only for one or two months, in order to complete an already advanced sales process. However, in four instances the extension was for more than six months.

117. Extensions were granted pursuant to a showing of "good cause" under a standard review clause. The reasons cited in requests for extensions related mainly to unforeseen events that were not under the control of the parties, such as, finalising the **SPA** for the imminent signature, difficulties in resolving third party rights, or delayed regulatory approval in other jurisdictions. Cyclical evolutions of the market were not considered a "good cause" to delay the divestiture.[427]

118. The number of deadline extensions granted may reflect several factors:

(1) divestitures are uncertain processes where unforeseen events often become a cause for extension;

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[424] r5; r26; r67; r80.

[425] r6.

[426] Excluding eight commitments to grant long-term exclusive licenses and 15 commitments to exit from a **JV**.

[427] r15.

(2) divestiture deadlines were generally tight and in certain cases needed adaptation to emerging business realities;

(3) the Commission adopted a flexible attitude towards deadline extensions;

(4) at the time of the request for extension the situation had evolved to a point where an extension remained the best option to restore effective competition quickly.

119. The Study did not generate enough evidence to judge the appropriateness of such extensions. It is worthwhile noting that a number of interviewed parties, and trustees underlined the importance of flexibility by the Commission, not least as market developments are particularly unforeseeable in some industries.

120. Despite the extensions, on average the actual time to implement the analysed commitments to transfer a market position was only 6.2 months, which is more than one month shorter than the average deadlines provided for of 7.6 months. The actual average implementation period for commitments to exit a **JV** was 7.7 months, mainly due to the need to resolve issues relating to the rights of the **JV** partner(s).

121. The above calculations show that in the past, six month deadlines have generally proved sufficient for most commitments to transfer a market position. Case evidence also supported the Commission's practice of determining the length of divestiture deadlines on a case-by-case basis. Complex divestiture processes (for example, complicated **carve-outs**, a market with few potential buyers, unresolved third party issues, or finding a suitable new entrant purchaser) may sometimes warrant divestiture periods of longer than six months.

122. In earlier Sections the Study's findings have indicated that divestiture periods should be as short as possible to (1) quickly restore competition in the **relevant market**, (2) to avoid the voluntary and involuntary negative consequences of the transition phase on the divested business (such as, uncertainty among suppliers, customers and personnel), and (3) to reduce the monitoring burden on the parties and the Commission. However, if deadline periods were too short this may negatively impact on the ability of parties to find an appropriate purchaser or unduly reduce the time for the purchaser to understand the divested business, thus increasing the "purchaser risk". It may also lower the price that the parties can realize in a sale, particularly where the purchaser is aware of the time pressure on the parties.

123. Therefore, the Study seems to support the current practice of initially agreeing a tight deadline with provisions for an extension of time where there is a showing of "good cause", rather than granting longer periods from the outset.

124. With regards to **fire-sale** provisions, they were already common features of commitments to transfer a market position in the reference period 1996-2000 where they were included in 40% of the remedies. In the analysed sample of remedies in the Study, half of all the analysed commitments to transfer a market position (*i.e.* 68 commitments) included a **fire-sale** provision (50%).

125. Since then, **fire-sale** clauses have become common practice and are included in both the **Remedies Notice** and the **Model Divestiture Commitments**.[428]

[428] **Remedies Notice**, paragraph 54, **Model Divestiture Commitments**, paragraph 24.

C. Implementation of commitments to grant access and other commitments

1. Access remedies

1. The grant of access as a stand-alone remedy was analysed in 10 commitments. These 10 commitments to grant access were designed to maintain actual or potential competition in the **relevant market** by preventing foreclosure to critical inputs, infrastructure or technology. There were, in addition, many access commitments that were considered "supplementary" to another remedy (e.g. a **divestiture remedy**). As the sample of analysed cases was very small and as for half of all access commitments later market developments have not confirmed the necessity of the remedies, the Study provide only limited generalised findings on access commitments.
2. As regards access to infrastructure, in three of four analysed remedies[429] actual market developments turned out substantially differently from what had been anticipated by the parties and the Commission at the time the commitments were offered, in that the rapid growth of emerging markets that had been predicted had failed to materialise. A fourth remedy proved effective.[430]
3. Remedies granting access to technology normally involved intangible proprietary assets such as **IPRs**. The Study analysed five "stand-alone" technology licensing remedies,[431] as well as a number of licensing remedies that were "supplementary" to commitments to transfer a market position or to exit from a **JV**. Two remedies concerned commitments to grant non-exclusive licenses: one was considered effective and the other partially effective. A further remedy concerning co-licensing agreements was considered partially effective. Two other remedies that concerned access to **IPRs** were considered "unnecessary" in hindsight.
4. The Study analysed one access remedy that involved the termination of an exclusive agreement. The remedy did not produce its intended result, *i.e.* suppliers did not use the new sales opportunities, mainly because of the lack of economic incentives due to design flaws in the remedy.[432] The remedy was considered ineffective.
5. All access remedies highlighted the particular challenges of determining the optimal scope of the licence, i.e. whether all necessary assets, **IPRs** and **know how** are included.
6. As regards the access terms, the costs of the licence were reportedly the single most essential element affecting the effectiveness of licensing remedies. Onerous financial terms can discourage, or hinder access, thereby deterring market entry and not achieving the purpose of the remedy. Furtermore, certain payment schemes may convey commercially sensitive information to the licensor or contain in-built disincentives for licensees to compete. Moreover, pre-determined prices may also pose problems in attracting new licensees over time, as the date for the expiration of the patent draws closer. One case in particular,[433] raised these issues related to determining the optimal scope of the licence and its terms, foremost among them, the price (including down-payments and royalties).

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[429] r4; r61; r64.

[430] r68.

[431] r20; r42; r50; r79; r92.

[432] r27.

[433] r79.

7. The Commission has accepted non-discrimination clauses, commitments to licence at the going market rate, or fair market value, and sometimes insisted on free licences or licences on cost basis or on a cost-plus basis. Given that **IPRs** are by definition monopoly rights and the fact that licences are often tailor-made to the needs of individual licensees, it is generally not easy to determine what amounts to non-discrimination or fair market value in particular circumstances. Some interviewees stated that it would therefore have been helpful for such commitments to include appropriate dispute resolution mechanisms which would have allowed the parties to resort to an expert determination in the event of disputes.
8. The Study found that licensors usually have many means to restrict access to technology through a variety of technical requirements in the licence. This seemed to require particularly careful review of the terms and conditions of the licence and monitoring of its implementation, ideally with a suitably qualified trustee monitoring compliance throughout the entire licence period.
9. In view of the above, the following conditions appear important in designing workable access remedies:
   (1) non-exclusive licences granting access to critical assets, such as **IPRs**, should be offered and granted to a sufficient number of potential users;
   (2) licences should clearly spell out the field of use, the correct territorial dimension, a sufficient period of time to make access to the assets worthwhile, and should be granted under terms that make access commercially feasible (in particular, the costs of the licence must not be too high);
   (3) such commitments should not contain clauses that could adversely affect the competitive outcome, by for example, conveying competitive advantages to the licensors (such as information on the sales volumes and/or values of the licensees);
   (4) licences should not facilitate co-ordination of the competitive behaviour of the grantor and its beneficiaries; and
   (5) interviewed parties consistently pointed out the need for review clauses in commitments involving the grant of access. By providing for a response to unexpected market developments, a review clause can ensure that the impact of the Commission's intervention on the parties in such cases is limited.
10. Nevertheless, the insights offered by the Study tend to suggest that such access remedies have only worked in a very limited number of instances. The primary causes for the failure of access commitments were found to lie in the inherent difficulties in setting the terms for effective access and in monitoring them. In view of this, it might be advisable to limit the use of access remedies to those situations where inherent difficulties can be effectively minimised. In any case, review clauses should always be included in these types of remedies.

2. *Other commitments*

11. The Study found that commitments to sever influence in a competitor were particularly important in situations where the Commission had concerns of co-ordinated effects among a few strong competitors and where the influence that competitors have over each other or the information they exchange enables them to better co-ordinate their market behaviour (or to better monitor deviations).
12. The Study analysed one commitment which concerned the withdrawal of a product with significant market presence from a market. The decision explained that the measure would

"eliminate the **overlap**". While this remedy may have to a limited degree strengthened competitors (although there is no guarantee that the market share freed through this withdrawal did not go partly or entirely back to the merging parties), the withdrawal also definitely reduced customer choice and destroyed commercial value. Its effectiveness must therefore be viewed critically, in particular because the option to divest or licence the brand and the product as an alternative seemed feasible, judging from the information obtained in the Study.

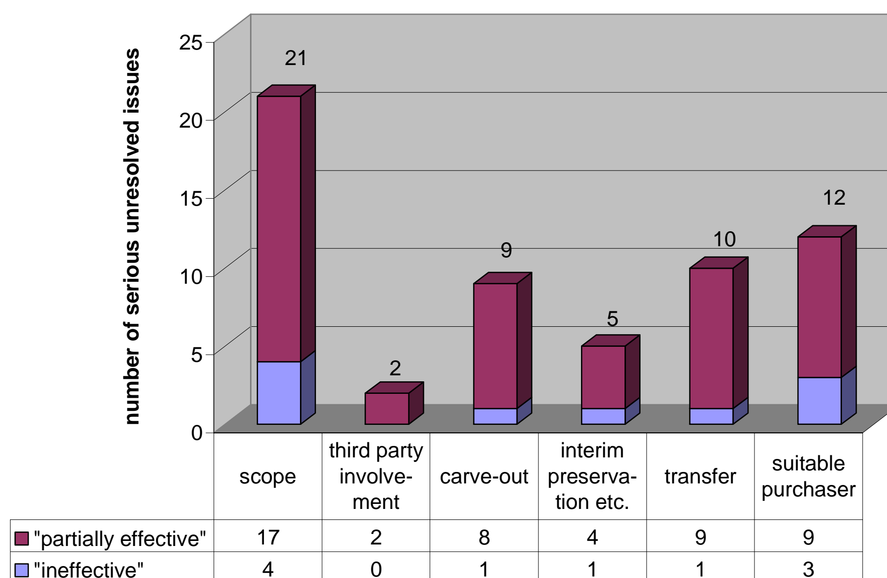
D. Effectiveness of the analysed remedies

1. Whilst the focus of the Study was primarily the detailed examination of the design and implementation of merger remedies, this analysis also generated a first indication of how effective a remedy might have been in preserving effective competition.
2. The Study did not carry out a detailed *ex post* assessment of the evolution of each of the markets concerned, which would have been necessary in order to reach firm conclusions as to the real market impact of the remedies analysed and, therefore, on their effectiveness. However, the findings on the design and implementation of the remedies were assessed together with a number of market indicators, such as market share evolution, where available, taking account also of any other relevant information obtained during the Study. This way, an overall approximate evaluation of the effectiveness of each of the remedies assessed was made.

1. Serious unresolved design and/or implementation issues

3. As regards commitments to transfer a market position or to exit from a **JV**, Chart 34 shows that, overall, 59 serious design and/or implementation issues remained unresolved. As described, of these unresolved serious design and/or implementation issues, the inadequate scope of the divested business was the most frequent, followed by situations where an unsuitable purchaser had been approved, the **carve-out** of assets and the **transfer** of the divested business.

Chart 34: Number of serious unresolved design and/or implementation issues in the analysed divestiture remedies



	scope	third party involve-ment	carve-out	interim preserva-tion etc.	transfer	suitable purchaser
"partially effective"	17	2	8	4	9	9
"ineffective"	4	0	1	1	1	3

4. The Chart distinguishes whether the issues arose in remedies that were later considered "ineffective" or "partially effective", as discussed below.
5. As regards the 10 analysed access remedies, they raised at least nine serious design and/or implementation issues, mainly in the field of the access terms. These led to considering one access remedy as "ineffective" and two as only "partially effective".

6. Finally, one of three "<u>other</u>" remedies raised serious design and/or implementation issues and was considered "ineffective" and a second one only "partially effective".

2. *<u>Market indicators</u>*

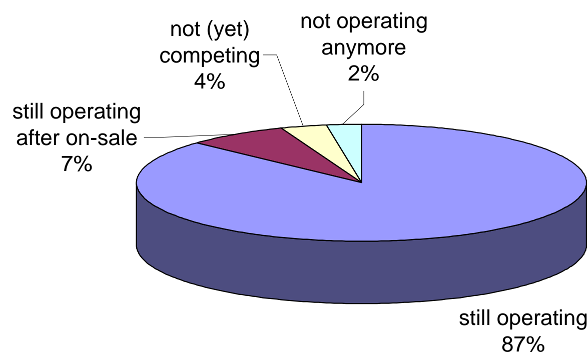
7. For most of the **divestiture remedies** assessed, *inter alia*, the following measurable parameters were examined:

   (1) whether the purchaser was still in business; and

   (2) the market share evolution of the divested and retained businesses, being compared where possible.

8. The Study found that 87% of all purchasers of the 84 **divestiture remedies** were still operating the divested business three to five years after divestiture, and another 7% of the purchasers had sold on the divested business to a new buyer which was still operating it ("still operating after on-sale") (see Chart 35). Thus, in total, 94% of the divested businesses were still operating and therefore exercising some degree of competitive constraint on the merged entity.

Chart 35: Was the divested business still operating?

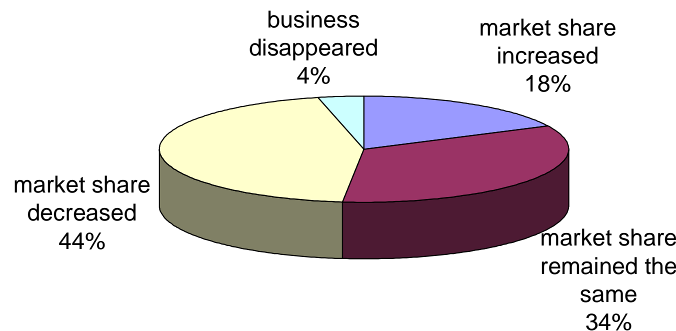


9. The continued operation of the divested business by the original or a subsequent purchaser is a necessary, but not sufficient condition, to ensure that a **divestiture remedy** has been effective. Indeed, the fact that the divested business is still operating in the market does not necessarily mean, that the purchaser is actually competing effectively in the market to the extent intended by the Commission's conditional clearance decision to maintain effective competition.

10. The evolution of market share data can provide a better indication of the performance of the divested and retained businesses, respectively, and therefore, of the effectiveness of the remedy in question. However, such an indicator does not take into account other exogenous factors that may nevertheless have an important impact on the evolution of market shares. Moreover, a business may be an effective competitive constraint even if it temporarily loses market share.

11. The Study examined the evolution of the market shares of the divested businesses in the three to five years following divestiture (see Chart 36). It obtained data for 56 remedies, *i.e.* 67% of the 84 **divestiture remedies**.

Chart 36: Evolution of the divested business' market share



12. The market shares of the divested businesses thus decreased more often (44%) than they increased (18%). Market shares remained stable in 34% of the remedies and they disappeared in 4% of instances. The Study thus identified a substantial number of remedies (48%) where the divested business lost market share after divestiture – some moderately (up to 10%), others rather dramatically (more than 50%) - or even went bankrupt. Most of these losses in market share concerned situations where the divested business was not able to claw back the initial drop in market share that it experienced when it acquired the divested business. The Study found only a relatively small number of remedies where the divested business managed to increase market shares in the three to five years following divestiture (18%).
13. Interestingly, when comparing the market share evolution of the divested businesses with that of the retained businesses for each of the 30 **divestiture remedies** (36%) for which both data sets were available, it appeared that the retained businesses very often outperformed the divested business (57%) three to five years after divestiture in terms of market shares, while the reverse occurred less frequently (23%). In a further 17% of remedies the market share evolution was similar.

3. Overall effectiveness assessment

14. On the basis of the data presented above as well as the findings in the Study remedy reports and taking account of numerous other facts from the case file, the statements of purchasers, the parties, trustees and sometimes other third parties collected in the interviews, and also the replies to the detailed follow-up questionnaires, a tentative overall evaluation of the effectiveness of each remedy has been developed. This effectiveness indicator attempts to classify the remedies assessed on the basis of the extent to which they have fulfilled their competition objective (*i.e.* maintaining effective competition by preventing the creation or strengthening of a dominant market position).
15. The following four categories were used:

(1) "effective" remedies clearly achieved their competition objective. For commitments to transfer a market position and for commitments to exit from a **JV** this meant that the divested entity remained a viable and effective competitor. Access remedies were

considered "effective" where the foreclosure concerns appeared to have been eliminated;

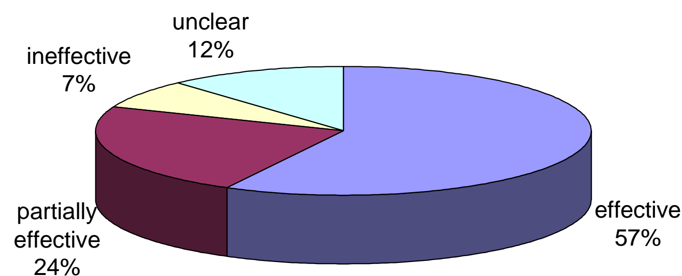
(2) "partially effective" remedies experienced design and implementation issues which were not fully resolved three to five years after the divestiture and which may have partially affected the **competitiveness** of the divested business. For access remedies in this category access was not granted to the extent determined in the Commission's conditional clearance decision and may have led to a situation where the foreclosure concerns were not fully resolved.

(3) "ineffective" remedies failed to restore competition as foreseen in the Commission's conditional clearance decision, either because the divested business was no longer operating or did not even begin competing within three to five years, or because market access was not granted during the evaluation period.

(4) "unclear" remedies are those where the Study could not determine whether the remedy had achieved its stated objective, either because the Study generated too little information, or because it was impossible to disentangle the impact of the remedy from the impact of other exogenous factors with simultaneous temporal effects (*e.g.* liberalisation measures in the **relevant market**).

16. The overall effectiveness evaluation was possible in 85 of the 96 analysed remedies.[434] The total results are presented in Chart 37.[435]

Chart 37: Effectiveness of 85 remedies analysed in this regard



[434] The assessment was carried out for all remedies, except for 11 remedies for which effectiveness could not be determined since market developments made the remedy unnecessary. If a remedy's necessity is not confirmed by subsequent market developments, this means that the market would have remained competitive in any event even without the remedy. Assessing the impact of a remedy in such a situation is pointless. Five of these 11 remedies were access remedies (half of all access remedies). Most of these remedies occurred in rapidly evolving high-tech industries, specifically the internet business and online sales. These 11 remedies are analysed, however, as regards all the implementation issues discussed in the Parts II and III of this Study.

[435] All remedies that are not effective are described in further detail in Annex 9: Summary descriptions of "ineffective", "partially effective", "unclear", remedies and those classified as "unconfirmed necessity" – [confidential], p. 233.

17. When considering the competition effectiveness of each type of remedy, the Study found that, overall, **JV** remedies were the most effective type of remedy, while the effectiveness of access remedies was weak.

VI. ANNEXES

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A. Annex 1: Glossary of terms

1. **Best Practice Guidelines**: explanatory note on the Commission's **Model Texts** (**Model Divestiture Commitments, Model Trustee Mandate**) submitted under the **ECMR**, published on **DG COMP**'s web site http://europa.eu.int/comm/competition/mergers/legislation/divestiture_commitments/.
2. **[C/c]arve-out**: consists of the legal and physical separation of the assets of the divested business from the parties' retained business, so that the divested business can operate on a stand-alone basis, which can compete successfully on a lasting basis independently of the divesting parties.
3. **[C/c]losing**: the transfer of legal title to the divested business from the seller to the purchaser in return for the transfer of valuable consideration from the purchaser to the seller.
4. **[C/c]ommitments**: the promises made by the undertakings concerned vis-à-vis the Commission under Articles 6(2) and/or 8(2) of the **ECMR**, to remedy any competition concerns identified by the Commission in its market investigation, with a view to rendering their concentration compatible with the common market, and the submissions in which these commitments are made to the Commission which are normally attached either as **conditions** or **obligations** to the Commission's conditional clearance decision thereby giving them binding effect.
5. **[C/c]ompetitiveness**: ability of a business to constrain the market strength of other market participants.
6. **[C/c]ondition**: requirements imposed by the Commission which need to be fully complied with by the parties concerned in order to allow the Commission to declare an otherwise incompatible concentration compatible with the common market. The principal remedy by means of which the concentration is rendered compatible with the common market is normally attached as a condition to the Commission's decision. If a condition is not fulfilled, the Commission's decision no longer stands.
7. **[C/c]onglomerate mergers**: mergers between firms that are in a relationship which is neither purely horizontal (as competitors in the same **relevant market**) nor vertical (as suppliers or customers). In practice, the focus is on mergers between companies that are active in related or neighbouring markets (*e.g.* mergers involving suppliers of complementary products[436] or of products belonging to a range of products that is generally sold to the same set of customers).
8. **[C/c]rown-jewel**: an alternative **divestiture commitment** comprising valuable assets of the committing parties which is offered as a fall-back remedy in case their primary remedy cannot be implemented and is normally kept confidential in the public version of the Commission's decision.
9. **DG COMP**: the Directorate General for Competition of the European Commission.
10. **DG ENTR**: the Directorate General for Enterprise and Industry of the European Commission.
11. **[D/d]ivestiture commitment[s] / remed[y/ies]**: refers to commitments to transfer a market position and commitments to exit a **JV** taken together.

[436] Products or services are called complementary when they are worth more to a customer when used or consumed together than when used or consumed separately.

12. **[D/d]ownstream**: a downstream market/industry/product/competitor is at the next stage of the production/distribution chain, *e.g.* the distribution and sale of motor vehicles would be a downstream market in relation to the production of motor vehicles.
13. **EC**: the European Community.
14. **ECMR**: Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, *OJ L 395, 30.12.1989, p. 1*, corrected version, *OJ L 257, 21.09.1990, p. 13*, as amended by Council Regulation (EC) No 1310/97 of 30 June 1997, *OJ L 180, 09.07.1997, p. 1*, corrected version *OJ L 40, 13.02.1998, p.17* (also referred to as the old ECMR); and Council Regulation (EC) No 139/2004 of 20 Jauary 2004 on the control of concentrations between undertakings, *OJ L 24, 29.01.2004, p. 1* (otherwise referred to as the new ECMR).
15. **EEA**: the European Economic Area comprising the **EC**, Norway, Iceland and Lichtenstein.
16. **EU/US Best Practice Guidelines**: EU-US best practices on cooperation in merger investigations, published on **DG COMP**'s web site http://europa.eu.int/comm/competition/mergers/others/eu_us.pdf.
17. **[F/f]ire-sale**: the quick sale of a divested business on behalf of the parties by the divestiture trustee at no minimum price.
18. **Horizontal Guidelines**: guidelines on the assessment of horizontal mergers under Council Regulation on the control of concentrations between undertakings, *OJ C 31, 05.02.2004, p. 5*.
19. **[H/h]orizontal (competition) concerns**: competition concerns related to concentrations where the undertakings concerned are either actual or potential competitors on the same **relevant market**.
20. **Implementing Regulation**: Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, *OJ L 61, 02.03.1998, p.1*.
21. **IPO**: Initial Public Offering.
22. **IP rights** or **IPRs**: intellectual property rights such as patents, **know how**, copyrights, trademarks, design rights and the like which by and large give the holder the exclusive right to exploit the patent, **know how**, copyright, trademark or design right in question, normally for a specified period of time and within a specific geographic territory. They are intended as an incentive to innovation by preventing free-riding from imitators and duplicators, but may in certain exceptional circumstances lead to a restriction or distortion of competition in a given product or service market.
23. **[J/j]oint control**: joint control exists where two or more undertakings or persons exercise a decisive influence over another undertaking either in law or in fact. Decisive influence in this sense normally means the power to block actions which determine the strategic commercial behaviour of the jointly controlled undertaking.
24. **JV**: is a joint venture or an association of firms or individuals formed to undertake a specific business project. Under **EC** competition rules, JVs are undertakings which are controlled jointly by two or more other undertakings. They may encompass a broad range of activities from **R&D**, to production or distribution. Full-function JVs which act on the market independently from their parent companies are treated as concentrations under the **ECMR**.

25. **[K/k]now how**: a body of technical information that is secret, substantial and identifiable held by an individual or a company normally on a product or production process, often obtained through extensive and costly **R&D**.
26. **LBO**: leveraged buy-out.
27. **M&A**: mergers and acquisitions.
28. **MBO**: management buy-out.
29. **Model Texts**: the Commission's Model Texts for **divestiture commitments** and trustee mandates submitted under the **ECMR**, published on **DG COMP**'s web site http://europa.eu.int/comm/competition/mergers/legislation/divestiture_commitments/.
30. **Model Divestiture Commitments**: the Commission's model text for **divestiture commitments** submitted under the **ECMR**, published on **DG COMP**'s web site http://europa.eu.int/comm/competition/mergers/legislation/divestiture_commitments/.
31. **Model Trustee Mandate**: the Commission's model text for trustee mandates submitted under the **ECMR**, published on **DG COMP**'s web site http://europa.eu.int/comm/competition/mergers/legislation/divestiture_commitments/.
32. **NCA**: national competition authority of an **EC** member state.
33. **[O/o]bligation**: requirements the Commission imposes on undertakings to declare a notified concentration compatible with the common market. Implementing measures compliance with which is necessary for the proper implementation of the commitments offered by the parties are normally attached as obligations to the Commission's decision. Breach of such obligations may result in the revocation of the Commission's decision.
34. **[O/o]verlap**: the smaller of the two merged businesses active in the same **relevant market**, regardless of whether it belonged to the acquiring or acquired company. "**Less than the overlap**" means that fewer assets were divested than those to which the market share additions created by the merger can be attributed. "**More than the overlap**" refers either to the bigger of the two overlapping businesses or to the smaller business plus additional assets, in particular those expanding the geographic scope of the divested business.
35. **Phase I**: the first phase of the Commission's investigation, which typically lasts one month but may be extended to six weeks, under the old **ECMR**, if the undertakings concerned submit commitments.
36. **Phase II**: the second in-depth phase of the Commission's investigation that the Commission may initiate if it identifies serious doubts as to the compatibility of the notified concentration with the common market, that are not resolved by commitments in the first phase of its investigation, and which typically lasts four months under the old **ECMR**.
37. **R&D**: research and development.
38. **[R/r]elevant market**: a tool to identify the market power of one or more firms normally by reference to their market shares. A relevant market is defined in terms of both product/service and geography. In product/service terms, it comprises all those products/services which are regarded by customers as interchangeable or substitutable by reason of their characteristics, prices and intended uses. Products/services that could readily be put on the market by one or more other actual or potential suppliers without significant switching costs and within a limited time span may fall within the same relevant products/services market. The relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of products/services, where

the conditions of competition are sufficiently homogeneous and can be distinguished from neighbouring areas where the conditions of competition are appreciably different.

39. **[R/r]emedies**: is the generic term used for all modifications that the undertakings concerned make to their concentration pursuant to Articles 6(2) and/or 8(2) of the **ECMR** to remove the competition concerns identified by the Commission in its market investigation, thereby rendering the concentration compatible with the common market.
40. **Remedies Notice**: Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, *OJ C 68, 02.03.2001, p. 3*.
41. **SPA**: sale and purchase agreement.
42. **[T/t]ransfer**: the physical hand-over of the assets of the divested business by the seller to the purchaser which normally occurs following the **closing** of the divestiture.
43. **[T/t]rustee**: one or more legal or natural persons approved by the Commission and appointed by the parties to oversee the implementation of their commitments, normally referred to as the monitoring trustee. Its powers and duties are set out in the commitments and the trustee mandate, approved by the Commission and entered into by the trustee and the parties. If the parties fail to sell the divested business within the time-frame allotted to them, the trustee may be given an irrevocable mandate to effect the divestiture of the divested business at no minimum price, in which case it will be normally referred to as the divestiture trustee.
44. **[U/u]pstream**: an upstream market/industry/competitor is at the previous stage of the production/distribution chain, *e.g.* the production of motor vehicles would be an upstream market in relation to their marketing and distribution to final consumers.
45. **US FCC**: the Federal Communications Commission of the United States of America.
46. **US FTC**: the Federal Trade Commission of the United States of America.
47. **US DOJ**: the Department of Justice of the United States of America.
48. **[V/v]ertical** (**competition**) **concerns**: competition concerns related to mergers where the undertakings concerned are operating at different levels of the production or distribution chain. For example, where a manufacturer of a certain product (the "**upstream** firm") merges with one of its distributors (the "**downstream** firm").

B. Annex 2: List of analysed cases and remedies (by date of decision) – [confidential]

C. Annex 3: List of analysed cases and remedies (by type of remedy) – [confidential]

D. Annex 4: Model contact letters with confidentiality assurance

Merger Task Force
The Director

Brussels, **[Date]**
Merger Task Force/GDz D(2003)

For the Attention of **[Name]**
[Address]
Fax: +**[Number]**

Subject: HT.63 - Commission Study on Remedies Practice in Merger Cases

Case COMP/M. [Case No.] – [Case Name]

Dear Madam/Sir:

The European Commission's Directorate-General for Competition (**DG COMP**) is conducting an in-house study of the Commission's practice regarding remedies that have been accepted in mergers and acquisitions reviewed under the Merger Regulation. Our aim is to draw on the results of our review to further advance our practice with regard to assessing and implementing remedies.

We have chosen your company to participate in this important exercise in its capacity as the **[buyer] [seller] [trustee] [third party]** concerned in Case COMP/M.**[Case No] - [Case Name]**.

Our goal is to gain insight into the experience of the parties directly involved in merger cases where remedies have been proposed, accepted and implemented. We intend to interview the relevant participants in this process, including buyers and sellers, as well as trustees and interested third parties, where appropriate.

Inasmuch as our aim is to get a comprehensive view of all stakeholders who have taken part in the process, we wish to solicit your support in our study. It is companies such as yours that are best placed to tell us what has worked well and what might need improvement. Indeed, input from direct participants in the remedies process should provide the clearest guidance for advancing our future policy and practice in assessing and implementing effective remedies.

We plan to conduct interviews by telephone or video-conference call, or – if you would prefer to conduct an interview in-person – we would be happy to make arrangements for such a meeting. We have selected the interview method in order to minimise the amount of time that would be required by you, while at the same time maximising the give-and-take in the information exchange.

We plan to publish the general findings of our study after the interview phase in a suitable non-confidential format which would entirely respect the anonymity of the participating companies and their business secrets.[437] Thus, all business secrets you might convey to the Commission in the course of this study will be covered by the obligation of professional secrecy the Commission is bound to by virtue of the **EC** Treaty and of the Merger Regulation.[438]

[For buyers:]

In order for you to identify the appropriate interviewees within your organisation, we would suggest that the most suitable individuals would be those directly involved in handling the acquisition of assets **[or rights]** from the viewpoints of both the legal and commercial aspects, respectively, as well as someone who has been responsible for the implementation and day-to-day operation of the acquired assets or other rights. **[To the extent that there is specialised expertise involved, for example, complex technology, we would like to speak with someone knowledgeable in this area as well.]**

To assist you in your search, we briefly note the general areas of interest that we intend to cover in our interview:

- a description of how the remedy process worked, including any particularly successful and/or difficult aspects of the procedure;
- a description of the actual operation and/or utilisation of the assets, or licensing rights, acquired in the process;
- a general assessment of the adequacy of the remedy provisions and terms contained in the Commission decision; and
- a general assessment of the impact of the remedy on competition; and
- any suggestions for improving the process.

After you have identified the relevant individuals, would you kindly inform us of their names and all necessary contact information, including phone and fax numbers, and email address, at your earliest convenience so that we can agree to a date for the interview as soon as possible.

[For trustees:]

In order for you to identify the appropriate interviewees within your organisation, we would suggest that the most suitable individuals would be those involved in implementing any aspect of the process, including those responsible for monitoring any hold-separate provisions involved; identifying and negotiating with potential purchasers; as well as monitoring the implementation of the divestiture or other remedy.

To assist you in your search, we briefly note the general areas of interest that we intend to cover in our interview:

[437] Any information the Commission might publish will be similar in nature to the **US FTC**'s "Study of the Commission's Divestiture Process" (1999; Federal Trade Commission, http://www.ftc.gov/os/1999/9908/divestiture.pdf).

[438] Article 287 (formerly Article 214) of the **EC** Treaty and Article 17, paragraphs 2 and 3, of the Merger Regulation.

- a description of how the remedy process worked, including any particularly successful and/or difficult aspects of the procedure;
- a description of the relationships developed with the seller, the ultimate buyer, and potential purchasers, respectively;
- a general assessment of the adequacy of the remedy provisions and terms contained in the Commission decision; and
- any suggestions for improving the process.

After you have identified the relevant individuals, would you kindly inform us of their names and all necessary contact information, including phone and fax numbers, and email address, at your earliest convenience so that we can agree to a date for the interview as soon as possible.

[For sellers:]

In order for you to identify the appropriate interviewees within your organisation, we would suggest that the most suitable individuals would be those involved in the negotiation of the commitments with the Commission, from the viewpoints of both the legal and commercial aspects, respectively; someone who was responsible for managing the hold-separate organisation of the divested **[assets] [business]** pending divestiture, the lead person or persons responsible for managing the sale of the divested assets **[and/or the granting of intellectual property rights]** and **[other access rights]**, as well as someone dealing with the monitoring and/or divestiture trustee.

To assist you in your search, we briefly note the general areas of interest that we intend to cover in our interview:

- a description of how the remedy process worked, including any particularly successful and/or difficult aspects of the procedure both in terms negotiation of the commitments and their implementation;
- a description of the process of identifying an acceptable purchaser and obtaining the Commission’s approval of the purchaser;
- a general assessment of the adequacy of the remedy provisions and terms contained in the Commission decision; and
- a general assessment of the impact of the remedy on competition; and
- any suggestions for improving the process.

After you have identified the relevant individuals, would you kindly inform us of their names and all necessary contact information, including phone and fax numbers, and email address, at your earliest convenience so that we can agree to a date for the interview as soon as possible.

[For third parties:]

In order for you to identify the appropriate interviewees within your organisation, we would suggest that the most suitable individuals would be those who are responsible for operations that deal with the parties involved in this matter, including those who may have experienced any changes in your company’s operations as a result of the implementation of the remedies in this case.

To assist you in your search, we briefly note the general areas of interest that we intend to cover in our interview:

- a description of how the remedy process worked;
- a general assessment of the adequacy of the remedy provisions and terms contained in the Commission decision;
- a general assessment of the impact of the remedy on competition; and
- any suggestions for improving the process.

After you have identified the relevant individuals, would you kindly inform us of their names and all necessary contact information, including phone and fax numbers, and email address, at your earliest convenience so that we can agree to a date for the interview as soon as possible.

[Conclusion for all]

We will be contacting you shortly to agree to a date for conducting our interview. In the meantime, if you have any questions regarding any of the above, please feel free to contact **[Insert: Names, Telephones, and E-mails of Interview Team]**, the interview team in this case.

We look forward to co-operating with your company in this study, and we thank you in advance for your consideration in this matter.

Yours sincerely,

Götz Drauz

c.c.: Wolfgang Mederer – Head of the Enforcement Unit – Merger Task Force
Alex Kopke – Project Leader Remedies Study – Merger Task Force

E. Annex 5: Sample interview questionnaires (by type of interviewee)

This Annex contains the model interview questionnaire used by the various interview teams to carry out the interviews. Where an issue was interesting, interview teams would follow-up with further and more detailed questions. On the other hand, not all issues were relevant in the context of the specific case or remedy.

As a rule, these questionnaires were not revealed to the interviewees before the interview, except in a few instances where the interview candidates insisted to see areas to be discussed. In this case, an abbreviated form was sent before the interview.

The model questionnaires contain brief explanations [*in brackets and italics*] at the start of each major section to recall the thrust of the questions to the interview team. In addition, at the end of each major section the model questionnaires contain framed boxes with control questions addressed exclusively to the Study team.

This Annex consists of three parts:

(1) Interview questions to purchasers, p. 181

(2) Interview questions to the parties or sellers, p. 192

(3) Interview questions to trustees, p. 202

1) Interview questions to purchasers

Introduction

1. Presentation of the interview team members
2. Objectives of Merger Remedies Study: study of remedy cases to improve competition analysis, the design of merger remedies, the role of trustees, and improve related procedures
3. Position of the interviewee: Name, function, and responsibility now and at the time of the transaction
4. Recall the rationale of the Commission decision and the need for the undertaking (merger, JV or other; type of control; competition concern etc.)

Scope of the divested business/ the remedy

[Some questions should be adapted according to the nature of the remedy (e.g. licenses). The scope of the divested business/ the remedy should be investigated in every case: Did the Commission decision and the commitment text correctly identify all relevant assets (including shared assets) and seller's obligations? Did the business/the commitment contain all elements that were necessary for the business to be viable/the remedy to be working? How well did the Commission in this case strike a balance between the desire of parties to restrict the scope of divested assets and the need for a viable and effective remedy to the competition problem?]

A. Description of the remedy

5. Clarify with interviewee the type of remedy/ the description of assets to be divested and any ancillary commitments (see sample list in following box):

Scope of remedies (sample list/terminology)

- ❑ Divestiture of stand-alone business, or assets (mix & match?)
- ❑ Assignment/license of IP rights?
- ❑ Access to assets, or other remedies?
- ❑ Divestiture of controlling stake?
- ❑ Divestiture of minority stake?
- ❑ Transfer of personnel? Technical assistance? Supply agreements?
- ❑ If IP rights: 1) assignment/transfer, 2) exclusive or non-exclusive license, 3) license-back provision

Ancillary Commitments (sample list/terminology)

- ❑ Non-solicitation clause?
- ❑ Non-compete clause?
- ❑ Preservation of viability, marketability and competitiveness
- ❑ Hold-separate clauses?
- ❑ Ring-fencing obligations (info-exchange)?

B. Was the commitments package complete and appropriate?

6. Did the commitments text include all assets required for the divested business to be a stand alone business?
7. If not, what was missing? How were the missing assets supplemented?
8. Was there any dispute with the parties about the scope of the remedies?
9. Was there a need for more detailed interpretations of the commitments? If so, did you have to invoke the text and/or purpose of the commitments?
10. Were any assets offered to you by the seller in addition to those specified in the commitments text? Did you request any assets to be removed from the divestiture package? In both cases, please give reasons why?
11. Did you have to rely on own assets or third parties to complete the package/ the business?
12. Do you think the divested business was one which the seller wanted to dispose of anyway in the short to medium term?
13. If you acquired a license, Trade Mark(s) or other IP right(s): Were they sufficient to operate in the market? What other assets were necessary to be competitive in the market?
14. Personnel: Were they crucial assets?
15. Did the key people transfer?
16. Were incentive schemes involved? If so, please describe.
17. What happened to motivation and loyalties of the personnel during and after the transaction?

C. Overall assessment regarding the scope of remedies

18. Was a different package (assets, licenses, personnel, business, other obligations or other terms) necessary to achieve the objective of preserving effective competition?

Analysis by interview team to feed into the issues paper

- ❑ Did the business contain all assets & personnel to make it viable?
- ❑ Were the assets defined in sufficient detail in commitment text?
- ❑ Were the assets sufficient to remedy the competition concern?

- Were the competition concerns correctly identified in the first place?

The divestiture process

[Issue: Did we in this case ensure that the buyer received timely information regarding the scope of the commitments without undermining the parties' margin for negotiation in a forced sale scenario? Should buyers have "rights" and parties have "duties"? What was and what should be the role of the trustee vis-à-vis the buyers? What was and what should be the relationship of the Commission with the buyer?]

A. Access to the commitments

19. How did you become aware of the sale of the assets/ the remedy? (through the parties, through the newspapers, through the Commission's press release etc.)
20. Did you obtain the commitment text? If so, how and when did you obtain it?
21. Was the commitment text a public version with no business secrets or the confidential version or something in between?
22. Should the Commission create more transparency regarding the precise text of the commitments? If so, how might this be done?

B. The sales and selection process

23. Please describe the sales process. Was it a negotiated transaction, a tender offer or auction, an IPO, LBO, MBO or other process?
24. Were you aware of the existence and/or identity of any other candidate buyers?
25. Why do you think you were selected?
26. Did you feel you were given sufficient information in respect of the business to be divested?
27. If not, please describe how your access to information could have been improved? How important would that have been for you?
28. Did you feel under undue time pressure to conclude the deal or agree to terms you would not have otherwise agreed to?
29. Please describe how any procedure-related factors might have had an impact on the purchase price or other terms (if any).
30. Result: Were you satisfied with the terms of the sale and purchase agreement/lease etc.?

C. The purchase price – the financing of the acquisition

31. What was your valuation of the business?
32. What was the basis for that valuation?
33. Was it by reference to earlier or comparable transactions and companies in the sector/country?
34. Did you carry out a discounted cash flow valuation of Net Present Value? Any other method?
35. What price did you pay for the divested business? Did this reflect the true value of the business? If not, why not?
36. What were the turnover and margins of the acquired business?
37. How did you finance this acquisition (own cash, debt, new equity)?

D. Transfer of the business

38. When did the transfer of business/assets actually occur?
39. Did you receive everything you were entitled to under the commitments/sale and purchase agreement, *e.g.* also technical assistance, supply agreement, all assets?
40. In a timely fashion?
41. In an acceptable form?

E. Conclusion

42. Did you encounter any other difficulties that we should be aware of?
43. How do you think such difficulties could be avoided in the design of future remedies?
44. What would you do different next time in a similar transaction?
45. Would you have needed or could have made good use of any extra help by anybody, *e.g.* the monitoring trustee (see extra section below)?
46. In what way could the seller's behaviour have been different towards you ? In so, in what way?

Analysis by interview team

- Did the buyer receive all information he needed to evaluate the business and negotiate?
- Did the buyer feel under undue time pressure or in a weak bargaining position?
- Did the transfer of the business take place satisfactorily for the buyer?
- Were the commitment provisions and the overall arrangements sufficiently flexible to allow to adapt the bundle of assets to the actual needs of the purchaser?
- Did the buyer feel the divestiture process could be improved? In what way?

Hold-separate arrangements

[Issue: How do we deal with the inherent conflict in the obligation to hold-separate the divested business and the need for access to information for the divestiture process? What if business belongs to acquirer, what if it belongs to the target? As from which date?) Should hold separate be carried out? How crucial are hold-separate managers? What's the role of the trustee in the hold-separate?]

47. Were you aware of the hold-separate obligations of the parties and the formulations in the commitment text?
48. How important was the hold-separate in your view in this transaction? Was it necessary at all?
49. Was there a hold-separate manager employed in the divested business?
50. What is your impression of the hold-separate manager, if any? Do you think it was necessary to have this function carried out? Do you think the right person was chosen for the job?
51. Please share your view of how well the seller did for the preservation of viability, marketability and competitiveness of the business to be divested [*check the concrete wording on these beforehand in the commitments*].
52. What are crucial elements for the preservation of competitiveness in this business?

53. Had the seller done anything specific to reduce/maintain the value of transferred assets?
54. Did he carry out necessary investments in the ordinary course of business? Were there any extraordinary items?
55. Do you think the personnel of the divested business was sufficiently separated from the merging parties (ring-fenced) and did not pass on key commercial information to them?

Analysis by interview team

- Was in the view of the buyer the hold-separate obligation necessary?
- Did the buyer think it was carried out sufficiently well? How about the ring fencing of personnel?
- Did the hold-separate hinder the flow of necessary information to the buyer?
- What contact did the buyer have with the hold-separate manager or the trustee?

Monitoring trustee

[Issue: What perception did the buyer have of the trustee and the role of the trustee? What should be the Commission's role vis-à-vis the trustee?]

56. Was there a Monitoring Trustee appointed to oversee the divestiture process?
57. If so, did you know who it was?
58. How and when did you find out?
59. Did you have any contact with the monitoring trustee?
60. How would you assess its performance?
61. Is there anything the Commission, or the Monitoring Trustee (if any), should have done before, during or after the divestiture/the transfer of assets?
62. What else could be improved in the future set-up of the monitoring trustee?

Analysis by interview team

- Was the buyer aware of the monitoring trustee?
- How would the buyer characterise the monitoring trustee?
- Was the trustee useful?
- Does the buyer need more trustee support?
- Did the Commission approve the most appropriate individual as trustee that had all crucial skills (*e.g.* sector experience)
- Did the trustee correctly understand its function to work for the Commission?

Suitability of the purchaser and evaluation of the divested business' performance

[Issue: Can we identify specific purchaser issues for certain types of purchasers or sales structures, such as: MBOs/financial investors, IPOs/fragmented ownership, industrial buyers, new entrants]

A. Purchaser's presence in market

63. We would like to understand the overall circumstances of your decision to acquire the business / the assets. We asked you already (see above section) for the reasons and would now like to follow up with some more details. [*Cite reasons*].
64. Were you selling in the same or neighbouring markets before acquiring the divested business?
65. Have you ever operated similar assets or run a similar business prior to the acquisition?
66. If so, was this sufficient to have the necessary expertise and knowledge to run the divested business?
67. If not, how did you manage to acquire this expertise and knowledge?

B. Business plan

68. Did you draw up a business plan before acquiring the divested business (or just after)?
69. Did you submit it to the Commission/ the monitoring trustee during the purchaser approval process? If not submitted to Commission, could we see it (email follow-up)?
70. With hindsight, would you now draw it differently?
71. Which elements would you modify and how?

C. Integration of business/ assets

72. How did you integrate the divested business into your existing operations (depending on type of remedy: structural change, mix & match, combination)?
73. What changes to your management structure did you make to integrate the divested business?
74. Which incentives did you give managers of that business and managers higher in your organisation to run it profitably?
75. How quickly were you able to be active in the market of the divested business?
    - ❑ Immediately, with existing customers
    - ❑ If you had to take other steps, what were they?
    - ❑ How long did it take you to be fully active if not immediately?

D. Operation of the business: Current position

76. Are you still in the market today?
77. If yes, do you think that the business is worth more or less than the acquisition price?
78. If not, why not and what happened to the assets?
79. Business or assets are scrapped/ idle/ resold?
80. If resold, to whom, when and at what price?
81. If scrapped/ idle/ resold, would you see any possible competition aspects in that? Why not?

E. Operation of the business: Evolution since the acquisition

82. Based on what you know post-acquisition, was the business a viable and profitable entity when you acquired it?
83. How did the business evolve since you acquired it?
84. Evolution of market shares
85. Please describe the price evolution since the acquisition?
86. Were there any unexpected events that took place in the market since you acquired the assets? Market changes/shocks from time of acquisition until the present?
87. We suggest sending you after our interview follow-up questions on the business at the time of acquisition and its subsequent evolution (*see draft follow-up letter*).

F. Independence from seller

88. Is the seller still active in the same product or geographic market?
89. Do you compete with the seller? How would you characterise this competition?
90. Did you have a continuing relationship with the seller either before or after the transfer? What was this? Are such relationships normal in the sector concerned?
91. Any supply agreement, financing relationships, any other arrangements?
92. Who is your contact person (department) at the seller's business?

G. Acquirer's Assessment of Divestiture/Purchase

[Many of the following questions also serve to double-check the information so far. Repetition is thus useful and may bring out additional elements]

Let us wrap up on these business questions on the operation of the business / the assets.

93. What is your assessment of the future prospect for the business?
94. Overall, did you meet your expectations you had at the time you closed the deal?
95. Would you do it again?
96. What was the biggest challenge overall in the operation?
97. What would you do differently?
98. Is there anything else the Commission could have done for you before, during or after the divestiture of the business assets?
99. Is there anything else the trustee or the hold-separate manager or anybody else could have done for you before, during or after the divestiture of the business assets?

Analysis by interview team

- On what criteria was the purchaser selected and has this resulted in the optimal choice from the point of view of an effective remedy?
- What type of purchaser was it (MBOs/financial investors, IPOs/fragmented ownership, industrial buyers, new entrants)?
- Was the purchaser present in market before?
- Did he have a valid business plan at the time of making an offer / at acquisition?
- Did the purchaser integrate the assets easily? Why not?
- Is the purchaser still present in the market?
- How did the business / the assets evolve since acquisition (positively, negatively)?

- Was part of this change unavoidable due to changes in market circumstances?
- Is the purchaser completely independent from the seller and actively competing?
- Conclusion: Was the purchaser suitable? [judging from the buyer interview]
- What conclusions regarding "suitability" of this type of purchaser can be drawn, if any, from this case?
- What general conclusions regarding "suitability" of purchasers can be drawn, if any, from this case?
- Anything the Commission could have done different/ better?
- Did the buyer get it right in its economic assessment of the business to be divested?
- Does the Commission retain sufficient control to determine the identity of the buyer (also one year after?)

Effectiveness of the remedy

[Issue: Was this remedy effective? Were all serious implementation issues resolved? Can we draw up general guidelines regarding what constitutes an effective remedy?]

We are trying to assess the effectiveness of the remedy. For that we look at the remedy from different perspectives, and would also to like to collect your views.

100. Were you able to capture the same sales volume and same market shares as the seller with the assets?
101. Were you able "to recreate a competitive force" in the market?
102. In your view: Did the remedy remove the competition concern (as explained in the introduction, above, question 2, page 181) it was addressed to?
103. How would you measure effectiveness? [to be explored in particular in non-divestiture cases]

Analysis by interview team

- Did the type of remedy (divestiture, license, access, etc.) constitute an effective remedy? Or would another remedy probably have better solved the problem or in a less interventionist way?
- How would the buyer measure effectiveness?
- Was this remedy effective in his view?
- Can licenses (in particular non-exclusive licenses) solve structural competition problems?
- What could the Commission have done better to identify and assess crucial IPRs?
- How did the Commission's decision assess the remedy's effectiveness?
- What does this case tell us about how to measure and/or assess effectiveness?

Necessity of the remedy and proportionality

[Issue: Proportionality of the remedy distinguishing 1st phase and 2nd phase remedies, seller's versus buyer's perspective, fast moving versus slow moving industries, unforeseen subsequent changes in circumstances. How well did the Commission strike a balance between the need to design a viable business and the need to limit the scope of the remedy to what is strictly necessary to restore effective competition]

104. Would an alternative remedy have resolved the problem perhaps just as well? Any views on that?
105. Did this seem like a proportional remedy to you? Was it necessary?
106. How would you measure proportionality?

Analysis by interview team

- Did the purchaser consider the remedy proportional?
- Was this remedy necessary in the buyers view?
- How would the buyer measure necessity?
- Was the remedy proportional considering the context, such as 1st phase and 2nd phase, fast moving versus slow moving industries, unforeseen subsequent changes in circumstances, etc.?
- What does this case tell us about how to measure necessity / proportionality?

EU versus US remedy practice [for some remedies]

[This issues applies only regarding remedies decided by the Commission and by the US agencies: Issue: Points of convergence / divergence in this case as concerns: substance (e.g. impact of different substantive test), negotiation of the remedy (e.g. level of information to assess remedy), procedure (e.g. level of transparency in implementation), powers to secure compliance, respective role of US trustee versus EU trustee]

107. Do you see any points of convergence / divergence in this case as concerns:
    - substance (*e.g.* impact of different substantive test),
    - negotiation of the remedy (*e.g.* level of information to assess remedy),
    - procedure (*e.g.* level of transparency in implementation),
    - powers to secure compliance,
    - respective role of US trustee versus EU trustee

Analysis by interview team

- Any information on convergence / divergence?
- Any conclusions for the Commission's practice?

Annex: Follow-up questions [extra letter]

Please describe the divestiture business at the time you acquired it.

108. What were the products (types and quality)?
109. Description of the cost structure (R&D, manufacturing, distribution, etc).
110. What was the full production capacity level of the divested business (measured by sales)?
111. How did average variable costs change as capacity was approached?
112. Description of the main customers.
113. How price-sensitive were the customers?
114. What were the sales volumes to the customers?
115. In which geographic markets were you selling products?
116. Please describe the main competitors and the competing goods (or services).
117. Please describe your competitors' prices and costs levels.
118. Was the operation profitable when you acquired it?
119. Please provide an estimate of the profitability of the similar businesses of your competitors and compare with your own at that time.

How did the business evolve since you acquired it?

120. Evolution of sales.
121. Has capacity changed since acquisition? If so, when and by how much?
122. If any estimates of potential synergies with your existing businesses were made prior to buying the divested business, please provide estimates together with an explanation of how they were expected to arise (separate the figures for each source of synergy if possible). Were these synergies expected to affect average variable costs or overheads?
123. To what extent have these synergies been achieved?
124. Evolution of prices.
125. Evolution of costs.
126. Did you achieve the cost levels you had planned?
127. Evolution of profits (operating profits, EBITDA)
128. Evolution of market shares
129. Please list your annual sales for the various products/services from the time of acquisition until the present (or until exit form the market)
130. Please provide estimates of your competitors' sales (and estimates of their market shares) for the same period
131. Please describe the price evolution since the acquisition in quantitative terms.
132. How have competitors operating profits evolved in the same line of business?
133. Which competitors have entered or exited the market? How/Why?
134. Were there changes in market conditions [that explain this evolution]? Please quantify the effects of the market changes/shocks if possible. Also, be clear if they are firm specific or industry wide.
135. Were there changes in the "relevant" products: small or major?

136. Changes in customers?

137. Changes in your strategy: R&D, product positioning, supply, marketing, any other area?

138. Changes in your competitors' strategy

139. Was there new technology or other innovations not already mentioned?

140. Were there any unexpected events that took place in the market since you acquired the assets? Market changes/shocks from time of acquisition until the present?

141. New regulations or other effects on ability to enter and operate the business.

Product substitutability

142. Suppose all the prices of the acquired business were to increase by 10% tomorrow, while your competitors' prices remain the same.

1. What percentage of their value of sales would the acquired business lose?
2. What share of this would you expect to be picked up: i) by other businesses in your own group; and ii) by the previous owner's businesses? (Consider a 12 month time horizon)

2) Interview questions to the parties or sellers

Introduction

0. Presentation of the interview team members
1. Objectives of Merger Remedies Study: study of remedy cases to improve competition analysis, the design of merger remedies, the role of trustees, and improve related procedures
2. Position of the interviewee: Name, function, and responsibility now and at the time of the transaction
3. Rationale for the Commission's decision and need for the undertaking (merger, JV or other; type of control; competition concern etc.)

Scope of the divested business/ of remedy

[This issue should be investigated in every case: How well did the Commission in this case strike a balance between the desire of parties to restrict the scope of divested assets and the need for a viable and effective remedy to the competition problem? Were all relevant assets (including shared assets) correctly identified? Was the commitment text helpful for that purpose?]

A. Description of remedy

4. Clarify with interviewee the type of remedy / the description of assets to be divested and any ancillary commitments (see sample list):

Scope of Divested Business (sample list/terminology)

- ❑ Divestiture of stand-alone business, or assets (mix & match?)
- ❑ Assignment/license of IP rights?
- ❑ Access to assets, or other remedies?
- ❑ Divestiture of controlling stake?
- ❑ Divestiture of minority stake?
- ❑ Transfer of personnel? Technical assistance? Supply agreements?
- ❑ If IP rights: 1) assignment/transfer, 2) exclusive or non-exclusive license, 3) license-back provision

Ancillary Commitments (sample list/terminology)

- ❑ Non-solicitation clause?
- ❑ Non-compete clause?
- ❑ Preservation of viability, marketability and competitiveness
- ❑ Hold-separate clauses?
- ❑ Ring-fencing obligations (info-exchange)?

5. Personnel: Were they crucial assets? Did all people transfer? Did the key people transfer? Were incentive schemes involved? If so, what?

6. What happened to motivation and loyalties of the personnel during and after the transaction? Examples?

B. Offering the remedy

7. Please describe the business rationale for the merger.
8. How central to the deal was the divested business?
9. What percentage of turnover did it represent?
10. What impact did the remedies have on the expected synergies/cost savings of the retained businesses?
11. Did you expect to have to propose the remedies?
12. Why did you offer the divested business rather than something else?
13. Was it a business you wanted to dispose of anyway? If so, in the short or in the medium run?
14. Did you sell the divested business with a profit? Was the price in your view appropriate?
15. Please describe the process of negotiation of the remedy with the Commission?
16. What input did you receive from the Commission regarding what the remedy should look like?
17. Did the Commission give you enough feedback so that you knew all the elements to define an appropriate remedy or would you have wished more exchange of information?
18. Was the remedy market tested? If not, do you know why not? If yes, please describe your experience of that process? Were you able to comment on third parties' comments?
19. What improvements or modifications were introduced to the commitments offered following their submission? Were these significant or insignificant?
20. Why were the changes deemed necessary? Why were they not included in the original text?
21. In terms of procedure, what would you do differently today if you had to do it again, if anything? Any other assets; Transfer of personnel; transfer of customer lists; Supply agreements; Non-compete clause; Hold-separate clause, hold-separate manager, ring-fencing; Non-buy-back clause; Monitoring Trustee;

C. Was it a stand-alone business?

22. Did the commitments text include all assets required for the divested business to be a stand alone business?
23. If not, why was this remedy anyhow sufficient to eliminate the Commission's competition concerns?
24. Did you have to offer to the buyer additional assets that were not specified in the commitment text? Did the buyer request you to remove certain assets from the divestiture package? In each case, please explain why?
25. Did the buyer have to rely on own assets or buy assets from somebody else to complement the package and make it a viable business?
26. Please describe how the business/assets operated prior to the commitments (business strategy, supply, flow chart, etc) (if possible).
27. Was the business profitable, well run?

D. Overall assessment

28. Would you have preferred to sell a different package (assets, licenses, personnel, business)?

29. Could you have offered a more appropriate package/business?
30. Might a different package also have been more appropriate for achieving our competition objective of preserving effective competition?
31. Was there any need for more detailed interpretations of the terms of the commitments or any dispute with the purchaser about the scope of the commitments?
32. With hindsight: What elements of the commitment text (or what secondary provision) did you find unnecessary for the achievement of that market result?

Analysis by interview team

- Was it a viable business according to the seller?
- Was the business/the remedy defined in sufficient detail in the commitment text?
- Was the remedy sufficient to remedy the competition concern?
- Were the competition concerns correctly identified in the first place?

The divestiture process

[Issue: Did we in this case ensure that the buyer received timely information regarding the scope of the commitments without undermining the parties' margin for negotiation in a forced sale scenario? Should buyers have "rights" and parties have "duties"? What was and what should be the role of the trustee vis-à-vis the buyers? What was and what should be the relationship of the Commission with the buyer?]

A. The sale and selection process

33. Please describe the sales process.
34. Was it a negotiated transaction?
35. Was it a tender offer or auction? Between how many candidate buyers did you finally chose?
36. Was it an IPO, LBO, MBO or other process?
37. Who conducted the search for a buyer? How was that done?
38. Did you receive more than one offer/indication of interest for the business to be divested?
39. Did you select the buyer on the basis of the criteria of the highest price or on the basis of other criteria? If so, which ones (pre-existing relationship with the buyer, assessment of his competitive strengths, etc)?
40. Did you encounter any difficulties stemming from the decision/commitment text?
41. Was there ever a discussion on reviewing the commitments within your company, *e.g.* to ask for an extension of deadlines, a modification or even a waiver?
42. What was the biggest challenge to fulfil the commitment in time? Did you feel under time pressure to conclude the deal [*e.g.* from a fire sale provision, where appropriate]?
43. [Where applicable: How did the fire-sale provision impact on the way you went about the divestiture?]
44. Did you feel you had sufficient margin for negotiating the terms of the deal? If not, why?
45. How did you experience your relationship with the monitoring trustee?

46. Did you consider that he intervened excessively in your operations in light of his responsibilities towards the Commission?
47. How would you assess the reporting requirement towards the Commission or towards the monitoring trustee?
48. Did the reporting contain only relevant information?
49. Do you consider that it was excessive in terms of quantity and/or frequency?
50. Was there any follow-up by the Commission on the reports submitted?
51. Result: Were you satisfied with the terms of the sales and purchase agreement/lease etc.?

B. The sales price

52. What was your valuation of the business? What was the basis for that valuation?
53. Did you carry out a discounted cash flow valuation of Net Present Value? Any other method?
54. What price was paid for the divested business?

C. Other issues

55. Did you encounter any other challenges in selling the business?
56. How do you think such challenges could be avoided in the design of future merger remedies?

D. Transfer of the business

57. When did the transfer of business/assets actually occur?
58. Did you experience any difficulties in providing the purchaser with everything he/she was entitled to under the commitments
59. What about under the sale and purchase agreement, *e.g.* technical assistance, supply agreement, all assets?
60. In a timely fashion?
61. In an acceptable form?
62. Were there any post-**Closing** matters that needed to be referred to the Commission or to any other adjudication *e.g.* by the courts, Trustee, arbitration etc?

E. Conclusion

63. What would you do different next time in a similar transaction?
64. Would you have needed or could have made good use of any extra help by anybody, *e.g.* the monitoring trustee (see extra section below)?
65. In what way could the buyer's behaviour have been more helpful towards you? If so, in what way?

Analysis by interview team

- Did the buyer receive all information he needed to buy a viable business?
- Did the threat of a forced sales scenario unduly influence the seller's bargaining position or their ability to sell to an appropriate buyer?
- Did any competitive bidding scenario unduly affect the buyer's bargaining position or their ability to negotiate the purchase?
- Were the commitment provisions and the overall arrangements sufficiently flexible to allow to adapt the bundle of assets to the actual needs of the purchaser?

- ❑ Are there any indications that the seller withheld crucial information before, during or after the sale?
- ❑ Should the Commission have monitored or even intervened more in the process?
- ❑ Did the monitoring trustee play any crucial role in the sales process?
- ❑ Did the seller make any suggestions of how to improve the process, *e.g.* through formulating better commitments?

Hold-separate arrangements

[Issue: How do we deal with the inherent conflict in the obligation to hold-separate the divested business and the need for access to information for the divestitureprocess? What if business belongs to acquirer, what if it belongs to the target? As from when should hold separate be carried out? How crucial are hold-separate managers? What's the role of the trustee in the hold-separate?]

66. Were there specific hold-separate obligations in the commitment text?
67. How did you make sure viability, marketability and competitiveness of the assets to be divested were preserved during the sales process?
68. Did you have to take any special measures?
69. What were these special measures?
70. Did you encounter any adverse market conditions that led to a degradation of the assets between the moment when remedies where first discussed with the Commission and the transfer of the assets?
71. How can one deal with the inherent conflict between hold-separate and the selling of the business/assets from the point of view of the seller?
72. How important was the hold-separate in your view in this transaction? Was it necessary at all?
73. Did you carry out the necessary investments in the ordinary course of business? Were there any extraordinary items
74. How did you ensure that the personnel of the divested business was sufficiently ring-fenced and did not pass on information to the remaining business or vice versa?
75. Was there a hold-separate manager employed in the divested business?
76. What is your impression of the hold-separate manager, if any? Do you think it was necessary to have this function carried out? Do you think the right person was chosen for the job?
77. Did you encounter difficulties at any moment to provide certain information to the purchaser because of the hold-separate obligations in the commitments?
78. Do you think that a longer hold-separate period could have done any harm to the business/ the assets to be divested, *e.g.* because of lack of continuous investment or because business secrets were being passed on?

Analysis by interview team

- ❑ Was in the view of the seller the hold-separate obligation necessary?

- Did the seller report any challenges on the hold-separate or the ring fencing of personnel?
- Did the hold-separate hinder the flow of necessary information to the buyer?
- How did the seller manage the hold-separate manager and the trustee?

Monitoring trustee

[Issue: What role did the trustee agree with the parties and perform? What should be the Commission's role vis-à-vis the trustee?]

79. Was there a monitoring trustee appointed to oversee the divestiture process?
80. If so, who was it?
81. How did you select your monitoring trustee?
82. How would you assess its experience, resources, independence and eventual performance?
83. How would you characterise its working style?
84. Is there anything the Commission, or the Monitoring Trustee (if any), could have done better before, during or after the divestiture/the transfer of assets?
85. What else could be improved in the future set-up of the monitoring trustee?

Analysis by interview team

- How would the seller characterise the monitoring trustee?
- Was the trustee helpful in any sense and necessary?
- Did the Commission approve the most appropriate individual as trustee that had all crucial skills (*e.g.* sector experience)
- Did the trustee correctly understand its function to work for the Commission?

Suitable purchaser

[Issue: Can we identify specific purchaser issues for certain types of purchasers or sales structures, such as: MBOs/financial investors, IPOs/fragmented ownership, industrial buyers, new entrants]

A. Selection process

86. Between how many candidate buyers did you finally chose?
87. Why did you select the purchaser you selected?
88. What is your experience of the Commission's purchaser approval process?
89. What contacts did you have with the purchaser during the approval process?
90. Were you required to supply any information? If so, what information?

B. Operation of the business by the purchaser

91. Is the buyer still in the market today?

92. If scrapped/ idle/ resold, would you see any possible competition aspects in that? Why not?
93. Is the purchaser a strong competitor?

C. Independence of seller and purchaser

[This question is relevant on the one hand to appreciate the importance of the hold-separate obligations and on the other hand to better understand the market of the divested business and is thus also interesting in the appreciation of the effectiveness of the remedy.]

94. Were assets retained to produce products that were similar to those manufactured by the divested business?
95. Are you still in the market today? Or in similar or neighbouring markets?
96. If so: Description of markets where you are still active, in terms of products and customers.
97. Did the divestiture have any effect on your "retained" business?
98. Has the business been profitable in your hands?
99. Were there any unexpected events that took place in the market since you sold the assets? Market changes/shocks from time of sale until the present?
100. If you went out of business: What happened? Scrapped/idle/resold? If resold, to whom, when and for what price?
101. Do you compete with the purchaser? How would you characterise this competition?
102. Did you have a continuing relationship with the purchaser either before or after the transfer? Are these relationships common in the sector? To what extent?
103. Any supply agreement, financing relationships, any other arrangements?
104. Who is your contact person (department) at the purchaser's business?
105. Do you consider that overall the purchaser was given a good start with the business/the assets?
106. Is there anything else the Commission could have done for you before, during or after the divestiture of the business assets?

Analysis by interview team

- What is the seller's appreciation of the purchaser?
- Is the seller still in the same business?
- Are there any issues of independence between the seller and the buyer?
- Is the purchaser completely independent from the seller and actively competing?
- What conclusions regarding "suitability" of this type of purchaser can be drawn, if any, from this case?
- What general conclusions regarding "suitability" of purchasers can be drawn, if any, from this case?
- Anything the Commission could have done different/ better for the seller?
- Did the buyer get it right in its economic assessment of the business to be divested?

Effectiveness of the remedy

[Issue: Was this remedy effective? Were all serious implementation issues resolved? Can we draw up general guidelines regarding what constitutes an effective remedy?]

107. Did the remedy remove the competition problem it was designed to prevent?
108. Did it create a viable competitor in the market? (did the market shares move?)
109. With hindsight: Would there in your view have been a better possibility/remedy to achieve the same (competitive result) in the market?
110. Would you have offered a remedy in 1st phase or proceeded to 2nd phase?
111. Would have offered a remedy prior to SO or waited for SO in 2nd phase?
112. Do you feel that the buyer was given a good start to enter the market?
113. How would you assess the way the buyer has taken over and run the divested business?
114. Did the buyer do anything wrong or less than optimal to operate the assets successfully in the market?
115. How would you measure effectiveness? [*to be explored in particular in non-divestiture cases*]

Analysis by interview team

- Did the type of remedy (divestiture, license, access, etc.) constitute an effective remedy? Or would another remedy probably have better solved the problem or in a less interventionist way?
- Does the seller have a view on effectiveness of a remedy?
- Can licenses (in particular non-exclusive licenses) solve structural competition problems?
- What could the Commission have done better to identify and assess crucial IPRs?
- Was this remedy effective in his view? Can he back up his arguments by facts?
- How did the Commission's decision assess the effectiveness of the remedy?
- How would the seller measure effectiveness?
- What does this case tell us about how to measure and/or assess effectiveness?

Necessity of the remedy and proportionality

[Issue: Proportionality of the remedy distinguishing 1st phase and 2nd phase remedies, seller's versus buyer's perspective, fast moving versus slow moving industries, unforeseen subsequent changes in circumstances]

116. Would an alternative remedy have resolved the problem perhaps just as well? Any views on that?
117. Did this seem like a proportional remedy to the seller?
118. Would in the opinion of the seller the purchaser have had more success on the market with a bigger or smaller package?
119. How would you measure proportionality?

Analysis by interview team

- ❑ Did the seller consider the remedy proportional?
- ❑ Was this remedy necessary in the seller's view?
- ❑ How would the seller measure necessity?
- ❑ Was the remedy proportional considering the context, such as 1st phase and 2nd phase, fast moving versus slow moving industries, unforeseen subsequent changes in circumstances, etc.?
- ❑ What does this case tell us about how to measure necessity/proportionality?

EU versus US remedy practice [for some remedies only]

[Issue: Points of convergence / divergence in this case as concerns: substance (e.g. impact of different substantive test), negotiation of the remedy (e.g. level of information to assess remedy), procedure (e.g. level of transparency in implementation), powers to secure compliance, respective role of US trustee versus EU trustee]

120. Please provide your views on any points of convergence / divergence in this case as concerns:
    - substance (*e.g.* impact of different substantive test),
    - negotiation of the remedy (*e.g.* level of information to assess remedy),
    - procedure (*e.g.* level of transparency in implementation),
    - powers to secure compliance,
    - respective role of US trustee versus EU trustee

Analysis by interview team

- ❑ Any information on convergence / divergence?
- ❑ Any conclusions for the Commission's practice?

Annex: Follow-up questions [extra letter]

A. Divested businesses pre-merger

121. What were the profit margins of the divested business before divestiture?
122. What were the sales and market share of the divested business pre-merger?
123. What was the full production capacity level of the divested business (measured by sales)?
124. How did average variable costs change as capacity was approached?

B. Retained business

125. Please provide your annual sales for the various products/services from the time of acquisition until the present (or until exit)
126. Please describe the price evolutions since the acquisition.
127. How did costs evolve since then?

C. Synergies

128. If any estimates of potential synergies were made prior to the original merger proposal, please provide estimates together with an explanation of how they were expected to arise (separate the figures for each source of synergy if possible). Were these synergies expected to affect average variable costs or overheads?
129. How much should these estimates be changed as a result of the required remedy?
130. To what extent have these remaining synergies been achieved?

D. Competitors

131. Please provide estimates of your competitors' sales (and estimates of market shares) for the same period
132. How have competitors operating profits evolved in the same line of business?
133. Which competitors have entered or exited the market? How/Why?

E. Market evolution

134. Change in products: small or major?
135. Changes in customers?
136. Changes in your strategy: R&D, product positioning, supply, marketing, any other area?
137. Changes in your competitors' strategy
138. New technology or other innovations not already mentioned?
139. New regulations or other effects on ability to enter and operate the business.

F. Product substitutability

140. Suppose all the prices of the divested business were to increase by 10% tomorrow, while your prices and those of all other competitors remained the same.
    1. What percentage of their value of sales would the divested business lose?
    2. What share of this would you expect your own businesses to be able to capture? (Consider a 12 month time horizon)
141. Next, cast your mind back to the period immediately before the merger (and divestiture). Suppose all the prices of the (soon to be) divested business had been increased by 10%, while your other prices and those of all other competitors remained the same.
    3. What percentage of the value of sales of the (soon to be) divested business would have been lost?
    4. What share of this would you have expected to be picked up: i) by other businesses in your own group; and ii) by the new owner's pre-acquisition businesses? (Consider a 12 month time horizon)

3) Interview questions to trustees

Introduction

0. Presentation of interview team members
1. Objectives of Merger Remedies Study: study of remedy cases to improve competition analysis, the design of merger remedies, the role of trustees, and improve related procedures
2. Position of the interviewee: Name, function, and responsibility now and at the time of the transaction
3. Rationale for the Commission's decision and need for the undertaking (JV or other; type of control; competition concern etc.)

Scope of the divested business/ of remedy

[This issue should be investigated in every case: How well did the Commission in this case strike a balance between the desire of parties to restrict the scope of divested assets and the need for a viable and effective remedy to the competition problem? Were all relevant assets (including shared assets) correctly identified? Was the commitment text helpful for that purpose?]

4. Clarify with interviewee the type of remedy / the description of assets to be divested and any ancillary commitments
5. Did the seller add or remove assets to the divested business in order to make it more attractive to potential purchasers?
6. Personnel: Were they crucial assets? Did all people transfer? Did the key people transfer? Incentive schemes involved?
7. What happened to motivation and loyalties of the personnel during and after the transaction?
8. Did the commitments text include all assets required for the divested business to be a stand alone business?
9. Was the business profitable, well run?
10. Was there any need for more detailed interpretations of terms or any dispute with the purchaser about the scope of the remedy?
11. Was the remedy in your view adequate to solve the competition concerns?

Analysis by interview team

- Was it a viable business according to the trustee?
- Was the business/ the remedy defined in sufficient detail in the commitment text?
- Was the remedy sufficient to remedy the competition concern (in case the trustee has an opinion on this)
- Were the competition problems well identified in the Commission's decision.

The divestiture process

[Issue: Did we in this case ensure that the buyer received timely information regarding the scope of the commitments without undermining the parties' margin for negotiation in a forced sale scenario? Should buyers have "rights" and parties have "duties"? What was and what should be the role of the trustee vis-à-vis the buyers? What was and what should be the relationship of the Commission with the buyer?]

A. Scope of duties of the trustee

12. Were you responsible for overseeing the hold-separate obligations of the seller and also to oversee the divestiture process (*i.e.* a so-called monitoring trustee).
13. Were you given a mandate to sell the divested business (*i.e.* a so-called divestiture trustee) or both monitoring and divestiture?
14. What, in your view, were the respective advantages/disadvantages of performing both functions or only one?
15. If you performed both duties, please distinguish in the questions between the "monitoring duties" and the "divestiture duties".

B. Monitoring duties of the trustee

16. Please describe the sales process. How were you involved?
17. Were there several potential purchasers who satisfied the purchaser criteria as laid down by the Commission?
18. Were you involved in making sure that the buyer receives all necessary information?
19. Did the threat of a forced sales scenario unduly influence the parties' bargaining position or their ability to sell to an appropriate buyer?
20. Did the fact that the purchaser was in a competitive bid situation unduly weaken its negotiating position vis-à-vis the parties?
21. Were there at any point any indications that the seller withheld crucial information before, during or after the sale?
22. Were there any post-**Closing** matters that needed to be referred to the Commission or to any other adjudication *e.g.* by the courts, Trustee, arbitration etc?
23. Would you have needed or could have made good use of any extra help *e.g.* by financial or legal advisors?

C. Divestiture duties of the trustee (if applicable)

24. Please indicate what were the main reasons for the seller to fail to sell the business to be divested within the set time period? (non-saleable business, no agreement could be reached ? If so, what was the reason?)
25. Please indicate how you went about organising the sale of the business. What problems did you run into?
26. Was it necessary for you in order to sell the business to add or remove assets? Please explain.
27. Did the seller co-operate fully? Did the seller try to influence the ultimate selection of the purchaser?

28. Would you have any suggestions of how to optimise the involvement of the trustee in the divestiture process?

Analysis by interview team

- Monitoring trustee AND divestiture trustee?
- Was the monitoring trustee involved in the sale process?
- Did the trustee ensure the buyer received all necessary information?
- Did in the view of the trustee the threat of a forced sales scenario unduly influence the parties' bargaining position or their ability to sell to an appropriate buyer?
- Did the fact that the purchaser was in a competitive bid unduly weaken its negotiating position vis-à-vis the parties?
- Were the commitment provisions and the overall arrangements sufficiently flexible to allow to adapt the bundle of assets to the actual needs of the purchaser?
- Are there from the point of view of the trustee any indications that the seller withheld crucial information before, during or after the sale?
- Should the Commission have monitored or even intervened more in the process?
- Did the trustee sell the business?
- Did the trustee make any suggestions on how to improve the process, *e.g.* through formulating a clearer trustee mandate?

Hold-separate (and preservation) arrangements

[Issue: How do we deal with the inherent conflict in the obligation to hold-separate the divested business and the need for access to information for the divestiture process? What if business belongs to acquirer, what if it belongs to the target? As from when should hold separate be carried out? How crucial are hold-separate managers? What is the role of the trustee in the hold-separate?]

A. Monitoring of the hold separate arrangements

29. Were there specific hold-separate obligations in the commitment text?
30. Did parties effectively fulfil their hold-separate and preservation obligations?
31. Did any difficulties arise? If so, what were they and how were they dealt with?
32. Hold separate managers: Was there one?
33. How was the right individual chosen?
34. Was there a hold-separate manager employed in the divested business?
35. Did the hold-separate manager stay with the divested business?
36. What is your impression of the hold-separate manager, if any? Do you think it was necessary to have this function carried out? Do you think the right person was chosen for the job?
37. What could the Commission have done better to ensure effective hold-separate, including ring-fencing and similar issues?
38. How can one deal with the inherent conflict between hold-separate and the selling of the business/assets from the point of view of the seller?

39. How important was the hold-separate in your view in this transaction? Was it necessary at all?
40. How did you ensure that the personnel of the divested business was sufficiently ring-fenced and did not pass on information to the remaining business or vice versa?
41. Do you think that a longer hold-separate period could have done any harm to the business/ the assets to be divested, *e.g.* because of lack of continuous investment or because business secrets were being passed on?

B. Hold-separate duties of the trustee

42. Did you encounter any problems in keeping the divested business separate from the retained business? What problems, if any, did you run into in this respect?
43. Did you encounter difficulties at any moment to provide certain information to the purchaser because of the hold-separate obligations in the commitments?
44. Did the trustee replace a member of the Supervisory Board/Board of Directors of the divested business, exercise any voting rights in the divested business or in any other way actively take part in the management/ decision-making in the divested business?
45. If yes, what was your experience with this?
46. If the answer to the previous question is no, please indicate why no such measures were taken.
47. Please describe your contacts with the hold-separate manager.
48. Did you independently check the information coming from the hold-separate manager?
49. Was in your view a hold-separate manager necessary?

C. Preservation of viability, marketability and competitiveness

50. How did you make sure viability, marketability and competitiveness of the assets to be divested were preserved during the sales process?
51. Do you think that you had sufficient means at your disposal to actually preserve the full viability and competitiveness of the divested business?
52. If not, why not and what kind of additional means might be needed for the monitoring trustee to be able to perform its duties?
53. During the monitoring period did you encounter any attempts by the seller to implement any measures that would negatively affect the value of the divested business?
54. If so, please indicate in which way you dealt with this and what problems you encountered in doing so.
55. Did you encounter any adverse market conditions that led to a degradation of the assets between the moment when remedies where first discussed with the Commission and the transfer of the assets?

Analysis by interview team

- Was in the view of the trustee the hold-separate obligation necessary?
- Does the trustee believe the parties have fulfilled their hold-separate and preservation duties in the best possible way?
- What did the trustee do to ensure correct ring-fencing of personnel?
- Did the hold-separate hinder the flow of necessary information to the buyer?

- ❑ How did the trustee supervise the hold-separate manager?
- ❑ How did the trustee ensure the preservation arrangements (viability, marketability, competitiveness)?
- ❑ Did the trustee possess sufficient powers to fulfil its mandate for the hold-separate and preservation arrangements?
- ❑ Was in the view of the trustee the hold-separate manager necessary?

Monitoring/divestiture trustee

[Issue: What role did the trustee agree with the parties and perform? Hands-on manager, hands-off certifier, pro-seller bias, guardian of fairness and transparency, consultant: financial versus industry expert? What should be the Commission's role vis-à-vis the trustee?]

A. Co-operation with seller

56. How was the co-operation with the seller? Did the seller co-operate fully with the trustee?
57. Was there ever a conflict with seller as to the duties that should be performed by you as trustee? Were there any conflicts between the seller and the divested business or hold separate organisation?
58. To what extent did the seller try to give instructions to you as trustee?
59. Did you ever ask information which the seller did not provide to you. If so which one?
60. Did you think that you were getting enough information from the seller/that you had enough powers to obtain all the information needed and that you thought that would be necessary.
61. Did the seller allow enough access by you to the purchaser in order to inform purchaser and also for you to determine whether the purchaser is suitable?
62. In general, do you think that trustees have sufficient means to ensure that the seller co-operates?

B. Co-operation with management of divested business

63. How was the co-operation with the management of divested business? Did they co-operate fully with the trustee?
64. Was there ever a conflict with them as to the duties that should be performed by you as trustee? Were there any conflicts between the seller and the divested business or hold separate organisation?
65. To what extent did they try to give instructions to you as trustee?
66. Did you ever ask information which they did not or could not provide to you. If so which one?
67. Did you think that you were getting enough information from them?
68. Did you think that you had enough powers to obtain all the information needed which you thought was necessary.
69. In general, do you think that trustees have sufficient means to work with the divested business? If not, why not?

C. Appointment/Discharge of the trustee

70. Were you proposed by the seller? If so, how did this process work? At what stage were you contacted by seller?
71. How long did it take for you to be proposed and/or for you to conclude the trustee mandate?
72. Was there a trustee mandate? What difficulties if any did you experience in negotiating the trustee mandate with the parties?
73. How were these resolved? What role did the Commission play, if any?
74. How did you experience the trustee approval process with the Commission?
75. Did you have previous business relationships with the seller? If yes, which were these? Were you asked about these during the approval process?
76. Were other trustees considered? If so, why do you think that you were chosen?
77. Had you any trustee duties in respect of the implementation of commitments under merger control before (either before the **EC** or any other competition authority)? If so, please specify in which cases.
78. And have you acted as a trustee in a merger procedure after this case? If yes, please specify.
79. Have you, in performing your duties, appointed any external (financial or legal) advisors? If yes, please indicate the reasons for seeking this external advice.
80. What was the duration of the trustee mandate this? Have you continued monitoring after the transfer of the divested business, for instance to oversee behavioural remedies or transitional arrangements?
81. Have you worked for the seller since your discharge from your mandate? Please specify.

D. Remuneration of the trustee

82. Please indicate what remuneration scheme was agreed regarding your trustee mandate.
83. What were your liabilities? Was there an indemnity clause protecting you?
84. What in your opinion are the important elements of a remuneration scheme such as to enable trustees to perform their duties in the most independent and objective manner?
85. Confidentiality obligations: please describe their scope whether they were too onerous whether they hampered you in carrying out your duties etc

E. General appreciation of trustee arrangements

86. With the benefit of hindsight/experience, what would you have done differently in the underlying case?
87. Would you find it appropriate to have trustees directly appointed by the Commission (no trustee mandate with the seller)? Please explain advantages and/or disadvantages.
88. Were you appointed soon enough to carry out your tasks appropriately?
89. Describe how you viewed your role?
90. How did you go about carrying out your functions? What was the nature and level of your involvement *in concreto*?
91. Is there anything the Commission could have done better before, during or after the divestiture/the transfer of assets?
92. What else could be improved in the future set-up of the monitoring trustee?

Analysis by interview team

- How suitable was the trustee for the job at hand?
- How does the trustee characterise its intervention?
- Did the trustee receive sufficient information and support to carry out its functions?
- Did the trustee receive instructions from parties or the management of the divested business?
- Was the trustee helpful in any sense and necessary?
- Is this an experienced trustee?
- Was he independent and were there any conflicts of interest? How were these dealt with?
- Does the party make suggestions regarding the tripartite nature of its mandate?
- Did the trustee correctly understand its function to work for the Commission?

Suitable purchaser

[Issue: Can we identify specific purchaser issues for certain types of purchasers or sales structures, such as: MBOs/financial investors, IPOs/fragmented ownership, industrial buyers, new entrants]

93. Please describe your experience of the Commission's purchaser approval process?
94. Were you required to assess the suitability of the purchaser? Please refer to the purchaser criteria.
95. Were you required to report to the Commission thereon?
96. If so, how did you go about doing that?
97. What level of resources did the purchaser assessment require of you?
98. Would it have been easier with more resources? What exactly?
99. Why was the ultimate purchaser in the end chosen (best price or other reason?)
100. What was the involvement of the Commission in the selection?
101. Do you think it was the ideal purchaser for the business and in terms of competition? Why or why not?

Analysis by interview team

- On what criteria was the purchaser selected and has this resulted in the optimal choice from the point of view of an effective remedy?
- Does the trustee intervene into the assessment or even selection of the purchaser?
- How did the trustee assess the purchaser?
- What general conclusions regarding "suitability" of purchasers can be drawn, if any, from this case?
- Anything the Commission could have done different/ better for the trustee?
- Did the buyer get it right in its economic assessment of the business to be divested?
- Does the Commission retain sufficient control to determine the identity of the buyer (also one year after?)

Effectiveness of the remedy

[Issue: Was this remedy effective? Were all serious implementation issues resolved? Can we draw up general guidelines regarding what constitutes an effective remedy?]

102. Did the remedy remove the competition problem it was designed to prevent?
103. Did it create a viable competitor in the market? (did the market shares move?)
104. With hindsight: Would there in your view have been a better possibility/remedy to achieve the same (competitive result) in the market?
105. Do you feel that the buyer was given a good start to enter the market?
106. How would you assess the way the buyer has taken over and run the divested business?
107. Did the buyer do anything wrong or less than optimal to operate the assets successfully in the market?
108. Were there any elements that hindered the competitive effect of the remedy from the start?
109. How would you measure effectiveness? [*to be explored in particular in non-divestiture cases*]

Analysis by interview team

- Did the type of remedy (divestiture, license, access, etc.) constitute an effective remedy? Or would another remedy probably have better solved the problem or in a less interventionist way?
- Does the trustee have a view on the effectiveness of this remedy?
- Did the trustee significantly contribute to the effectiveness of the remedy by helping correct implementation?
- Can licenses (in particular non-exclusive licenses) solve structural competition problems?
- What could the Commission have done better to identify and assess crucial IPRs?
- How would the trustee measure effectiveness?
- What does this case tell us about how to measure effectiveness?

Necessity of the remedy and proportionality

[Issue: Proportionality of the remedy distinguishing 1st phase and 2nd phase remedies, seller's versus buyer's perspective, fast moving versus slow moving industries, unforeseen subsequent changes in circumstances]

110. Would an alternative remedy have resolved the problem perhaps just as well? Any views on that?
111. Did this seem like a proportional remedy to you?
112. Would in your opinion the purchaser have had more success on the market with a bigger or smaller package?
113. How would you measure proportionality?

Analysis by interview team

- Was this remedy necessary in the trustee's view?
- How would the trustee measure necessity?
- Was the remedy proportional considering the context, such as 1st phase and 2nd phase, fast moving versus slow moving industries, unforeseen subsequent changes in circumstances, etc.?
- What does this case tell us about how to measure necessity / proportionality?

EU versus US remedy practice [only for some cases]

[Issue: Points of convergence / divergence in this case as concerns: substance (e.g. impact of different substantive test), negotiation of the remedy (e.g. level of information to assess remedy), procedure (e.g. level of transparency in implementation), powers to secure compliance, respective role of US trustee versus EU trustee]

114. Please report any points of convergence / divergence in this case as concerns:

- substance (*e.g.* impact of different substantive test),
- negotiation of the remedy (*e.g.* level of information to assess remedy),
- procedure (*e.g.* level of transparency in implementation),
- powers to secure compliance,
- respective role of US trustee versus EU trustee

Analysis by interview team

- ❑ Any information on convergence / divergence?
- ❑ Any conclusions for the Commission's practice?

F. Annex 6: Sample follow-up questionnaires (by type of interviewee)

For 10 remedies, the following follow-up questionnaires were sent to companies to collect detailed quantitative information about the situation and evolution on a number of relevant markets.

Two models were used: one for purchasers and one for the parties or sellers. The questionnaires were adapted to the specific case and remedies in question, and case handlers provided support to respondents over the telephone to explain the questions, where necessary.

Instructions for the prior adaptation of the model questionnaires are left in the following text [*in brackets and italics* **or bold and usually shaded/yellow**].

This Annex contains:

1) Follow-up questionnaire to *purchasers*

2) Follow-up questionnaire to *the parties or sellers*

1) Follow-up questionnaire to purchasers

Introduction

As discussed during our interview, we have prepared some economic questions that elicit more quantitative answers. We thought that it would be more efficient if you would answer these in writing. These questions complete the assessment of the remedy's implementation.

We thank you for your co-operation in answering these questions and would appreciate receiving answers **by [day & date]**, if possible.

Rest assured that all business secrets you may convey to the Commission in answering these questions will be covered by the obligation of professional secrecy the Commission is bound to by virtue of the EC Treaty and of the Merger Regulation.[439]

You can fill out the questionnaire in the Word document and send it by e-mail to the persons identified below. Alternatively, you can fill it out by hand and fax it to the same persons at the number +32 (2) 296.43.01.

In the meantime, if you have any questions regarding this questionnaire, please feel free to contact **[insert the contact details of the interview team],** the interview team in this case.

* * *

<u>Part I</u> of the questionnaire applies to the purchased business as a whole, in as much as it is operated as one entity across the various antitrust markets, or, otherwise, per business.

Below, we identify [*n*] [***Note to team****: please fill out correct number of markets which must equal the number of subsections of Part I*] individual antitrust markets.

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[439] Article 287 of the **EC** Treaty and Article 17, paragraphs 2 and 3, of the Merger Regulation.

All questions seek to determine the relative importance of various elements involved in the divestiture process. In general, we therefore request no actual numbers but only estimates in terms of relative proportions (for example, percentage terms).

Before proceeding with the questions, we recall the key elements of the market[s] in which the purchased business was active at the time of acquisition. The questions in this Annex have been structured according to the antitrust markets referred to by the Commission in its Decision, as set out below.

The main characteristics of the markets in which the purchased or licensed business was active

I. Affected Products: The Commission decision identified the affected products relating to the remedy (or remedies) as follows:

*[**Note to team:** name of market as from the Commission decision. This aims at focusing the mind of the buyer and to accurately focus the remainder of the analysis]*

II. Geographic Scope: According to the decision and the file, the business to be divested was mainly selling the products mentioned above under I, in the following geographic markets:

*[**Note to team:** name of market as from the Commission decision, indicating world-wide, EEA-wide and/or national.]*

III. Market Structure: At the time of the decision, the Commission found that the main competitors for the divested business' products were the following companies:

*[**Note to team:** name of competitors as from the Commission decision and the interview. Include seller if still in the business.]*

IV. Summary: In total, the remedy thus concerned [*n*] markets:

(a) __ affected product markets, in

(b) __ geographic markets.

*[**Note to team:** fill out on the basis of the Commission decision and the interview. If there are more than 5 antitrust markets in this case, select the five or six markets that are the most significant/important either from a relative sales volume point of view or if those were the markets with the highest degree of overlap. If so, add a sentence like:*

Given the high number of affected product and geographical markets, we suggest limiting the questionnaire to the following markets which seem the most important ones in terms of relative sales volumes or from a competition point of view.]

Part I - Questions relating to the purchased business, and perhaps applicable across several antitrust markets

Part II.1 Market relating to ______________

*[**Note to Team**: replicate this subset of questions as many times as there are antitrust markets, with a limitation of about five markets.]*

The purchased business

*Note: Questions 1 to 4 refer to the current cost structure of the purchased business (**plant/business name**). This information is needed to assess its ability to compete and to constrain the merged entity post-merger, for example by expanding output.*

115. Is the purchased business currently (*please tick the appropriate box*):

a stand alone business with separate reporting on costs?	
operated with no separate cost information because it is in a larger organisation?	

116. Please fill in the following table regarding the current cost structure of the purchased business (**plant/business name**). Where the remedy allowed you to purchase a license (**product name**), please answer in the context of the business in which that license is currently exploited.

*[**Note to team**: adapt the question to the type of divestiture (business or license) and add the name of the relevant plant/product.]*

Type of cost	**% of total costs**
Labour costs relating to manufacturing	
Raw materials and other input costs	
Capital costs (*e.g. depreciation & interest*)	
R&D allocated to the business	
Distribution and transport	
Marketing	
Other	
Total	100%

117. Do you have a capacity constraint, *i.e.* upper limit on production level of the acquired business?

Yes / No.

If yes:

a) what would happen to average variable costs (AVC[440]) if you increased output from 95% to 100% capacity (*please tick the appropriate box*):

AVC falls		AVC remains constant		AVC rises by less than 5%		AVC rises by 5%-10%		AVC rises by more than 10%	

b) What is your normal capacity utilisation rate (*i.e.*, the one at which you normally operate)?

___%

118. What would happen to AVC if you reduced output by 5% from your "normal" level (mentioned above if you answered "Yes" to question 2.) (*please tick the appropriate box*)?

AVC remains constant		AVC falls		AVC rises	

Note: Question 5 deals with the current cost structure of the purchased business in the hypothesis of a licensing agreement. Information on the license fees is needed to assess its impact on certain cost elements of the purchased business. The overall aim of this question is similar to the aim of questions 1-4.

119. Did the remedy involve a licensing agreement? *Yes / No.*

If yes,

a. what form does the licensing payment take (*please tick the appropriate box*):

royalty per unit ☐ % of sales revenue ☐ % of profit ☐ lump sum ☐ none (free license) ☐

b. What share of sales revenues of the purchased business do such licensing payments ac☐ for?

%

Note: Question 6 focuses your ability to rely on any acquired brand to have a market impact compared to the previous owner.

120. Did the acquisition include a brand name? *Yes / No*

If yes,

a. Compared to the performance of the purchased business prior to divestiture, how would you compare your ability to sell the brand: (*please tick the appropriate box*):

Less ☐ The same ☐ More ☐

b. Did you change the branding strategy? *Yes/No.*

440 "AVC is the cost per unit of output produced, ignoring any fixed costs. Fixed costs are 'overheads', *i.e.* those costs which are not influenced by the actual scale of output.

c. If yes, *please tick the appropriate box and specify the "Other" if relevant*:

Type of change	
Expand target customers by repositioning the brand	
Change the brand name	
Other: (*please specify*)	

Note: Question 7 focuses on the impact of the acquisition of the purchased business on your M&A strategy and [would help to understand your interest in acquiring the purchased business].

7. How has this acquisition affected your future M&A strategy (*please tick the appropriate box*)?

No change *(one-off opportunity)*		No change *(we were looking for a business like this and it was the right fit)*		Future asset sale *(it encouraged us to refocus)*		Further acquisitions *(it has encouraged us to develop a new market)*	

Other: (*please specify*)

Note: Questions 8-12 focus on the expected synergies between your existing businesses and the purchased entity. This type of information helps assessing the competitive strength of the purchased business.

8. Did you make, and document, any estimates of potential synergies with your existing businesses prior to buying the purchased business?

Yes / No.

If yes, please provide below estimates in terms of cost reduction together with an explanation of how these synergies were expected to arise (*separate the figures for each source of synergy if possible*).

Type of synergies	**% total cost reduction**

9. Were these synergies expected to affect (*Please tick the most appropriate answer*):

Only AVC		Mostly AVC		Both equally		Mostly overheads		Only overheads	

10. To what extent have these synergies been achieved? (*Please tick the most appropriate answer*)

Not at all		Very little		Moderately		Very well	

11. Did the synergies take significantly longer to materialise than expected? *Yes / No.*

12. Did some synergies materialise that were not previously expected? *Yes / No.*

If yes, please explain briefly their nature and impact.

Part II – Questions relating to the performance of the purchased business in each "antitrust" market

Part II.1 Market relating to _____________

*[**Note to Team**: replicate this subset of questions as many times as there are antitrust markets, with a limitation of about five markets. See remarks above concerning the selection of the markets.]*

Key characteristics of this market and of your strategy relative to other market players

Note: Questions 13-14 focus on the dependency of the purchased business on the demand side. This type of information helps assessing the competitive strength of the purchased business.

13. What proportion of sales in the **[name of market]** market did your largest customer and the largest five account for?

Largest customer: ___% of total sales	Largest five customers: ___% of total sales

14. Please provide the name and address, including contact person, phone & fax numbers if readily available, of the single largest customer of the purchased business in the **[name of market]** market.

Customer name	*Contact person*	*Phone & Fax number*	*Address*

Note: Question 15 focuses on comparing your business strategy to that of your competitors in the market. We would like to look at the various possible dimensions of competition. This type of information helps assessing the competitive strength of the purchased business.

15. How would you characterise your business strategy in the **[name of market]** market in relation to your main rivals in this market?

	Much lower	**Lower**	**Same**	**Higher**	**Much higher**
Price					
R&D					
Advertising & promotion					
Product quality					
Product range[1]					

Note: a tick in the "higher price" box means that you priced your products higher than your main rivals.

[1] "Lower" means a narrower product range compared to that of your rivals' products.

Note: Question 16 aims at estimating the responsiveness of all customers to price increases by all competitors. Question 17 aims at estimating the responsiveness of the customers of the Purchased Business to price increases of the Purchased Business only. The latter is an indicator of the competitive strength of the Purchased Business and hence of its performance.

16. If all competitors in the **[name of market]** market, including the purchased business, raised their sales prices by 5%, by how much would the aggregate *volume* sold decrease?[441]

___%

17. If the sales prices of the purchased business in the **[name of market]** market had increased by 5% at the time of the acquisition, *while your competitors' sales prices remained the same:*

a. By how much would the value of sales by the purchased business fall?

It would fall by ___ %.

b. What share of the loss in *a.* would you expect the other businesses in your own group to pick up?

c. What share of the loss in *a.* would you expect the previous owner's remaining businesses to pick up?

Evolution of the business since you acquired it

Note: Questions 18-21 focus on what has happened in the market since you acquired the purchased business. These questions also focus on the various exogenous events that may have occurred in the market during that period. This type of information helps assessing the competitive strength of the purchased business and at separating it from exogenous events.

18. Please fill in this table regarding developments in the **[name of market]** market since the time of the acquisition as completely as you can:

	At time of acquisition	**1 year after**	**2 years after**	**3 years after**
Annual sales				
Market shares in value				
Capacity[1]	100			
Average sales **prices**[1] relative to the prices at the time of the divestiture/license transfer	100			
Average Variable **Costs**[1]	100			
Gross operating **margins** (difference between sales revenues and variable costs relative to sales revenues)	__%	__%	__%	__%

[1] You may find it helpful to express capacity, sales prices and AVC relative to their value at the time of acquisition (based on 100 as the value at the time of acquisition, as already filled in). All figures should be expressed in nominal terms, *i.e.* not adapted to neutralise the effect of inflation.

[441] This question focuses on *volume* change since it should be easier to answer because volume data are more readily available than *turnover* data from all market players.

19. Please fill in this table by providing estimates of the market shares of not less than three of your largest competitors' in the **[name of market]** market at the time of the acquisition and subsequently.

Ranking	**At time of acquisition**		**1 year after**		**2 years after**		**3 years after**	
	Competitor's name	Mkt share	Competitor's name	Mkt share	Competitor's name	Mkt share	Competitor's name	Mkt share
# 1		%		%		%		%
# 2		%		%		%		%
# 3		%		%		%		%

20. Please fill in these tables regarding the history of entry and exit in the **[name of market]** market since the acquisition as completely as you can:

The following firms have entered	**Directly**	**By acquisition**	**with the following products:**

The following firms have exited or withdrawn products	**the following product(s) were withdrawn:**

21. Please fill in this table regarding major changes in conditions in the **[name of market]** market as completely as you can:

Types of major events	**Did it occur?**	**If yes, when?**	**If yes, did it affect only your firm?**[1]	**Briefly comment on the relevant event (*include impact*)**
Raw material price increase	Y / N		Y / N	

Patent expiration	Y / N		Y / N	
Improvement of existing product	Y / N		Y / N	
New innovative product	Y / N		Y / N	(*inventor? Product description*)
New marketing	Y / N		Y / N	
Product repositioning	Y / N		Y / N	
New regulation	Y / N		Y / N	
Changes in customers' tastes or requirements	Y / N		Y / N	
Other (*please specify*):	Y / N		Y / N	

[1] A no answer (N) means that it affected most or all players in the market. A "major" change is one that has had a significant impact on the business.

Part II.2 and so on Market relating to ______________

*[**Note to Team**: replicate the above subset of questions as many times as there are antitrust markets, with a limitation of about five markets. See remarks above concerning the selection of the markets if there are more than five markets. Have the question number preceded by the number X of the relevant Part II.X (first 2.12, 2.13, 2.14, etc, then 3.12, 3.13, 3.14, etc. There is no need to repeat the notes that precede and explain the questions.]*

Key characteristics of this market and of strategies of market players

2.13. **[*Note to Team:*** *repeated***]** What proportion of sales in the **[name of market]** market did your largest customer and the largest five account for?

Largest customer: ___% of total sales	Largest five customers: ___% of total sales

*[**Note to Team**: copy remainder of the questions]*

If you have any additional comments regarding any part of this questionnaire, please provide them on a separate page.

2) Follow-up questionnaire to the parties or sellers

Introduction

As discussed during our interview, we have prepared some economic questions that elicit more quantitative answers. We thought that it would be more efficient if you would answer these in writing. These questions complete the assessment of the remedy's implementation.

We thank you for your co-operation in answering these questions and would appreciate receiving answers **by [day & date]**, if possible.

Rest assured that all business secrets you may convey to the Commission in answering these questions will be covered by the obligation of professional secrecy the Commission is bound to by virtue of the EC Treaty and of the Merger Regulation.[442]

You can fill out the questionnaire in the Word document and send it by e-mail to the persons identified below. Alternatively, you can fill it out by hand and fax it to the same persons at the number +32 (2) 296.43.01.

In the meantime, if you have any questions regarding this questionnaire, please feel free to contact **[insert contact details of the interview team],** the interview team in this case.

* * *

Part I of the questionnaire applies to the business that you have retained and that is competing against the divested business, even if it operates across various antitrust markets. Below, we identify [*n*] [***Note to team****: please fill out correct number of markets and include for each a Part I and a Part II*] individual antitrust markets.

All questions seek to determine the relative importance of various elements involved in the divestiture process. In general, we therefore request no actual numbers but only estimates in terms of relative proportions (for example, percentage terms).

Before proceeding with the questions, we recall the key elements of the market[s] in which the divested business was active at the time of disposal. The questions in this Annex have been structured according to the markets referred to by the Commission in its Decision, as set out below.

The main characteristics of the markets in which the divested or licensed business was active

I. Affected products: The Commission decision identified the affected products relating to the remedy (or remedies) as follows:

*[**Note to team:** name the products as from the Commission decision. This aims at focusing the mind of the buyer and to accurately focus the remainder of the analysis]*

[442] Article 287 of the **EC** Treaty and Article 17, paragraphs 2 and 3, of the Merger Regulation.

II. Geographic scope: According to the decision and the file, the business to be divested was mainly selling the products mentioned above under I, in the following geographic markets:

*[**Note to team:** name the geographic markets as from the Commission decision.]*

III. Market structure: At the time of the decision, the Commission found that the main competitors for the divested business' products were the following companies:

*[**Note to team:** provide names of companies from Commission decision and interview.]*

The divested business was thus destined to competing with your company active under the brand [**brand name**], hereinafter called the "Retained Business". [***Note to team:*** *insert correct brand name from the Commission decision and the interview.]*

IV. Scope of the Remedy: In total, the remedy thus concerned [*n*] markets:

(a) __ affected product markets, in

(b) __ geographic markets.

*[**Note to team:** fill out on the basis of the Commission decision. If there are more than 5 antitrust markets in this case, select the five or six markets that are the most significant/important either from a relative volume point of view or if those were the markets with the highest degree of overlap. If so, add a sentence like:*

Given the high number of affected product and geographical markets, we suggest limiting the questionnaire to the following markets that seem the most important ones in terms of relative sales volumes or from a competition point of view.]

Part I – Questions relating to the Retained Business

Part I.1 Market relating to ______________

*[**Note to Team:** replicate this subset of questions as many times as there are antitrust markets]*

*Note: Questions 1 to 4 refer to the current cost structure of the Retained Business (**plant/business name**). This information is needed to assess its ability to compete, for example by expanding output.*

1. Is the Retained Business currently (*please tick the* appropriate *box*):

a stand alone business with separate reporting on costs?	
operated with no separate cost information because it is in a larger organisation?	

2. Please fill in the following table regarding the current cost structure of the Retained Business (**plant/business name**). Where the remedy provided that you would grant a license (**product name**), please answer in the context of the business from which that license was granted.

*[**Note to team**: adapt the question to the type of divestiture (business or license) and add the name of the relevant plant/product.]*

Type of cost	% of total costs
Labour costs relating to manufacturing	
Raw materials and other input costs	
Capital costs (*e.g. depreciation & interest*)	
R&D allocated to the business	
Distribution and transport	
Marketing	
Other	
Total	100%

3. Does the Retained Business have a capacity constraint, *i.e.* upper limit on production level?

Yes / No.

If yes:

a) what would happen to average variable costs (AVC) if you increased output from 95% to 100% capacity?:

AVC falls		AVC remains constant		AVC rises by less than 5%		AVC rises by 5%-10%		AVC rises by more than 10%	

b) What is your normal capacity utilisation rate (*i.e.*, the one at which you normally operate)?

___%

4. What would happen to AVC if you reduced output by 5% from your "normal" level (mentioned above if you answered "Yes" to question 3.)?

AVC remains constant		AVC falls		AVC rises	

Note: Questions 5-6 focus on the expected synergies from the merger and on the possibly impact of the remedy on these synergies. This type of information helps assessing the competitive strength of the Retained Business.

5. If any estimates of potential synergies were made prior to selling the divested business, please provide estimates together with an explanation of how they were expected to arise (separate the figures for each source of synergy if possible).

6. How much should these estimates be changed as a result of the required remedy?

Part II – Questions relating to the performance of the Retained Business in each "antitrust" market

Part II.1 Market relating to _____________

*[**Note to Team:** replicate this subset of questions as many times as there are antitrust markets]*

Key characteristics of this market and of your strategy relative to other market players

Note: Questions 7-8 focus on the dependency of the Retained Business on the demand side. This type of information helps assessing its competitive strength.

7. What proportion of sales in the **[name of market]** market does the Retained Business' largest customer and the largest five account for?

Largest customer: ___% of total sales	Largest five customers: ___% of total sales

8. Please provide the name and address, including contact person, phone & fax numbers if readily available, of the single largest customer of the Retained Business in the **[name of market]** market.

Customer name	*Contact person*	*Phone & Fax number*	*Address*

Note: Question 9 focuses on comparing your business strategy to that of your competitors in the market. We would like to look at the various possible dimensions of competition. This type of information helps assessing the competitive strength of the Retained Business.

9. How would you characterise the Retained Business' strategy in the **[name of market]** market in relation to your main rivals in this market?

	Much lower	**Lower**	**Same**	**Higher**	**Much higher**
Price					
R&D					
Advertising & promotion					
Product quality					
Product range[1]					

Note: a tick in the "higher price" box means that you priced your products higher than your main rivals.
[1] "Lower" means a narrower product range compared to that of your rivals' products.

Note: Question 10 aims at estimating the responsiveness of all customers to price increases by all competitors. Question 11 aims at estimating the responsiveness of the customers of the Retained Business to price increases of the Retained Business only. The latter is an indicator of its competitive strength.

10. If all competitors in the **[name of market]** market, including the Retained Business, raised their sales prices by 5%, by how much would the aggregate *volume* sold decrease?[443]

___%

[443] This question focuses on *volume* change since it should be easier to answer because volume data are more readily available than *turnover* data from all market players.

11. If the sales prices of the Retained Business, in the **[name of market]** market had increased by 5% after the disposal of the divested business, *while your competitors' sales prices remained the same:*

a. By how much would the value of sales by the Retained Business fall?

It would fall by ___ %.

b. What share of the loss in *a.* would you expect the divested business to pick up?

We would expect the buyer to pick up ___ % of the loss in a.

Evolution of the market since divestiture

Note: Questions 12-15 focus on what has happened in the market since you disposed of the divested business. These questions also focus on the various exogenous events that may have occurred in the market during that period. This type of information helps assessing the competitive strength of the divested business and at separating it from exogenous events.

12. Please fill in this table regarding developments in the **[name of market]** market since the time of merger as completely as you can:

	At time of merger	1 year after	2 years after	3 years after
Annual sales				
Market shares in value				
Capacity$^{\alpha}$	100			
Average sales **prices**$^{\alpha}$ relative to the prices at the time of the divestiture	100			
Average Variable **Costs**$^{\alpha}$	100			
Gross operating **margins** (difference between sales revenues and variable costs relative to sales revenues)	__%	__%	__%	__%

$^{\alpha}$ You may find it helpful to express capacity, sales prices and AVC relative to their value at the time of disposal (based on 100 as the value at the time of disposal, as already filled in). All figures should be expressed in nominal terms, *i.e.* not adapted to neutralise the effect of inflation.

13. Please provide estimates of the market shares of the Retained Business' three largest competitors in the **[name of market]** market at the time of the disposal and subsequently.

Ranking	At time of disposal		1 year after		2 years after		3 years after	
	Competitor's name	Mkt share	Competitor's name	Mkt share	Competitor's name	Mkt share	Competitor's name	Mkt share
# 1		%		%		%		%
# 2		%		%		%		%
# 3		%		%		%		%

14. Please fill in these tables regarding the history of entry and exit in the **[name of market]** market since the disposal as completely as you can:

The following firms have entered	Directly	By acquisition	with the following products:

The following firms have exited or withdrawn products	the following product(s) were withdrawn:

15. Please fill in this table regarding major changes in market conditions in the **[name of market]** market as completely as you can:

Types of major events	Did it occur?	If yes, when?	If yes, did it affect only your firm?[1]	Briefly comment on the relevant event (*include impact*)
Raw material price increase	*Y / N*		*Y / N*	
Patent expiration	*Y / N*		*Y / N*	
Improvement of existing product	*Y / N*		*Y / N*	
New innovative product	*Y / N*		*Y / N*	(*inventor? Product description*)
New marketing / product positioning	*Y / N*		*Y / N*	
New regulation	*Y / N*		*Y / N*	
Demand-driven change	*Y / N*		*Y / N*	
Other (*please specify*):	*Y / N*		*Y / N*	

[1] A no answer (N) means that it affected most or all players in the market. A "major" change is one that has had a significant impact on the business.

Part II.2 Market relating to _____________

*[**Note to Team**: This is the repetition for the next market. Replicate the above subset of questions as many times as there are antitrust markets, with a limitation of about five markets. See remarks above concerning the selection of the markets. Have the question number preceded by the number X of the relevant Part II.X (first 2.7, 2.8, 2.9 etc, then 3.7, 3.8, 3.9 etc). There is no need to repeat the notes that precede and explain the questions.]*

Key characteristics of this market and of strategies of market players

2.7 [*Note to Team:* *repeated***]** What proportion of sales in the **[name of market]** market does your largest customer and the largest five account for?

Largest customer: ___% of total sales	Largest five customers: ___% of total sales

[***Note to Team***: *copy remainder of the questions*]

If you have any additional comments regarding any part of this questionnaire, please provide them on a separate page.

G. Annex 7: Standard format for remedy reports

49. The length of remedy reports varied between 50 and 300 pages, depending on the number of remedies in the case, the number of interviews held, and the complexity of remedies.

Remedy report **Case: ____________** **r1: ________________** **r2: _____________ …**

1) Case background

- ❑ Excerpts/synthesis of the relevant parts of the Commission decision
- ❑ Remarks on other relevant facts from the file, such as litigation etc.

2) Interview settings

- ❑ Overview and overall comments on who was interviewed

3) Interview results

For each of the following issues: Citation of the views of the different interviewees (buyer, seller, trustee etc.), group appreciation of what can be concluded, discussion of results including all necessary remedy related background.

- ❑ Scope of the divested business / of the remedy
- ❑ The divestiture process
- ❑ Hold-separate arrangements
- ❑ Monitoring trustee
- ❑ Suitable purchaser
- ❑ Effectiveness of the remedy
- ❑ Necessity of the remedy
- ❑ EU versus US practice

4) Preliminary conclusions

- ❑ Conclusions or lessons to be learned from the interviews, the remedies, and the case

5) Follow-up

- ❑ Follow-up questionnaires
- ❑ Other specific follow-up that seems necessary at this stage (*e.g.* interview competitors, check more market data, cross check data of other merger cases in the same sector, etc.)

6) Annexes

- ❑ Detailed data on interviews
- ❑ Minutes of interviews

H. Annex 8: Methodology used to count remedies

1. This Annex briefly describes the methodology used in the Study to count the number of remedies in the selected sample of 40 merger cases which were analysed.

1. Three counting principles

2. The first principle for retaining any remedy in our sample was to determine whether we had obtained sufficient market information on its implementation and/or impact. On this basis, the sample of 129 remedies in 40 cases was thus reduced to 96 remedies.
3. The second principle was that the Study counted one remedy per one competition concern to be solved, *i.e.* for each one **relevant market** (rather than the number of measures). This means that, *e.g.* that a combination of a **divestiture commitment** together with accompanying access provisions would be counted as one, as would *e.g.* several divestitures covering one **relevant market**, or *e.g.* several non-divestiture measures covering one **relevant market**. This focus on the competition concern was necessary to determine the effect of a remedy on the market. Using the analogy of administering several medical treatments to cure one illness, one could ask whether for a patient who must take two medicines plus vitamins to cure itself should these be counted as one or three "remedies". In line with an effects-oriented approach, the Study counted only one main cure per illness and considered the other measures as supplementary. Therefore, for each competition concern the Study determined one main remedy. These are listed and described in Annex 3: List of analysed cases and remedies (by type of remedy) – [confidential], p. 176; and Annex 9: Summary descriptions of "ineffective", "partially effective", "unclear", remedies and those classified as "unconfirmed necessity" – [confidential], p. 233, respectively.
4. Therefore, if both a divestiture and a non-divestiture remedy were ordered to treat one competitive concern in the same product market, these were counted as one remedy.
5. The following actual examples illustrate the principle.

> In the **Phase II** case […], parties committed to a divestiture and to grant an open licence in the **relevant market** of […] technology. Both measures together are counted as one remedy to transfer a market position. The licence is considered supplementary to the divestiture and thus not counted as a separate remedy.

> In the **Phase I** case […], three measures were ordered concerning three relevant product markets. However, the Commission had expressed competition concerns only on two of these markets. The third measure, the termination of two supply agreements with a company which was also a competitor in the first two markets, merely supplemented the other remedies and was thus not counted separately.

> In the **Phase I** case […], [… the parties] had to divest stakes [… two divested businesses] which served one **relevant market**. The decision is unclear on the intent of the remedies (one or two purchasers), but originally two separate purchasers)acquired these facilities. Shortly afterwards, one of the purchasers was acquired by the other one. Thus, only one purchaser was interviewed and it was not

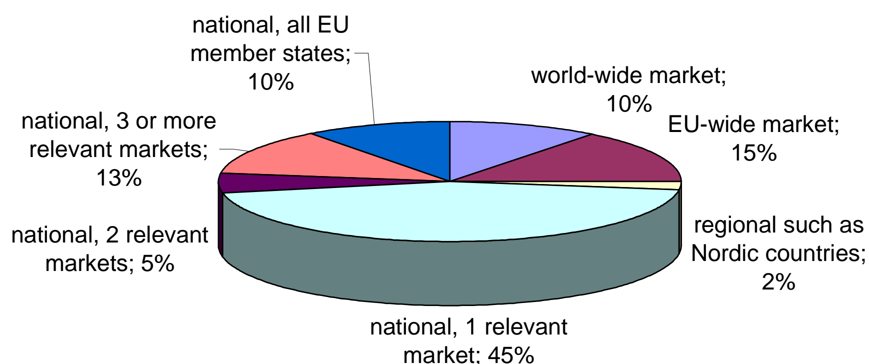
possible to gather information regarding the implementation of remedies regarding the other [… divested business]. This was counted as one remedy.

In **Phase II** case […], [… the parties] had one large **JV** with […] consisting of two separate businesses active in two separate product markets: […]. [… The JV partner] operated the former and [… the parties] the latter. The commitment was to either sell or dissolve the **JVs**. One business was bought by [… the JV partner] and the other business was dissolved. As two different relevant markets were concerned, two remedies were counted. In addition, [… the parties9 had to sell their [… minority] stake in [… another JV] which was active in the market for […]. This was counted as a third remedy because it was sold to a different purchaser.

In the **Phase I** case […], […more than ten] divestitures were ordered concerning more than 50 markets. The Study obtained information regarding […n] divestitures which were initially bought by one purchaser. This purchaser later resold two businesses to different purchasers. The Study could therefore have counted three remedies (to reflect the impact of the original buyer, as well as that of the two subsequent purchasers). However, since the Study obtained specific information on the […n] divestitures, which consisted of distinct product markets, this led the Study to count […n] remedies.

6. The third principle determined that when competition concerns were raised in one product market spanning more than one geographic market, only one remedy was counted if there was only one main remedial measure, such as only one divested business.
7. As illustrated by Chart 38, the application of this principle concerned 27 out of the 96 remedies analysed in this Study. In these 28%, the geographic scope of the remedy extended beyond one geographic market (see categories: “national, two **relevant markets**”, “national, three or more **relevant markets**”, and “national, all EU member states”.

Chart 38: Of 96 analysed remedies 28% covered more than one geographic market



2. *Exceptions*

8. In 16 remedies (6 cases) out of the 96 remedies (17%), the counting methodology was adapted to reflect particular considerations related to the fact that the delineation of businesses and the definition of relevant product markets did not coincide:

(1) In two instances, a divested business covered several problematic relevant product markets and thus several competition concerns.

> In the **Phase I** case […], competition concerns in one product market were remedied by the divestiture of two production plants ([…]) to two different (expected) purchasers and thus were counted as <u>two</u> remedies.

> In the **Phase II** case […], the structural remedy, which concerned the sale of [… the parties'] stake in the […] **JV** and which was ordered to deal with competitive harm on two product markets, was treated as <u>one</u> remedy because it was one business entity and was taken over by one purchaser.

(2) In two further instances, one competition concern on one **relevant market** was dealt with in several divestitures to several purchasers (split of the divested business). In these circumstances, 3 remedies were counted instead of just one (for only one competition concern). This was done because the Study aimed at focussing on the performance of these purchasers individually.

> In the **Phase II** case […], the competition concern was in one product market, involving […many businesses]. The business was to be sold to one or more purchasers. In the end, eight purchasers were proposed and accepted by the Commission. In the Study, three purchasers were interviewed, which together acquired [… about half of the businesses]. For the other five purchasers not enough information was available. However, the information collected regarding these three purchasers with their own respective businesss strategies, different from each other, led the Study to considering these as <u>three</u> remedies.

> In the **Phase I** case […], six divestitures had been ordered regarding the same […] markets. These were various businesses or stakes in different **JVs** which were distinct viable entities. The intention of the commitments was that these six sets of assets should be sold to separate purchasers. The Study only interviewed two purchasers: one bought one divested business and the other one bought two. Here, the Study counted them as <u>three</u> remedies, based on the number of intended separate buyers.

(3) Finally, two further cases slightly deviated from the above mentioned principles:

> In the **Phase II** case […], competition concerns were found in three product markets: […]. The remedies were as follows:
>
> <u>[…]</u>: (a) divestiture of a production plant and two [… brands]; and (b) because this remedy did not adequately address the competition concerns involving […], a specific remedy was designed for that geographic market: an OEM supply agreement with a competitor for a […]-year period;
>
> <u>[…]</u>: divestiture of a production plant and [… the parties'] entire product line; and

[…]: divestiture of the […]-branded product line and related assembly line, with these assets to be moved to another production site by the purchaser.

In addition, as regards all these markets, the parties had to open up their distribution network for new sales and aftermarket servicing. Here, the Study counted four remedies. The network access remedy was supplementary to all three of the mentioned product markets.

In the **Phase II** case […], essentially eight measures were imposed regarding two main product markets. Although the Study could have counted only two remedies, it found that the measures concerning one of these markets aimed at resolving two distinct competitive issues. Hence, the Study counted three remedies to reflect the substantive importance of each of these three remedies.

Explanation: […] In the separate market for […], the Commission ordered the divestiture of […] as well as certain measures dealing directly with co-ordinated effects: […]. These two measures are counted as two remedies as [… one] seemed to be mainly geared to remedy a unilateral effects concern, while the other three measures dealt exclusively with co-ordination issues and were classified as one "other" remedy.

3. ***Datasets used in the different Parts and Sections of the Study***

9. For the statistics in the different parts of this Study, datasets vary slightly because of the fact that the necessary information could be obtained for all analysed aspects.
10. In general, all Sections in Part II on "Implementation of commitments to transfer a market position and of commitments to exit from a JV", p. 23, refer to the 84 **divestiture remedies** in this Study. "**Divestiture remedies**" or "**divestiture commitments**" are all 68 commitments to transfer a market position, including eight commitments to grant a long-term exclusive licence, and all 15 commitments to exit from a **JV**, and one "other" commitment.
11. There are three deviations:
    1) in Section A on "Scope of the divested business", p. 23, the statistics on **overlap** are based on a sample of only 49 **divestiture remedies** for which sufficiently robust evidence was gathered.
    2) in Section F on "Carve-out of the divested business", p. 73, the statistics are based on 50 remedies, which is the entirety of **divestiture remedies** where the divested business required extensive **carve-out** of assets.
    3) Section H on "Monitoring trustees", p. 87, often refers to cases instead of remedies, as in 67% of all remedies monitoring trustees were overseeing several analysed remedies in a case. Such reference to cases instead of remedies is also used in other Sections when referring to a trustee who monitored more than one remedy.
12. Statistics in Part IV. "Effectiveness of the analysed remedies", Section B" on "Market indicators", p. 127, are based on more limited datasets based on the availablility of the data. In particular, the statistics on:

1) “Divested business still operating in the market”, p. 128, are based on all of the 84 **divestiture remedies** (100%),
2) “Market share evolution of the divested business”, p. 129, are based on only 56 of the 84 **divestiture remedies** (67%);
3) “Market share evolution of the retained business, p. 130, and “Comparison of the market share evolution of the retained and divested businesses”, p. 130” are based on only 30 of the 84 **divestiture remedies** (36%); and
4) “Purchasers’ own assessment”, p. 131”, are based on 68 of all 84 **divestiture remedies** (71%).

13. Part IV, Section C. on “Overall effectiveness assessment”, p. 132, is based on a total of 85 remedies, which is made up of all 96 remedies reduced by 11 remedies that were classified under “unconfirmed necessity”. For these 11 remedies, the overall effectiveness of the remedy could not be determined as the market outcome would have been competitive even without the implementation of the remedy.

I. Annex 9: Summary descriptions of “ineffective”, “partially effective”, “unclear”, remedies and those classified as “unconfirmed necessity” – [confidential]