

# Purchaser Approval Decisions: A Practitioner’s Guide to “Phase III” Merger Control in Europe

Deirdre Carroll\*

## 2-I. Introduction

In EU merger control proceedings, parties to a concentration which is cleared subject to commitments may be forgiven for thinking that they are on the home strait once a final decision, whether in Phase I or Phase II, is adopted. However, depending on the nature of the commitments offered, even the most seemingly straightforward remedies package may take considerable time to implement. This is particularly true of divestment remedies, where identifying potential purchasers, negotiating a sale and purchase agreement (“SPA”) and securing approval of the third-party purchaser of the relevant business or assets can constitute a substantial and time-consuming process in its own right. While the European Commission (“Commission”) does not systematically replicate the comprehensive “market test” undertaken in the commitments procedure, the divestment is subjected to a rigorous assessment to determine if the SPA (along with any ancillary agreements) satisfies the commitments and if the purchaser is suitable from a competition perspective. The process comes close to a “Phase III” in the overall merger control review procedure, given the significant amount of time and resources the parties to the divestment transaction are typically required to expend in securing approval of the proposed purchaser.

With the Commission quietly ushering in a new practice of publishing its purchaser approval decisions, the entire merger control process risks becoming even more drawn out for the parties to the main transaction, as the Commission takes the time to ensure its (now public) decision is as robust as possible to mitigate the risk of an appeal by a dissatisfied third party. For the purchaser of the divestment business, confidentiality issues arising from the publication of the purchaser approval decision are triggered too. The purpose of this article is to explore these matters in the light of recently-published purchaser approval decisions.

## 2-II. The Purchaser Approval Process under EU Merger Control

### A. Time Granted to Agree Terms with a Purchaser

The parties are in principle free to identify and negotiate terms with a suitable purchaser following the adoption of the Commission’s decision and closing of the merger (subject always to the hold-separate requirements for the divestment business). Once the SPA is signed, the seller formally proposes the purchaser to the Commission for approval. The Commission will then assess the proposed buyer against the purchaser requirements found in the commitments (which may include requirements specific to the divestment business)

---

\* Deirdre Carroll is an associate at Wilson Sonsini Goodrich & Rosati in Brussels. None of the opinions expressed in this article can or should be ascribed to the firm or any of its clients. The author would like to thank Paul McGeown for his helpful comments on this article.

before granting approval. This is generally the approach taken where the market test of the remedies indicates that there is sufficient interest around the business to be divested.

Alternatively, the parties may have to undertake in the commitments that, following the conditional clearance decision, they will not close the notified transaction until a binding agreement has been signed with a purchaser approved by the Commission (an “up-front-buyer” remedy), or even already identify a purchaser and enter into a binding agreement during the Commission’s procedure (a “fix-it-first” remedy) before a conditional clearance decision will be adopted. The purchaser, in the latter scenario, is approved at the same time as the transaction receives clearance.<sup>1</sup>

The time given by the Commission to the parties to agree terms with a suitable buyer is case-dependent and ultimately driven by the Commission’s need to be comfortable, with the requisite degree of certainty, that the commitments will be effectively implemented. Factors which weigh in to this decision are the nature and scope of the divestment business (whether it is a pre-existing and viable stand-alone business, or a combination of assets), the risks of degradation of the business in the interim period before closing of the divestiture, and any uncertainties inherent in the transfer of the business and implementation, in particular due to a limited pool of suitable potential purchasers.<sup>2</sup>

Unless a fix-it-first remedy is required, the business to be divested must be transferred within a fixed time-limit after the adoption of the conditional clearance decision. In practice, the parties have a set time-frame within which to market the business to be sold and enter into a final agreement with a suitable purchaser (usually six months).<sup>3</sup> This period is overseen by a monitoring trustee who reports to the Commission on the parties’ progress in the sales process. If the parties have not entered into a final agreement within this period or a short extension thereof<sup>4</sup> (the “first divestiture period”), a divestiture trustee will be granted an

---

<sup>1</sup> Commission notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004 OJEU 2008 C267/1, dated October 22, 2008, paragraph 50 (“Notice on Remedies”).

<sup>2</sup> Notice on Remedies, paragraph 51.

<sup>3</sup> The timeframe varies depending on the specific facts of the case. In cases involving an up-front buyer clause, the parties are naturally motivated to procure the sale of the divestment business as swiftly as they can so that they may implement the main transaction. The Commission does not publicize the exact time period granted, so as to prevent the seller being disadvantaged in commercial negotiations with potential purchasers.

<sup>4</sup> Notice on Remedies, paragraph 72. To obtain an extension, the parties must submit a reasoned request showing “good cause” and demonstrating that the inability to meet the deadline is due to “reasons outside their responsibility”. The parties must also show that it can be expected that they will subsequently succeed in divesting the business “within a short time-frame”. Pursuant to the general review clause contained in the commitments, the reasoned request must generally be submitted no later than one month before the expiry of the relevant period, and only in exceptional circumstances will the parties be entitled to request an extension within this last month. The Commission assesses what constitutes “good cause” on a case-by-case basis and typically seeks the input of the monitoring trustee. The Commission will also have regard to the parties’ efforts to effect the divestment, and balance the effect of the extension on the economic viability, marketability and competitiveness of the divestment business against the potential harm to the parties, the divestment business, or the divestment process itself if no extension were granted. See G. Drauz and C. Jones (eds.), *EU Competition Law—Mergers and Acquisitions*, Vol. 1, Claeys & Casteels, 2nd ed., at page 799. The authors cite Case COMP/M.1980—*Volvo/Renault, V. I.*, decision of April 7, 2004, where the Commission refused a request for the extension of a deadline.

irrevocable and exclusive mandate to divest the business at no minimum price, i.e., in a “fire sale”. This trustee divestiture period is typically three months. A further three months can be expected from signing of the SPA to closing of the divestment transaction.<sup>5</sup> The divestiture—and therefore the condition attaching to the Commission’s decision approving the main transaction—will only be considered implemented once legal title to the divestment business has passed to the approved purchaser and the assets have been transferred.

## B. Purchaser Criteria

The identity of the proposed purchaser and the text of the final binding SPA (as well as ancillary agreements) are conditional on the Commission’s approval to ensure that the divestment business is transferred “*to a suitable purchaser in whose hands it will become an active competitive force in the market.*”<sup>6</sup> Once an agreement has been reached with a purchaser, the parties generally have one week from signing to submit a fully documented and reasoned purchaser proposal, including a copy of the final agreements, to the Commission and trustee. The trustee must also submit a separate reasoned opinion and typically has one week from the submission of the parties’ reasoned proposal to do so. In their submission, the parties must be able to demonstrate that the proposed purchaser satisfies the purchaser criteria, and that the divestment business is being sold in a manner consistent with the commitments.

The standard purchaser criteria are as follows:

1. The purchaser is independent of and unconnected to the parties and their affiliated undertakings,<sup>7</sup>
2. The purchaser must possess the financial resources, proven relevant expertise, and

---

<sup>5</sup> Notice on Remedies, paragraphs 97–98.

<sup>6</sup> Notice on Remedies, paragraph 47.

<sup>7</sup> As part of its assessment of independence, the Commission looks at the situation pre-divestment (for example, the presence of cross-shareholdings or directorships between the seller and purchaser, participation in joint ventures or M&A activity involving the parties in the previous three years, and the existence of commercial relationships) and post-divestment (including the nature and duration of any transitional arrangements). In Case COMP/M.7975—*Mylan/Meda*, purchaser approval decision of March 8, 2017, a direct ownership stake of 4.2% in the outstanding shares of Mylan held by the proposed purchaser (Teva) was deemed too small to constitute material influence on Mylan.

In Case COMP/M.7678—*Equinix/Telecity*, purchaser approval decision of June 15, 2016, the Commission determined that the landlord/tenant relationship between Equinix and the purchaser did not undermine the independence of the purchaser due to the nature of the leases (long-term standard commercial leases of certain data centers), their limited relative value to the purchaser against its annual revenues, and the likely future reduction in the number of such leases and associated monthly rents.

Regarding pre-existing commercial relationships, the Commission generally only views those which are significant in nature as problematic. For example, in Case COMP/M.7919—*Sanofi/Boehringer Ingelheim Consumer Healthcare Business*, purchaser approval decision of May 3, 2017, the Commission considered that a distribution relationship between Sanofi and the purchaser (Ipsen) would not have a material impact on the independence of Ipsen as the relationship did not affect the European market nor the area of competitive concern (over-the-counter pharmaceutical products), and the relationship was of an arm’s length nature and of relatively insignificant value in terms of the parties’ respective revenues. Similarly, in Case COMP/M.7873—*Worldline/Equens/Paysquare*, purchaser approval decision of March 14, 2017, certain service contracts between the seller

have the incentive and ability to maintain and develop the divested business as a viable and active competitive force in competition with the parties and other competitors, and

3. The acquisition of the business by a proposed purchaser must neither be likely to create new competition problems nor give rise to a risk that the implementation of the commitments will be delayed.<sup>8</sup>

In short, the Commission needs to be convinced that the selling parties will not be in a position to exercise influence over the divestment business' competitive strategy post-divestment, and that the business (under new ownership) will be a sufficient competitive force on the market.

These standard purchaser criteria can be, and with increasing regularity are, supplemented on a case-by-case basis with requirements, such as the inclusion of a provision that the purchaser should be an industrial purchaser with specific industry expertise, rather than a financial purchaser.

### C. Assessment of the Proposed Purchaser and the Final Agreements

In evaluating whether the proposed purchaser meets the purchaser criteria and that the business is being divested in a manner consistent with the Commission's decision and the commitments, the Commission will consider the reasoned proposal of the parties and the opinion of the monitoring trustee. The Commission typically engages in detailed discussions with the proposed purchaser (whether directly or through the trustee), including on its business plan, financial and operational information, and past experience of successfully integrating companies into its business.<sup>9</sup> The Commission will also examine the SPA and any ancillary agreements to ensure that these are consistent with the effective and timely implementation of the commitments.

In the course of its assessment, the Commission may request—and, anecdotally at least, often does request—more detailed information from the proposed purchaser. It may also require the monitoring trustee to report on particular issues; engage in discussions on the modification of the SPA or ancillary agreements; meet with the proposed purchaser, and market test the proposed purchaser and agreements. It appears to be increasingly common for the Commission to enter into discussions with the purchaser and conduct a careful analysis of its business plan and incentives to operate the divestment business as a competitive force on the market targeted by the commitments.

The Commission will, as part of its suitability assessment, also evaluate any ancillary agreements (both industrial supply contracts and temporary services agreements). Even if the

---

and purchaser were considered to be “normal course” client/supplier contracts and of minimal value relative to the parties' turnover.

<sup>8</sup> Notice on Remedies, paragraph 48. Formally speaking, the Commission uses a *prima facie* test for the competition assessment in point 3. The proposed purchaser must be reasonably expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the business to be divested. Where the Commission considers that the purchaser may have difficulties in obtaining the required clearances or that regulatory approvals may significantly delay the implementation of the divestiture, the expectation is that it will find that the purchaser does not meet the third limb of the test.

<sup>9</sup> Notice on Remedies, paragraph 102.

proposed purchaser's identity itself does not give rise to suitability concerns, the terms of the SPA or of the ancillary agreements may undermine the effective and timely implementation of the commitments through creating ongoing links between the purchaser and the parties or a relationship of continued dependence, or by facilitating the exchange of commercially sensitive information.

The Commission may, at the parties' request, approve the sale of the divestment business without one or more assets or personnel, or substitute certain assets or personnel, if this does not affect the viability and competitiveness of the divestment business after the sale, taking into account the proposed purchaser's resources.<sup>10</sup>

While no provision is made in the EU Merger Regulation ("EUMR") or in the Commission's Notice on Remedies or its Best Practices for the Commission to "market test" the purchaser, the Commission appears to have begun carrying out a limited form of market test on prospective purchasers and the sales "package" by sending out requests for information and inviting interested third parties (such as customers, competitors, the divestment business itself, and any other party which may have expressed an interest in the process to the Commission during the merger review procedure) to comment.

Given that the Commission has no legally binding deadline within which it must make a determination on the proposed purchaser's suitability, the increasing use by the Commission of market testing in assessing the purchaser package risks lengthening the purchaser approval period even further. This is particularly the case where comments from the third parties consulted may prompt further rounds of Commission questioning. There is also an inherent risk that dissatisfied bidders or competitors may use the process to agitate against the transaction and seek to delay an approval decision for as long as possible, thus leaving the divestment business in limbo and giving competitors more time to prepare for the change of control of the divestment business.

#### **D. Duration of Purchaser Approval Process**

Unlike the strict procedural framework governing the merger review proper, in particular as regards timing obligations, the Commission is not bound by any deadlines in its assessment of the proposed purchaser and final agreements. This means that, in stark contrast to Phase I or Phase II reviews with their set time-frames, the parties to the divestment

---

<sup>10</sup> See Case COMP/M.7893—*Plastic Omnium/Faurecia Exterior Automotive Business*, purchaser approval decision of March 28, 2017. In this decision, the Commission approved a modification involving the sale of the divestment business without a previously included employee (at the request of the hold-separate manager). Likewise, in Case COMP/M.7567—*Ball/Rexam*, purchaser approval decision of June 17, 2016, the Commission felt the differences between the commitments and the final agreement between the parties (substitution of legal entities and personnel to be transferred to the purchaser) would not affect the viability or competitiveness of the divestment business after the sale. In approving the purchaser package with these modifications, the Commission had regard to the fact that the divestment business had been closely involved in discussions and the changes addressed its needs, together with the fact that the inclusion of a "wrong-pockets" clause in the final agreement would permit the rectification of any potential asset misallocation (paragraphs 25–30). See also Case COMP/M.7559—*Pfizer/Hospira*, purchaser approval decisions of February 4, 2016 (Novartis AG as purchaser of the Infiximab divestment business) and May 31, 2016 (Hikma Farmacêutica (Portugal) S.A. as purchaser of Sterile Injectables Divestment Businesses).

transaction and their counsel can only estimate when this supplemental “Phase III” purchaser approval process will be finalized. The Commission’s Remedies Notice merely provides that the Commission will issue the necessary approvals “as expeditiously as possible.”<sup>11</sup>

Until closing of the sale of the divestment business, the business must be kept independent of the activities retained by the merging parties through strict ring-fencing mechanisms, and must be managed as a distinct and saleable business by a hold-separate manager, under monitoring trustee supervision. The parties are moreover obligated to preserve the economic viability, marketability, and competitiveness of the divestment business in this interim period.<sup>12</sup>

Once the Commission has reached a determination on the proposed purchaser’s suitability, the Commission will notify the parties in one of three manners, depending on its conclusion: (1) if the Commission deems that the purchaser does not meet the purchaser requirements, a rejection decision will be adopted; (2) if the Commission concludes that the sale and purchase agreement (or ancillary agreements) do not provide for a divestiture in line with the commitments, this will be communicated to the parties without the Commission necessarily rejecting the purchaser at this stage; and (3) if the Commission determines that a purchaser and final agreements are suitable, the Commission will adopt a purchaser approval decision.<sup>13</sup>

### **2-III. The EC’s Publication of Purchaser Approval Decisions**

With the Commission’s most recent highly-publicized and much-documented public consultation on the procedural and jurisdictional aspects of EU merger control,<sup>14</sup> one might assume that the Commission had put all its latest and proposed policy changes on the table for discussion. However, the Commission appears to have quietly snuck one change in under the radar in 2016: the new practice of publishing its purchaser approval decisions in remedy proceedings.<sup>15</sup>

Under the EUMR, the Commission is legally required to publish only the decisions it takes in relation to Phase II merger proceedings in the Official Journal.<sup>16</sup> Decisions ending Phase I proceedings need only be notified to the parties to the concentration and the Member States.<sup>17</sup> However, a recital to the EUMR provides that “for the sake of transparency, all

---

<sup>11</sup> Notice on Remedies, paragraph 106.

<sup>12</sup> Notice on Remedies, paragraphs 108–109.

<sup>13</sup> Notice on Remedies, paragraph 106.

<sup>14</sup> The consultation on the evaluation of procedural and jurisdictional aspects of EU merger control was open between October 2016 and January 2017.

<sup>15</sup> This is not the first time that the Commission has changed its publication policy. Decisions on the grant of derogations to the “standstill” obligation (the obligation to suspend the implementation of a concentration until receipt of Commission approval) were typically kept confidential but in August 2012, the Commission published the majority of Article 7(3) decisions taken since 2004 and has continued to publish such decisions regularly since.

<sup>16</sup> Council Regulation (EC) No. 139/2004 of January 20, 2004 on the control of concentrations between undertakings, Article 20, OJEU 2004 L 24, dated January 29, 2004 (“EUMR”).

<sup>17</sup> EUMR, Article 6(5).

decisions of the Commission which are not of a merely procedural nature should be widely publicized.”<sup>18</sup> Since the start, the Commission’s practice has generally been to publish redacted versions of all final decisions in both Phase I and Phase II proceedings. Other decisions adopted in merger control proceedings, such as requests for the modification of commitments or extensions of divestiture periods, are rarely published.

However, since summer 2016,<sup>19</sup> the Commission appears to have adopted a new policy of publishing its purchaser approval decisions as a matter of practice, despite their procedural nature. Prior to this, the purchaser approval decision would generally only be notified to the parties, with a confidential version of the decision sent to the trustee and the Member States for their information. In the limited cases where the Commission has made purchaser details public, this has generally been driven by the case’s particular context, such as the nature of the divestment business (publicly listed), a high degree of media interest, or where the decision risked action by complainants or potential litigants,<sup>20</sup> including from disappointed bidders.<sup>21</sup>

While the Commission is sometimes criticized for a general lack of transparency, in particular regarding the reasoning underlying some of its practices, in certain cases this lack of transparency is justified and even desired. The public interest in having access to public versions of Commission decisions must be balanced against the legitimate interest of parties to Commission proceedings in the protection of their business secrets.<sup>22</sup>

By its very nature, a purchaser approval decision draws predominantly (and heavily) on the purchaser’s business secrets. The decision necessarily evaluates the purchaser’s commercial strategy and financial status, including its detailed plans for integration of the divestment business and its business plans and projections going forward. Publishing purchaser approval decisions also comes with the inherent risk of the decision being challenged by interested third parties or dissatisfied bidders. If publication of such decisions

---

<sup>18</sup> EUMR, Recital 42.

<sup>19</sup> The two purchaser approval decisions arising from Case COMP/M.7559—*Pfizer/Hospira* were published in July 2016 and seem to mark the beginning of the (consistent) publication of such decisions.

<sup>20</sup> See Case COMP/M.1980—*Volvo/Renault, V. I.*, decision of April 7, 2004 and the related press release IP/04/484 of April 14, 2004. This case also involved an attempt by an interested party to have the purchaser approval decision annulled—Case T-248/04—*Scania v. Commission*. This action was lodged on June 21, 2004 but subsequently withdrawn. A related action concerning the Commission’s conditional clearance decision as it related to a specific undertaking (the Scania undertaking) was also withdrawn (Case T-163/03—*Scania v. Commission*).

<sup>21</sup> See Joined Cases C-553-4/10 P—*Commission v Éditions Odile Jacob*, judgment of November 6, 2012 and Case C-514/14 P—*Éditions Odile Jacob SAS v. Commission*, judgment of January 28, 2016. These cases deal with a flurry of annulment actions and appeals brought by Éditions Odile Jacob (“EOJ”) in its challenge of the Commission’s conditional clearance decision and approval of Wendel Investissement SA (“Wendel”) as purchaser in Case COMP/M.2978—*Lagardère/Natexis/VUP*. The Courts annulled the Commission’s approval decision as it deemed the trustee overseeing the divestment process had not satisfied the requirement of independence. The Commission, following the appointment of an alternative trustee and the resubmission of Wendel as purchaser, adopted a “re-approval” decision. EOJ subsequently brought an unsuccessful action challenging this second purchaser approval decision.

<sup>22</sup> EUMR, Article 20(2) and Recital 42.

is to become standard practice, the Commission will presumably dedicate more and more time to a rigorous and comprehensive assessment of the proposed purchaser to ensure that its eventual decision is as robust as possible. This, coupled with the fact that the parties involved will most likely wish to engage in negotiations with the Commission on what can and cannot be made public in its final decision may add significant delays to any purchaser approval process.

## 2-IV. What the Commission's New Practice Means

### A. Inclusion of Specific Purchaser Criteria

The Commission's increasing use of additional requirements to supplement the standard purchaser criteria naturally limits the pool of suitable potential purchasers from which the parties can choose candidates to enter into negotiations with during the divestiture sales process in any given case. The most commonly included additional criteria appear to be a preference for an industrial purchaser with the relevant know how, or an industry player with an existing sales and distribution network, rather than a financial purchaser.

In *Sanofi*, the commitments specified that in addition to the standard purchaser criteria, the purchaser should have an existing market presence in the field of over-the-counter pharmaceutical products as companies marketing such products tend to compete using their entire portfolio rather than on a single product basis. In addition, a local footprint was required, including a sales and distribution network in each country concerned by the divestment business so as to be an effective competitor of the merged entity. The market test of the remedy had confirmed that market entry was risky and for the divestment business to remain viable, a purchaser would need to have the ability to "swiftly include" the acquired business into its existing product portfolio (which itself should have a "sufficient breadth to appeal to pharmacy and wholesale customers").<sup>23</sup>

The identity of the purchaser was seen as a crucial factor for the viability of the divestment business in *Ball/Rexam* and the commitments specified that the purchaser should, in addition to the standard criteria, have "the ability and willingness to develop the Divestment Business, including through investment in new capacity at the European Divestment Plants and/or in new plants in different locations in the EEA, and keep pace with industry innovation."<sup>24</sup> An up-front buyer was required and the Commission approved Ardagh Group S.A. as purchaser, having regard to, *inter alia*, the fact that Ardagh would have sufficient cash flow to maintain and invest in the business, its intent to implement the capital expenditure and growth plans of the existing management of the divestment business, and its investment in new capacity and completion of R&D projects.<sup>25</sup>

---

<sup>23</sup> Case COMP/M.7919—*Sanofi/Boehringer Ingelheim Consumer Healthcare Business*, decision of August 4, 2016 at paragraphs 313–315 and paragraph 16 of the attached commitments. Almost identical reasoning was used in Case COMP/M.7975—*Mylan/Meda*, decision of July 20, 2016, paragraphs 627–628 and paragraph 17 of the attached commitments.

<sup>24</sup> Case COMP/M.7567—*Ball/Rexam*, decision of January 15, 2016, paragraphs 977–981 and paragraph 18 of the attached commitments.

<sup>25</sup> Case COMP/M.7567—*Ball/Rexam*, purchaser approval decision of June 17, 2016, paragraphs 15–21.



An up-front buyer was likewise required in *Investindustrial/Black Diamond/Polynt/Reichhold*, given the importance of the identity of the ultimate purchaser of the divestment business (an unsaturated polyester resin ("UPR") plant) to its viability and competitiveness. The standard purchaser criteria in the commitments were supplemented by the detailed requirements that the purchaser should be a well-established UPR supplier active in the EEA (with a pre-existing network of plants), capable of sourcing the necessary inputs at competitive terms, and possessing the necessary manufacturing capabilities to expand it, as well as the necessary personnel to market the products and provide technical support to customers throughout the EEA.<sup>26</sup>

### **B. Inconsistencies between Final Agreements and the Commitments**

As noted above, in addition to assessing the purchaser itself, the Commission will also need to be satisfied that the terms of the SPA or any ancillary agreements proposed do not undermine the effective and timely implementation of the commitments. Based on the purchaser approval decisions published to date, it is clear that the Commission pays particular attention to any inconsistencies between the commitments as agreed and the final agreements between the parties and the proposed purchaser.

In *Plastic Omnium*, the Commission considered that the SPA and related agreements departed from what was set out in the commitments and raised concerns over the scope of the intellectual property transferred to the purchaser. Despite the submission by Plastic Omnium of a letter designed to remedy the Commission's concerns, the Commission determined that the IP agreements involved were still not suitable and Plastic Omnium ultimately reopened negotiations with the purchaser on this point so as to ensure an agreed upon IP scheme compliant with the commitments and approval of the final agreements by the Commission.<sup>27</sup>

Similar concerns over inconsistencies between the commitments and the final agreements put forward for approval were raised in *Worldline/Equens/Paysquare*, where four separate deviations from the text of the commitments were highlighted by the trustee in its reasoned opinion to the Commission:

First, the commitments in this case provided for a non-compete of five years, during which Worldline agreed not to directly approach nor directly contract with the customers of the divestment business. However, the SPA between Worldline and BNP Paribas Fortis ("BNPPF") provided only for a two year non-compete. Worldline, in response to the trustee's enquiry, stated that the purchaser had only requested a non-compete of two years, and that in any event, the commitments were sufficient to bind Worldline to the original five-year term.

---

<sup>26</sup> Case COMP/M.8059—*Investindustrial/Black Diamond/Polynt/Reichhold*, decision of May 12, 2017, paragraphs 192–195 and paragraph 17 of the attached commitments. The purchaser approval process ran in parallel, and in fact the commitments were designed by the notifying parties in close cooperation with the intended purchaser, Ashland Global Holdings Inc. Approval of Ashland was granted by decision on May 15, 2017. See also Case COMP/M.7559—*Pfizer/Hospira* for equally-detailed supplemental purchaser criteria (purchaser approval decision of February 4, 2016—Novartis AG as purchaser of the Infliximab divestment business).

<sup>27</sup> Case COMP/M.7893—*Plastic Omnium/Faurecia Exterior Automotive Business*, purchaser approval decision of March 28, 2017.

The trustee and the Commission considered that “*merely invoking*” the commitments text was not sufficient to comply with the obligation undertaken by Worldline and that the non-compete clause as included in the SPA was inconsistent with the commitments.<sup>28</sup>

Second, while only BNPPF had the right to terminate an interim services agreement ancillary to the SPA for convenience, both parties had the right to do so in cases of material breach. The trustee in its reasoned opinion noted that such clauses are “*generally usual and legitimate clauses*” but that Worldline’s termination right should not undermine its obligation to offer a service agreement to the purchaser under the commitments. The trustee thus requested that it be provided with any breach notices so that Worldline would not terminate the agreement for a breach by BNPPF without the trustee being notified in advance.

Third, the trustee noted that the SPA did not contain an express provision reflecting the obligation contained in the commitments for the seller to employ its best efforts to procure the consent of customers with respect to the transfer of customer contracts to a third party. While the trustee felt that none of the provisions of the SPA prevented Worldline from complying with this obligation, the Commission considered the provision relevant to ensure a maximum number of contracts would be transferred.

Finally, the trustee highlighted that the SPA provided for the territorial limitation of a non-solicitation of key personnel clause which was inconsistent with the broader provision contained in the commitments.

The four deviations from the text of the commitments identified by the trustee were modified so as to be fully compliant with the text of the commitments through a letter submitted to the Commission and signed by both parties. *Worldline* is thus notable for its clear illustration of just how integral trustee input is to the purchaser approval process, and as a cautionary example to parties who may feel it is both acceptable and desirable to deviate from the strict requirements of the commitments—even if at the request of the purchaser or through the ordinary course “give and take” commercial negotiations of a SPA—unless the deviation can be justified.

### C. Length of the Purchaser Approval Process

In practice, the time the Commission takes to approve a purchaser is highly case-dependent and varies according to the transaction’s complexity. This section addresses some of the reasons underlying the length of certain purchaser approval processes and the possible implications of a prolonged approval process.

Based on the limited amount of decisions published by the Commission, principally for the years 2016 and 2017, proposed purchasers at least latterly appear to have received approval in as little as twenty days,<sup>29</sup> while other decisions have taken over three months.<sup>30</sup> In *Plastic*

---

<sup>28</sup> Case COMP/M.7873—*Worldline/Equens/Paysquare*, purchaser approval decision of March 14, 2017 at paragraph 37. BNPPF was proposed as purchaser on January 30, 2017 and a letter signed by both Worldline and BNPPF addressing the deviations from the commitments raised by the trustee was submitted on March 7, 2017.

<sup>29</sup> Case COMP/M.7792—*Konecranes/Terex MHPS*. Purchaser proposal submitted on December 2, 2016 and approved on December 22, 2016. The relatively swift approval decision may have been due to the parties’ motivation to close the deal as expeditiously as possible; this case involved an upfront buyer clause whereby the main transaction could not close until an agreement was signed for the divestment of Konecranes’ Stahl subsidiary and the Commission granted purchaser approval. The same motivation likely lies behind the equally

*Omnium/Faurecia Exterior Automotive Business*, the delay in a purchaser approval decision appears to have been driven predominantly by the need to renegotiate certain IP agreements during the process due to inconsistencies with the commitments.<sup>31</sup> The published purchaser approval decision in *Sanofi/Boehringer Ingelheim Consumer Healthcare Business* does not treat the SPA or ancillary agreements, but the length of the approval process in this particular case may also have been due, in part, to amendments apparently required to their terms during the Commission's assessment process.<sup>32</sup>

The length of certain purchaser approval processes may be driven not only by issues arising from inconsistencies between the commitments and the purchaser package, but also by the need for the Commission to verify that the acquisition by the proposed purchaser is not likely to give rise to a new competition problem nor risk delaying the implementation of the commitments due to any clearances or regulatory approvals which may be required.<sup>33</sup> Sellers of relatively minor value and uncomplicated divestment packages may feel understandably frustrated if their small deals are subjected to the same degree of scrutiny and prolonged assessment as complex packages stemming from "mega-mergers" worth millions or even billions of dollars.<sup>34</sup>

As an example, the approval decision in *AB InBev/SABMiller* took eleven weeks from submission of the purchaser proposal.<sup>35</sup> The proposed purchaser, the Asahi Group, had already completed its acquisition of SABMiller's business in Italy, the Netherlands and the UK, comprised mainly of the Peroni, Grolsch, and Meantime brands, along with related assets ("the PGM Business"). Asahi had been identified up-front as a suitable purchaser of

---

quick approval in Case COMP/M.7678—*Equinix/Telecity*, another up-front buyer remedy (purchaser approval was submitted on May 24, 2016 and approval received on June 15, 2016).

<sup>30</sup> See Case COMP/M.7893—*Plastic Omnium/Faurecia Exterior Automotive Business* (purchaser proposal submitted on December 23, 2016 and approved on March 28, 2017) and Case COMP/M.7919—*Sanofi/Boehringer Ingelheim Consumer Healthcare Business* (purchaser proposal submitted on February 17, 2017 and approved on May 3, 2017).

<sup>31</sup> Flex-N-Gate Automotive Corporation was proposed as purchaser by Plastic Omnium ("PO") on December 23, 2016. To address concerns expressed by the Commission, PO submitted a letter covering certain IP agreements on January 17, 2017, which the Commission ultimately deemed insufficient. On January 26, the Commission held a meeting with the purchaser. On March 14, following the reopening of negotiations with the purchaser, PO notified the Commission that an agreement had been reached on an IP scheme which ensured the grant of, or a license to, all IP rights needed for the operation of the divestment business. Purchaser approval was received on March 28, 2017.

<sup>32</sup> A reasoned proposal of the purchaser (Ipsen) was submitted on February 17, 2017 along with the SPA and related agreements, followed by the opinion of the monitoring trustee in the case on February 24, 2017. However, additional information and revised transaction agreements were provided on April 12, 2017, with an approval decision from the Commission following on May 3, 2017.

<sup>33</sup> Notice on Remedies, paragraph 48.

<sup>34</sup> The remedy packages required to secure clearance in *Dow/DuPont* required notification to the Commission in their own right and were also subject to conditional clearance. See Cases COMP/M.8435—*FMC/DuPont Divestment Business* and COMP/M.8440—*DuPont/FMC (Health and Nutrition Business)*. Public versions of the decisions are not available at the time of writing (September 2017).

<sup>35</sup> Case COMP/M.7881—*AB InBev/SABMiller*, purchaser approval decision of March 8, 2017. A purchaser proposal was submitted on December 20, 2016 and the approval decision was received on March 8, 2017.

the PGM business in the main *AB InBev/SABMiller* decision and approved in the conditional clearance adopted (a fix-it-first remedy).<sup>36</sup> Asahi was also proposed as the purchaser of SABMiller's business in the Czech Republic, Hungary, Poland, Romania and Slovakia ("the CEE business"). Asahi's purchase of the CEE business was notifiable to the Commission in its own right and was notified to the Commission during the purchaser approval process.<sup>37</sup> The transaction was cleared unconditionally and Asahi received purchaser approval a week later.

*Ball/Rexam* was a Phase II remedy decision which involved an up-front buyer. The purchaser approval decision took seven weeks from submission of the purchaser proposal and the divestment transaction was also notifiable in its own right, but under the simplified procedure. In a mark of procedural efficiency, the purchaser (Ardagh Group) received approval as purchaser and clearance of the divestment transaction on the same day.<sup>38</sup>

Regarding the possible implications of a prolonged approval process, it is clear that, between the divestiture period(s) and the purchaser approval process itself, the hold-separate period during this additional "Phase III" of merger control review naturally exposes the divestment business to an extended spell of uncertainty. It is thus in the interests of all parties to the process that the divestiture is implemented within the shortest feasible time-frame to avoid any possible negative consequences on the business to be divested.

The notifying parties generally wish to close the divestment transaction as quickly as possible, whether for legal reasons (contractual long-stop dates), statutory obligations (tax, accounting or securities filing obligations), or commercial and practical reasons (personnel and resources redirected to support the divestment business). The parties are obliged to ring-fence the business(es) to be divested, to continue financing for ongoing development of the business on the basis of existing business plans, and to retain key personnel. All of these obligations become more difficult and burdensome the longer the process is dragged out. For the purchaser, it may wish to ramp up the integration process and benefit from the newly-acquired entity as soon as it can.

The divestment business itself also has a strong interest in seeing the deal closed within a reasonable period. A divestiture comes with an inherent level of uncertainty, such as disruptions for suppliers or customers, and even interim preservation and hold-separate measures may not be enough to counterbalance the potential detrimental effects where a divestment process runs substantially longer than the parties may have foreseen. It is not unimaginable that, in a future remedies case, the sheer length and complexity of the

---

<sup>36</sup> Case COMP/M.7881—*AB InBev/SABMiller*, decision of May 24, 2016, paragraphs 391–402.

<sup>37</sup> Asahi was proposed as purchaser on December 20, 2016 and received approval on March 8, 2017 (Case COMP/M.7881—*AB InBev/SABMiller*, purchaser approval decision of March 8, 2017). The divestment acquisition was notified to the Commission on January 26, 2017 (Case COMP/M.8357—*Asahi/AB InBev CEE Divestment Business*, decision of March 1, 2017).

<sup>38</sup> Cases COMP/M.7567—*Ball/Rexam*, purchaser approval decision of June 17, 2016 and COMP/M.8048—*Ardagh/ Ball Rexam Divestment Business*, decision of June 17, 2016. The transaction was notified to the Commission on May 18, 2016 under the simplified procedure. As noted previously, the Commission was also required to undertake an assessment of whether certain modifications to the divestment package proposed in the commitments were consistent with the commitments (see Fn. 10).

purchaser approval process will result in harm to the target business: whether due to a leakage of customers (or employees) impacting on both its financial viability and commercial operations, or due to a proposed purchaser simply choosing to walk away at this late stage and throwing the divestment process in to disarray.

From the Commission's perspective, it is in its interest to see the divestiture closed expeditiously so that the purpose of the commitments is fulfilled (i.e., to immediately maintain effective competition in the market where competition concerns had been found),<sup>39</sup> and to reduce the monitoring burden on the Commission and free up resources.

## **2-V. Navigating the Purchaser Approval Process: Key Points for Practitioners**

In light of the risk that the purchaser approval process may result in a significant "Phase III" on top of the initial merger control review, competition counsel should be mindful of the need to advise their clients to be prepared to build a (possibly) lengthy EU purchaser approval process in to their deal closing timelines and SPA long-stop dates as a precaution.

Competition counsel should continue to be involved and consulted when corporate teams are finalizing commercial negotiations between the parties to the divestment and drafting the SPA and ancillary agreements to confirm that, in so far as practicable, deviations from the text of the commitments are kept to a minimum. On a related note, care should also be taken when drafting the purchaser proposal to the Commission to ensure that any deviations from the commitments text in the agreements, however minor, are addressed up-front, well-reasoned and supported by both the purchaser and the divestment business.

Once the proposal is submitted, a regular and open dialogue with the monitoring trustee appointed in the case is imperative. The monitoring trustee is designed to be the "eyes and ears" of the Commission in a divestment process and must engage with the respective parties to the transaction (including the divestment business) and report on a regular basis to the Commission. As such, close contacts with the trustee will ensure that the notifying parties are aware of any issues identified as they arise and can work towards resolving them promptly, including both issues with the purchaser proposal itself and any concerns arising over the interim preservation of the divestment business.

Given that the "market testing" of the purchaser package during this assessment process may lead to further engagement and rounds of questions from the Commission, parties to the transaction should have people from the respective businesses' on hand to field questions from the Commission's case team and ensure the process is not overly delayed by any issues arising from the market test feedback.

Finally, counsel should carefully explain to clients the implications of the Commission's new practice of publishing its purchaser approval decisions on its website (such as more information available for an interested party to ground an appeal on, or the need to negotiate a non-confidential version of the decision). This is of particular importance when acting for the purchaser in a deal as any such decision by its nature will contain a large amount of business secrets of the purchaser. The adopted decision will not be addressed to the purchaser, who will need to make any concerns over the content of the non-confidential

---

<sup>39</sup> Remedies Notice, paragraph 102.

version clear to the Commission on its own behalf and may even wish to seek a waiver from the notifying parties of the right to receive the confidential version of the decision and an agreement that outside counsel will instead be charged with redacting any confidential information before passing on the decision.