



Bundeskartellamt

# Guidance on Remedies in Merger Control

May 2017

English Version (Courtesy translation. Only the German language version is authentic.)



open markets | fair competition

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## A. Introduction

### I. Objectives of the guidance document

- 1 This guidance document explains the requirements that need to be met for the Bundeskartellamt to clear an otherwise problematic concentration subject to **conditions and obligations** (remedies). By including remedies in a clearance decision the Bundeskartellamt ensures that the parties to the merger fully meet the commitments they have offered during the merger proceeding (Section 40(3) sentence 1 GWB<sup>1</sup>).
- 2 The guidance document describes the most important types of remedies and explains the **requirements** they have to fulfil respectively (see B., para. 37-106).<sup>2</sup> For divestiture remedies, the requirements a potential buyer would have to meet in order to be suitable are explained (see B.I.2., para. 58-66). Finally, the document sets out the procedure by which remedies are accepted and implemented. In this context, the role and function of trustees are also addressed (see C., para. 107-165).
- 3 In addition to economic considerations the present guidance document incorporates in particular the Bundeskartellamt's case practice and experience as well as the case law of the Oberlandesgericht Düsseldorf (Düsseldorf Higher Regional Court, OLG) and the Bundesgerichtshof (German Federal Court of Justice, BGH).<sup>3</sup> Furthermore, the case practice and guidance documents of other competition authorities regarding the assessment of commitments were analysed and taken into account. This is particularly true for the case

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<sup>1</sup> Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition, GWB) in the version published on 26 June 2013 (Bundesgesetzblatt I p. 1750, 3245), as last amended by Article 2 of the law of 26 July 2016 (Bundesgesetzblatt I p. 1786 no. 37).

<sup>2</sup> Some central terms used in this guidance document are explained in the annex "Definitions".

<sup>3</sup> The 8th amendment to the Act against Restraints of Competition introduced the SIEC test into German competition law. The BKartA's case practice as well as the case law of the courts that have been built up before the entry into force of the new test continue to be applicable in most cases because the creation or strengthening of a dominant position, which was the test applicable prior to the change, remains applicable as a key standard example for an SIEC. The SIEC test also captures situations in which a merger leads to a significant impediment to effective competition not covered by the dominance test, in particular certain SIEC due to non-coordinated effects. This expansion of the substantive test also affects the assessment as to whether a commitment proposal is suitable. In particular, when assessing commitments it is, for example, no longer sufficient to exclude that the implementation of the commitments would create or strengthen a dominant position. In addition, it is necessary that no other critical effects on competition – beyond market dominance and covered by the SIEC test – are to be expected as a result of the merger once the commitments are implemented.

law of the European courts and the decisions and guidelines of the European Commission. The work products of the international fora ICN and OECD have also been taken into consideration in the drafting of the guidance document. Furthermore, the procedure described in this document takes account of the fact that, in the case of cross-border mergers for which remedies are negotiated in several jurisdictions, effective and close co-operation between the authorities is of key importance.

- 4 The document is not intended to provide an exhaustive description of all acceptable merger remedies. Each concentration requires an **individual assessment** of the particular facts of the case by the decision division that is dealing with the respective industry. In addition, it may become necessary to refine the analytical concept outlined in this document in light of future developments in the Bundeskartellamt's case practice. Therefore, the text does not claim to be conclusive.

## II. Remedies as an instrument of merger control

- 5 Merger control can make a substantial contribution to preventing the restriction of competition brought about by **corporate transactions** that change the market structure. The Bundeskartellamt examines and assesses between 1,000 and 1,200 mergers<sup>4</sup> annually, of which the vast majority do not raise any competition issues at all. In actual fact, a high number of mergers have a positive impact on competition, e.g. M&A transactions may allow merging parties to attain economies of scale and to realize other synergies as well. However, in particular in the context of markets that are already to some degree concentrated, mergers can also have negative effects on market structure and the competitive behaviour of companies and in this way can adversely influence market results by increasing the market power of a single or several companies active on the relevant market.<sup>5</sup>
- 6 A (notifiable) concentration has to be prohibited by the Bundeskartellamt if it would significantly impede effective competition (so-called **SIEC Test**).<sup>6</sup> This is the case, for exam-

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<sup>4</sup> Throughout this document, the terms "merger" and "concentration" are used interchangeably as synonyms.

<sup>5</sup> See BKartA, Guidance document on substantive merger control (2012), para. 4, the guidance document explains in detail in which cases mergers could give rise to competition problems in the context of the dominance test. Therefore, the guidance document covers the situations that fall under the standard example of the SIEC test. The SIEC test, however, is a broader substantive test and also covers situations in which the merger does not create or strengthen a dominant position, especially non-coordinated effects in a tight oligopoly, cf. e.g. BKartA, decision of 31.3.2015, B2-96/14 – *Edeka/Kaiser's Tengelmann*, para. 141 et seq.

<sup>6</sup> Significant Impediment of Effective Competition.

ple, if it can be expected that the merger will create or strengthen a dominant position (Section 36(1) sentence 1 GWB).<sup>7</sup> Even if these conditions are met, the concentration will be permitted if the merging parties prove that the concentration will also lead to improvements in the conditions of competition and that these improvements will outweigh the impediment to competition (Section 36(1) sentence 2 no. 1 GWB).<sup>8</sup>

7 In certain case scenarios, with the help of **commitments** the parties to a merger can modify their project post-notification in such a way that the merger no longer has to be prohibited. This requires that the parties' proposals are suitable to remedy the competition concerns.<sup>9</sup> As a result, the concentration can then be cleared (subject to conditions and obligations). Commitments have proved their worth in practice as a major instrument for the effective implementation and enforcement of merger control rules. For companies, commitments are an important instrument that enables them to realize the expected benefits of a merger to the greatest possible extent, even if they cannot obtain an unconditional clearance. This is a viable option in many cases where the acquisition of the target company only raises competition concerns with regard to individual parts of its business activities, which can be separated from its other activities. Selling the relevant business to an appropriate independent third party is often sufficient to prevent any competition problems arising from the concentration.<sup>10</sup> The same applies to certain divestitures in the context of a market that is characterised by tacit collusion. For example, if a maverick that has not been part of the implied coordination between the major players is acquired by one of them and thereby integrated in the coordinated behaviour, it can be sufficient to divest the relevant business of the target company in order to maintain it as an independent competitive force. In this case, the market conditions will not suffer as a consequence of the merger. In some cases a

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<sup>7</sup> See also BKartA, guidance document on substantive merger control (2012), which explains in detail the circumstances under which a dominant position is created or strengthened by a merger. The guidance document was published prior to the introduction of the SIEC test. With dominance being a standard example of a significant impediment to effective competition, the dominance test is still relevant in the context of the SIEC test. The BKartA plans to revise the aforementioned guidance document to reflect the changes in the law. In particular, scenarios covered by the SIEC test, but not the dominance test, will need to be addressed.

<sup>8</sup> The BKartA cannot intervene against a merger if the conditions for a prohibition under the SIEC test are only met with regard to a so-called de-minimis market (Section 36(1) 2 no. 2 GWB) or if the requirements for the failing firm defence in the publishing sector are fulfilled (Section 36(1) 2 no. 3 GWB).

<sup>9</sup> See e.g. BGH (Federal Court of Justice), decision of 20.4.2010, KVR 1/09 – *Phonak/GN Store*, para. 90 (juris); BGH (Federal Court of Justice), decision of 7.2.2006, KVR 5/05 – *DB Regio/üstra*, para. 56 (juris); OLG Düsseldorf (Higher Regional Court), decision of 6.6.2007, VI-2 Kart 7/04 (V) – *E.ON/Stadtwerke Eschwege*, para. 114 (juris).

<sup>10</sup> See A.III, para. 16 as to the requirements for commitments which are intended to lead to improvements of the competitive conditions on other markets (balancing clause Section 36(1) GWB).

divestiture can also be an appropriate remedy to prevent a merger from creating a situation in which tacit collusion occurs.

- 8 **Appropriate and effective** remedies are not available in each and every case that raises competition issues. If a suitable remedy is not available to or offered by the merging parties, a concentration cannot be cleared but has to be prohibited. In some cases in which an effective remedy could be considered the parties might prefer not to propose any remedies for reasons of their corporate strategy, for example if a necessary divestiture would destroy the rationale for the transaction. In general, the merging parties will usually refrain from offering commitments if their implementation would be economically more damaging than withdrawing the merger altogether.
- 9 In principle, **it is for the merging parties** to propose suitable commitments (on the procedure see C.I., para. 109-113).<sup>11</sup> Deciding on the way an M&A transaction is structured is part of the merging parties' right to determine their economic activities. This applies also to the decision whether or not to propose commitments. Unilaterally imposing remedies would also interfere with the rights and obligations as agreed between the merging parties. The Bundeskartellamt also refrains from imposing remedies because it cannot be expected that they will be implemented fully and timely if they are not based on commitments proposed by the merging parties. In appropriate cases the authority may, however, suggest to the parties which remedies would be suitable and necessary in the particular case (see C.II., para. 114). Where the parties propose commitments, these will be assessed by the Bundeskartellamt with a view to whether they are suitable, necessary and proportionate. If there is more than one suitable remedy, the least restrictive for the parties is to prefer, provided that this remedy does not appear inappropriate for any other reason (e.g. Third-Party-Rights).
- 10 The extent to which the Bundeskartellamt is obliged to conduct **investigations** is limited by the tight time limits within which it must decide whether a proposed merger can be cleared. In cases in which a remedy proposal is submitted to the Bundeskartellamt, the time limit for the assessment of the case is extended by one month. Nonetheless, the available time for investigations is limited and this has to be taken into account when deciding on the scope and depth of investigations that the Bundeskartellamt is required to conduct

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<sup>11</sup> According to Section 40(3) GWB, conditions and obligations are to ensure that "the undertakings concerned comply with the commitments they entered into with the Bundeskartellamt".

in order to assess the suitability of remedy proposals.<sup>12</sup> The merging parties usually have access to many of the facts that are instrumental when assessing whether the remedies are suitable to address the competition problems caused by the merger. Since the necessary information is often within their own sphere, merging parties are obliged to cooperate closely with the Bundeskartellamt in the context of this assessment.<sup>13</sup> The obligation of the merging parties carries even more weight if remedy proposals are submitted at a late stage of the merger control proceedings.

- 11 If the commitments are suitable, necessary and proportionate to fully and effectively remedy the competition problems in a timely manner, clearance subject to remedies has to be granted under the principle of **proportionality**.<sup>14</sup> The Bundeskartellamt has no discretion to decide whether or not it will accept such commitments (on the procedure see C.IV., para. 126-127).<sup>15</sup> The Bundeskartellamt does not have discretion in the opposite situation either. If the proposed commitments are not sufficient to remedy the competition issues with the required degree of certainty, the Bundeskartellamt is not empowered to clear the merger subject to commitments, but must prohibit it.<sup>16</sup>
- 12 **Judicial review** is also available with regard to decisions of the Bundeskartellamt that provide a conditional clearance of a merger.<sup>17</sup> The parties to a merger may ask the competent court to revoke the conditions imposed in the clearance decision, which, if successful, has the effect of providing an unconditional clearance.<sup>18</sup> Furthermore, the parties may claim that the Bundeskartellamt wrongly rejected a proposed commitment despite the

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<sup>12</sup> See BGH (Federal Court of Justice), decision of 16.1.2007, KVR 12/06 – *National Geographic II*, para. 15 (the required depth of the investigation is limited by the short time limits applicable to merger control proceedings; decided in the context of consumer surveys and competitive assessment).

<sup>13</sup> See in the context of an abuse of a dominant position BGH (Federal Court of Justice), decision of 14.7.2015, KVR 77/13 – *Wasserpreise Calw II*, para. 30.

<sup>14</sup> See government bill on the 6<sup>th</sup> amendment to the Act against Restraints on Competition (6. GWB-Novelle), explanatory memorandum, on the amendment of Section 40 (3) GWB, Bundestagsdrucksache BT-Drs. 13/9720, p. 60; see e.g. OLG Düsseldorf (Higher Regional Court), decision of 22.12.2008, VI-Kart 12/08 (V) – *Globus/Distributa*, para. 19 (juris).

<sup>15</sup> “A merger clearance subject to conditions and obligations is only permissible, yet also required, if this can prevent an impairment of the market structure that Section 36 (1) GWB seeks to avoid.” BGH (Federal Court of Justice), decision of 20.4.2010, KVR 1/09 – *Phonak/GN Store*, para. 90 (juris). For the different view of the lower court of first instance see OLG Düsseldorf (Higher Regional Court), decision of 7.5.2008, VI-Kart 13/07 (V) – *Cargotec/CVS Ferrari*; OLG Düsseldorf (Higher Regional Court), decision of 26.11.2008, VI-Kart 8/07 (V) – *Phonak/GN Store*, para. 166 et seq. (juris).

<sup>16</sup> See e.g. OLG Düsseldorf (Higher Regional Court), decision of 25.9.2013, VI Kart 4/12 - *Xella/H+H*, para. 141-163 (juris).

<sup>17</sup> Appeal to the OLG Düsseldorf (Higher Regional Court) according to Sections 63 et seq. GWB.

<sup>18</sup> See OLG Düsseldorf (Higher Regional Court), decision of 22.12.2004, VI-Kart 1/04 – *ÖPNV Hannover*, para. 39 (juris).

commitment's suitability and ask the court to overturn a prohibition decision.<sup>19</sup> A judgement of the Düsseldorf Higher Regional Court may be appealed on points of law (Rechtsbeschwerde) to the Federal Court of Justice (BGH). If the Higher Regional Court did not grant leave to appeal its judgement, the merging parties need, as a preliminary step, to challenge the refusal of leave to appeal with a separate legal action before the BGH (Nichtzulassungsbeschwerde).<sup>20</sup>

- 13 Beside the parties to the merger themselves, third parties may also have standing to appeal against merger decisions of the Bundeskartellamt to the Düsseldorf Higher Regional Court. This procedure is e.g. permitted for companies and consumer associations which have been admitted to the proceedings by the Bundeskartellamt as an intervening party.<sup>21</sup> Moreover, companies which applied to join the proceedings and satisfy all statutory requirements but were not admitted by the Bundeskartellamt solely for reasons of procedural economy (i.e. in order to guarantee a swift and efficient procedure) also have standing to appeal.<sup>22</sup> Competitors and customers of the merging parties in general fulfil the requirements to join the proceedings, because their economic interests are usually significantly affected by the merger.<sup>23</sup> The same applies to the additional requirement that they have standing for a legal action (materielle Beschwer), i.e. their interests are directly and individually affected by the conditional clearance.<sup>24</sup> In their claim the third parties may argue that the remedies were not sufficient to clear the merger and that the Bundeskartellamt was therefore obliged to block the merger. If the Düsseldorf Higher Regional Court agrees with the plaintiffs, the clearance is annulled and the matter is remitted to the Bundeskartellamt for a second examination of the case. The deadline for the main examination proceedings starts running afresh when the court ruling becomes final and non-appealable (Section 40(6) GWB). As already mentioned above the plaintiffs in this situation may also appeal the judgement on

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<sup>19</sup> See e.g. OLG Düsseldorf (Higher Regional Court), decision of 25.9.2013, VI Kart 4/12 - *Xella/H+H*, para. 102 et seq. (juris).

<sup>20</sup> Sections 74 et seq. GWB.

<sup>21</sup> Section 63 (2) in conjunction with Section 54 (2) no. 3 GWB.

<sup>22</sup> See BGH (Federal Court of Justice), decision of 7.11.2006, KVR 37/05 – *pepcom*, para. 12 (juris).

<sup>23</sup> Section 54 (2) no. 3 GWB, cf. e.g. BGH (Federal Court of Justice), decision of 7.11.2006, KVR 37/05 – *pepcom*, para. 18 (juris) (insofar as they have reasonable grounds to assert that they are directly and individually affected by the decision).

<sup>24</sup> These are the requirements set out for example in the judgement *HABET/Lekkerland* of the Federal Court of Justice (BGH). It must not be alleged that a subjective right vis-à-vis the public authorities to prohibit the merger is infringed (see Section 42 (2) 2 Code of Administrative Court Procedure, VwGO). See BGH (Federal Court of Justice), decision of 24.6.2003, KVR 14/01 – *HABET/Lekkerland*, para. 15 (juris); BGH (Federal Court of Justice), decision of 25.9.2007, KVR 25/06 – *Anteilsveräußerung*, para. 14 (juris).

points of law (Rechtsbeschwerde) to the Federal Court of Justice (BGH) or appeal against refusal of leave to appeal (Nichtzulassungsbeschwerde).

### III. Requirements placed on a remedy

- 14 A remedy has to be suitable and necessary to **completely** remedy the competitive harm identified in the Bundeskartellamt's investigation **in a timely manner**.<sup>25</sup> This is the case if the remedy completely prevents the expected negative impact on market conditions and market structures or at least reduces the anti-competitive effects of the merger to an acceptable degree that eliminates the grounds for a prohibition.<sup>26</sup> In other words, if a market is characterised by effective competition absent the merger, the remedy has to ensure that the merger will not result in a situation in which competition is reduced. If the market is already highly concentrated and characterised by the market power of one or several companies, the remedy has to at least prevent the merger from (further) worsening the conditions of competition on the affected market.

#### **Federal Court of Justice (Bundesgerichtshof) *Deutsche Bahn/üstra*<sup>27</sup> – General requirements to be met by remedies**

In this ruling the court gives general instructions about the assessment of commitments:

“According to Section 40(3) sentence 1 GWB, as introduced by the 6th amendment, it is possible to clear a merger with commitments and conditions. The provision places the Bundeskartellamt's decisional practice on a statutory basis (see the legislative proposal of the German Federal government, BT-Drs. 13/9720, p. 60). The use of conditions and commitments is solely lawful in cases where (and to the extent that) the merger would otherwise have been prohibited. The remedies must be suitable and necessary to prevent the creation or strengthening of a dominant position or to achieve improvements in the conditions of competition which will outweigh the negative effects of the market dominance resulting from the merger (Section 36(1) GWB). The aim and purpose of merger control is to avoid a deterioration of the conditions of competition as a consequence of changes in the market structure. Therefore, in general, remedies need to be structural in character and [it is not

<sup>25</sup> For the requirement “in a timely manner” see OLG Düsseldorf (Higher Regional Court), decision of 22.12.2008, VI-Kart 12/08 (V) – *Globus/Distributa*, para. 19 (juris) and for completeness e.g. OLG Düsseldorf (Higher Regional Court), decision of 25.9.2013, VI Kart 4/12 (V) – *Xella/H+H*, para. 141 (juris); OLG Düsseldorf (Higher Regional Court), decision of 6.6.2007, VI-2 Kart 7/04 (V) – *E.ON/Stadtwerke Eschwege*, para. 114 (juris); BKartA, decision of 22.2.2013, B7-70/12 – *Kabel Deutschland/Tele Columbus*, para. 335 et seq., 341 (Kabel Deutschland's commitment to sell Tele Columbus' broadband infrastructure in Berlin, Dresden and Cottbus addressed the competition concerns in only three out of twenty areas); BKartA, decision of 12.3.2007, B8-62/06 – *RWE Energy/Saar Ferngas*, p. 48 et seq. (RWE Energy committed to sell its shares in various companies, inter alia, municipal utilities. This did not solve the competition concerns on all of the affected gas and electricity markets).

<sup>26</sup> See e.g. OLG Düsseldorf (Higher Regional Court), decision of 12.11.2008, VI-Kart 5/08 (V) – *A-TEC/Norddeutsche Affinerie*, para. 93 (juris).

<sup>27</sup> BGH (Federal Court of Justice), decision of 7.2.2006, KVR 5/05 – *DB Regio/üstra*.

sufficient if they only] influence the competitive behaviour of the parties involved [...]. This is how remedies should operate (ultimately this is determined by the ratio legis) and these requirements are clarified further and substantiated by the explicit requirement in the law that remedies must not aim at subjecting the conduct of the undertakings concerned to continued control (Section 40(3) sentence 2 GWB).”<sup>28</sup> (Unofficial translation of the decision’s wording provided by the Bundeskartellamt.)

- 15 Divestitures and other activities that have **already been planned** or decided are usually not a suitable remedy. If their implementation is sufficiently certain, they are taken into account at the stage of the competitive assessment of the merger project.<sup>29</sup> If the implementation of the planned measures is not sufficiently certain, implementation can be secured by including the measures in a remedy package.
- 16 Remedies can also be geared towards **improving conditions of competition** on a different market than the market where the competition issues arise. In order to be acceptable, such remedies have to be intrinsically linked to the concentration because, according to the so-called balancing clause, the pro-competitive effects have to be caused by the concentration. For such a connection it is not sufficient that the merging parties merely create a “formal” link by offering a remedy package that includes improvements that are otherwise unrelated to the merger. In addition, the pro-competitive effects of a merger must be of a structural nature to counterbalance the anti-competitive effects. Expected price cuts, intended conduct according to a business plan or the willingness to invest are therefore not sufficient.<sup>30</sup> Finally, the pro-competitive effects have to outweigh the anti-competitive effects resulting from the concentration.<sup>31</sup> Remedies that only reduce the competitive harm created by a merger and do not fully compensate for the impediment to effective competi-

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<sup>28</sup> Ibid, para. 56 (juris).

<sup>29</sup> See BKartA, decision of 20.11.2003, B8-84/03– *E.ON/Stadtwerke Lübeck*, para. 55 et seq. (E.ON Hanse offered to sell power generation capacity amounting to around 100 MW to compensate for the strengthening of dominant positions held by the acquired municipal utility in electricity and gas markets. This was not included in the assessment of the commitments since the sale had already been agreed on or, at least, negotiated before the merger was notified.) For commitments already accepted as remedies in an earlier merger control procedure see BKartA, decision of 26.2.2002, B8-149/01 – *E.ON AG/RAG Beteiligungs GmbH*, para. 83; BKartA, decision of 17.1.2002, B8-109/01 – *E.ON/Gelsenberg*, para. 69.

<sup>30</sup> See BKartA, decision of 3.4.2008, B7- 200/07 – *KDG/Orion*, para. 245.

<sup>31</sup> See e.g. BGH (Federal Court of Justice), decision of 7.2.2006, KVR 5/05 – *DB Regio/üstra*, para. 56 (juris); BKartA decision of 12.3.2007, B8-62/06 – *RWE Energie/SaarFergas*, p. 50 et seq. (improvements not sufficient to outweigh the impediment to effective competition as a result of the acquisition of a regional gas transmission company; sale of certain shares in municipal utilities fell short of negative impact both in terms of quantity and quality of the expected positive effects on competition in third markets); BKartA, Guidance on substantive merger control (2012), para. 195 et seq.

tion are not sufficient to avoid a prohibition.<sup>32</sup> The law imposes the burden of proof on the merging parties with respect to the expected pro-competitive effects (Section 36(1) GWB). This requires the merging parties to provide substantial and consistent evidence.

- 17 Except for the rare cases in which the balancing clause can be applied, the Bundeskartellamt has no discretion to accept an impediment to effective competition, e.g. by accepting insufficient remedies. Conversely, the merger control provisions do not give the Bundeskartellamt the power to improve the competitive conditions on an already impaired market. The parties to the merger may therefore not be required to offer commitments that go beyond what is **necessary** to prevent or eliminate the competitive harm created by a merger. This does not exclude that it may be necessary in particular cases for a divestment remedy to extend beyond the areas that are strictly affected by the merger. In some situations a divestment business is only viable if it includes other economic activities as well (see B.I.1.f., para. 54).
- 18 Remedies are only suitable if their **implementation** can be expected with sufficient certainty and in a timely manner.<sup>33</sup> They must be practical, i.e. capable of being implemented, monitored and enforced. This requires that the wording of the remedy clearly specifies which particular actions the parties to the merger have to undertake to fulfil the obligations laid down in the remedy. To verify the implementation of these actions suitable control mechanisms need to be provided for in the clearance decision.<sup>34</sup> Finally, it is necessary that all the parties to the transaction fully agree on the remedy proposal. Otherwise, it is normally not possible to confirm during the limited time available for a merger control procedure that the proposed remedies will be fully implemented.
- 19 Three major **risks** involved in the implementation of a remedy need to be considered when designing a divestiture remedy. First, the divestment package may not be suitable to fully address the competition issues, e.g. because the divestment business does not encompass

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<sup>32</sup> See BKartA, decision of 19.1.2006, B6-103/05 – *Springer/Pro7Sat1*, p. 73 et seq. (only reducing the degree to which a dominant position is strengthened).

<sup>33</sup> See e.g. OLG Düsseldorf (Higher Regional Court), decision of 25.9.2013, VI Kart 4/12 - *Xella/H+H*, para. 141. (juris) (“Commitments proposed by the parties will meet these conditions only in so far as it can be concluded with the requisite degree of certainty that it will be possible to implement [the commitments] and that it will be likely that the new company structures resulting from them will be sufficiently viable and lasting to ensure that the significant impediment to effective competition will not materialise”); BKartA, decision of 17.3.2011, B6-94/10 – *Pro7Sat1/RTL Interactive*, para. 182 et seq., para. 194 et seq. (Proposed commitment to structure the planned online video platform in a way so as to limit its activities to those performed by a provider of technical services. Rejected, inter alia, due to serious doubts as to whether merging parties intended to implement this commitment).

<sup>34</sup> See e.g. BKartA, decision of 30.6.2008, B2-333/07 – *Edeka/Tengelmann*, operative part of the decision no. II (p. 5).

all the assets and other resources that are necessary for a viable competitor. Second, the divestment business may not attract a suitable purchaser.<sup>35</sup> Finally, the divestment business may lose its competitive potential before the divestment procedure is successfully concluded. One reason for this could be the loss of customers or key personnel. It may not be possible to fully exclude these risks, but they must be at least reduced to an acceptable level by including appropriate provisions in the wording of the remedy (see B.I.1.a, para. 40; B.IV.1., para. 89-93).

20 Finally, commitments have to be submitted **in time**. The Bundeskartellamt needs to be able to evaluate the proposed remedies (and where necessary conduct a market test) before the review period for a phase-two decision expires (see C.I., para. 110). Merging parties have to take these requirements into account when they plan milestones for the transaction and negotiate the contractual rights and obligations of the parties (see C.I., para. 113).

21 **Three guiding principles** have to be taken into account when drafting remedies in order to ensure their effectiveness: In most cases, divestiture remedies are the most appropriate instrument (1.). Insofar as behavioural commitments can be considered to provide an effective solution in the particular case, they must not subject the conduct of the companies involved to continued control (2.). As a rule, divestiture remedies in the form of an up-front-buyer divestiture are better suited to remove competitive concerns than a condition precedent, as they help to avoid harmful effects to competition in the first place. In contrast, conditions precedent result in a temporary toleration of a restriction to competition.<sup>36</sup> Therefore, a divestiture remedy generally has to take the form of an up-front buyer divestiture (3.).

22 In expanding or dynamic markets, a high market share does not necessarily coincide with market power, as there is room for innovation on such markets, which promotes market entries and/or a quick shift of market shares.<sup>37</sup> Revenue-based market shares may also be insignificant for the determination of market power, for example if, on two-sided markets (e. g. platform markets) only one side is charged for the services offered.<sup>38</sup> Market power in

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<sup>35</sup> See e.g. BKartA, decision of 22.2.2013, B7-70/12 – *Kabel Deutschland/Tele Columbus*, para. 342 (the proposed divestment business was not sufficiently attractive for potential purchasers).

<sup>36</sup> OLG Düsseldorf (Higher Regional Court), decision of 22.12.2008, VI-Kart 12/08 (V) – *Globus/Distributa*, para. 19 (juris).

<sup>37</sup> See BKartA, decision of 12.11.2014, B5-138/13 – *Tokyo Electron Limited/Applied Materials*, para. 194.

<sup>38</sup> See the Federal Government's reasoning for the 9<sup>th</sup> amendment of the German Competition Act, sect. 18(3a).

expanding or dynamic markets may for example rather result from (exclusive) access to data or network effects<sup>39</sup>. Accordingly, the 9<sup>th</sup> amendment to the GWB includes the special economic features characterizing business models and user behaviour on digital platform markets into the assessment criteria for market dominance (Section 18(3a) GWB-new). Where expanding or dynamic markets are at issue, commitments may thus have to meet special demands. In negotiations with parties about appropriate commitments, the Bundeskartellamt will consider these special demands.

## 1. Clear preference for divestments

- 23 Divestiture remedies have proved their effectiveness in many cases, which is why they are usually the most preferable remedy. They lead to a structural change that directly addresses the external growth that causes a competition problem. They are in line with the aim and purpose of merger control to prevent competitive harm that is caused by changes to the market structure. In addition, a major advantage in comparison with other types of remedies is that once implemented divestments do not require any further monitoring or intervention by the competition authority.<sup>40</sup> Divestments are usually **self-policing** and they often have a **lasting** competitive impact. For most divestments, implementation risks are less severe than the risks that are usually associated with non-structural remedies. For these reasons, the remedy practice of the Bundeskartellamt – as well as that of the EU Commission – is characterised by divestments in the vast majority of cases.
- 24 However, divestments are not a practicable solution in every single case. In some cases, they are not an acceptable option for the merging parties because they would completely undermine the rationale of the transaction. For example, vertical mergers often aim at a closer coordination of products at different levels of the value chain. If the up-stream or down-stream business is divested, efficiencies that would result from vertical integration cannot be realized. In some of these cases, **behavioural remedies** can be a possible solution, provided they are suitable and effective. When compared to the effects of a divestment remedy as a benchmark, the expected impact of a particular behavioural remedy on competition has to be similarly effective. Pro-competitive effects have to be sufficiently likely. In practice, this is often not the case.

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<sup>39</sup> E. g. with regard to platforms whose aim is to match supply and demand (“matching platforms”), see BKartA, decision of 22.10.2015, B6-57/15 – *OCPE II/EliteMedianet*, para. 76.

<sup>40</sup> However, the decision may provide for certain temporary behavioural commitments besides the divestiture, which require a certain (but not continued) control beyond the date of divestiture, see B.IV.

25 Behavioural remedies are often used as complementary obligations in addition to a divestment remedy to ensure the effective implementation of the divestment (see B.IV., para. 88-106).

## 2. No continued control

26 Remedies should address the lasting change to market structure that results from the concentration. They must not aim at subjecting the parties' market conduct to continued control (Section 40(3) sentence 2 GWB). Otherwise, a remedy would not be effective in eliminating competitive harm. The conduct of the parties to the merger would constantly have to be monitored by the competition authority or an external third party. Non-compliance could only be identified and addressed ex-post because the parties would be able to implement the merger once they obtained clearance. The enforcement of behavioural remedies can, therefore, be faced with similar difficulties as procedures that aim at ending the abuse of a dominant position. If behavioural remedies necessitate a continued control, they are also not in line with the objectives of a preventive merger control system. As soon as a commitment provides for an internal restriction, as for example the implementation and maintenance of a "Chinese wall"<sup>41</sup>, control is only possible to a limited extent, irrespective of whether it is carried out by the authority or a third party. It cannot be excluded that information between the companies involved in the merger is exchanged without this being noticed. Therefore, an effective control cannot be guaranteed in such cases. In light of these disadvantages, the legislator has excluded behavioural remedies if they require a constant control of the merging parties' conduct.

27 In appropriate cases, the Bundeskartellamt may also request ancillary provisions requiring the parties to (once or repeatedly) behave in a certain way. However, the parties must not be obliged to act **constantly** in a specific way. Furthermore, the relevant conduct must have an effective and sustainable structural effect on the market conditions in order to permanently remedy the competitive harm. This structural effect must result from the fulfilment of the behavioural commitment. Provided there is no need to control the parties' behaviour beyond the steps necessary for the fulfilment of the commitments, such ancillary provisions do not infringe the restriction to implement a constant control (for case examples and con-

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<sup>41</sup> During the public consultation of the guidance document it was pointed out that in other jurisdictions the implementation of „Chinese walls“ (= „Firewalls“) by the parties to the merger has been regarded as an effective remedy to remove competition concerns.

ditions under which such behavioural commitments are in accordance with the law, see in detail B.III.).

### **Federal Court of Justice *Deutsche Bahn/üstra*<sup>42</sup> – on the structural effect of behavioural remedies**

The Federal Court of Justice referred the examination of the case back to the Düsseldorf Higher Regional Court which had reversed the Bundeskartellamt's clearance decision (clearance was subject to remedies) in the *Deutsche Bahn/üstra* case. The Federal Court of Justice acknowledges that "the implementation of transparent and non-discriminatory public procurement procedures can generally be considered as a structural condition for more effective competition", i.e. it has a sufficient effect on market conditions and can therefore be regarded as effective.<sup>43</sup>

The Federal Court of Justice applies the principles set out above (see A.III., para. 14) to the obligation to implement a public procurement procedure outside the scope of public procurement law. The Court provides useful guidance on the interpretation of the prohibition on subjecting the conduct of companies to continued control (emphasis added):

"The remedies aim at achieving this objective (implementation of public procurement procedure as a structural condition for effective competition) through repeated influence on the market conduct of the parties. The remedies [...] thus provide that one of the conditions subsequent for clearance of the concentration can arise within a period of more than nine years, if not all bus transport services which are currently provided by *üstra*, and all local passenger rail services which are currently provided by DB Regio, are [subjected to a public procurement procedure and thus] awarded by 1 January 2013 under competitive conditions. [A further] condition [...] indirectly forces *üstra* not to apply for the renewal of expiring licences and is meant to induce DB Regio not to offer contracts for transport services and to refuse offers made by the contracting authority if the negotiated contracts used by the contracting authority for transport services would not fulfil the requirements on competitive tendering [mentioned above].

However, it cannot be concluded from this that at least the last condition [mentioned above] subjects the parties to continued control of their market conduct within the meaning of Section 40(3) sentence 2 GWB and is therefore unlawful. This does not oblige the parties to adopt a certain behaviour on a permanent basis. The conditions will in fact have an effect on their market conduct. However, changes in the market structure can generally only be achieved through a certain conduct by the companies, which means that it is not possible to draw a clear line between influencing the conditions of competition and influencing the competitive conduct of companies which act within the framework of these market conditions [...]. Therefore, the ***decisive question is not so much whether the companies' conduct has been influenced, but whether this results in a structural effect*** that is sufficiently effective and sustainable to prevent or compensate for a deterioration of the conditions of competition resulting from the concentration.

Under this aspect the appeal court will have to examine whether the legal and actual effects of the remedies are suitable to prevent that in future award procedures for transport services the merger would result in a deterioration of the conditions of effective competition. It will thus have to be considered on the one hand whether, beyond the direct control of the market participants' behaviour

<sup>42</sup> BGH (Federal Court of Justice), decision of 7.2.2006, KVR 5/05 – *DB Regio/üstra* (see also BKartA, decision of 2.12.2003, B9-91/03 – *DB Regio/üstra*, reversed by the OLG Düsseldorf (Higher Regional Court), decision of 22.12.04, VI-Kart 1/04 (V); the Higher Regional Court's decision was reversed by the BGH (Federal Court of Justice) and referred back to the OLG Düsseldorf; no need to adjudicate on the substance since the parties terminated and unwound the joint venture).

<sup>43</sup> BGH (Federal Court of Justice), decision of 7.2.2006, KVR 5/05 – *DB Regio/üstra*, para. 57 (juris).

when offering or procuring [transport services] at specific points in time, the remedies would be suitable to have a sustainable influence on the market conditions in the [respective] markets in the local public transport sector."<sup>44</sup>

- 28 Examples of **inadmissible** remedies are market access remedies and sales restrictions, provided they require constant monitoring (see B.III., para. 76). “Chinese-Wall” commitments are also not suitable because their implementation within a group of companies cannot be effectively monitored by a competition authority (see B.III.5, para. 86 et seq.). Equally problematic are organisational obligations (e.g. legal unbundling within a corporate group), obligations to make or refrain from making particular investments, and obligations not to exercise certain shareholder rights (see B.II., para. 68).<sup>45</sup> Price-caps would not amount to an acceptable remedy, because in practice they are not an effective measure to address the negative impact of a merger on market conditions.<sup>46</sup> Nor would long-term supply obligations meet the requirements for effective remedies.<sup>47</sup>
- 29 The following behavioural remedies have been **accepted** in appropriate circumstances: divestment of take-off and landing slots at airports,<sup>48</sup> termination of exclusive distribution agreements,<sup>49</sup> granting customers the right to terminate long-term supply contracts,<sup>50</sup> granting access to infrastructure,<sup>51</sup> granting IP licences,<sup>52</sup> obligation to apply public procurement procedures in the local public transport sector after contracts have expired,<sup>53</sup> and

<sup>44</sup> BGH (Federal Court of Justice), decision of 7.2.2006, KVR 5/05 – *DB Regio/üstra*, para. 58 et seq.

<sup>45</sup> See OLG Düsseldorf (Higher Regional Court), decision of 16.2.2002, VI-Kart 25/02 (V) – *E.ON/Ruhrgas*, para. 91 (juris). In this context see also OLG Düsseldorf (Higher Regional Court), decision of 14.8.2013, VI-Kart 1/12 (V) – *Signalmarkt*, para. 129 et seq. (juris).

<sup>46</sup> See e.g. BKartA, decision of 27.2.2008, B5-198/07 – *A-Tec/Norddeutsche Affinerie*, para. 135 et seq. and 152 et seq. (proposed price cap rejected, commitment proposal was not to increase the price within a certain period of time unless justified by increased costs). See also International Competition Network (ICN), Merger Working Group, Merger Remedies Guide, 2016, annex 3.

<sup>47</sup> See e.g. BKartA, decision of 2.7.2008, B2-359/07 – *Loose/Poelmeyer*, p. 57 et seq. (proposed supply obligation rejected; commitment proposal was to supply competitors with sour milk quark, an upstream product to acid curd cheese).

<sup>48</sup> See BKartA, decision of 19.9.2001, B9-147/00 – *Lufthansa/Eurowings*, p. 2, 22 et seq.

<sup>49</sup> See BKartA, decision of 2.6.2005, B3-123/04 – *H&R WASAG/Sprengstoffwerke Gnaschwitz*, p. 3, 33 et seq.

<sup>50</sup> See e.g. BKartA, decision of 28.5.2001, B8-29/01 – *EnBW/Schramberg*, p. 2, 8 et seq.; BKartA, decision of 11.10.2000, B8-109/00 – *Contigas/Stadtwerke Heide*, p. 2, 8 et seq.

<sup>51</sup> See e.g. BKartA, decision of 22.1.2002, B8-111/01 – *RWE/Stadtwerke Düren*, p. 4 et seq.; BKartA, decision of 4.9.2000, B8-132/00 – *E.ON/Hein Gas*, p. 2, 18 et seq.

<sup>52</sup> See BKartA, decision of 22.5.2003, B3-6/03 – *BASF/Bayer Crop Science*, p. 1 et seq., 39 et seq.

<sup>53</sup> See BKartA, decision of 3.7.2002, B9-164/01 – *DB AG/Stadt- und Regionalbus Göttingen*, p. 2 et seq., 46 et seq.; BKartA, decision of 2.12.2003, B9-91/03 – *DB Regio/üstra*, p. 2 et seq., 64 et seq.

admission of a competitor as a supplier of publicly funded healthcare services.<sup>54</sup> These remedies were appropriate in the context of the particular market conditions and the respective mergers. Whether these measures would also amount to effective remedies in other sectors or cases would need to be assessed in the particular case. These cases have in common, that the behaviour the parties committed to had a structural effect on the market that was comparable to a divestiture. For example in the Deutsche Bahn/üstra case, a constant control of conduct was not necessary as in case of an infringement of the commitment, the Bundeskartellamt could rely on the market participants to complain.<sup>55</sup>

### 3. Preference for up-front buyer solutions, relation to fix-it-first solutions and withdrawal of notification

- 30 There is a strong preference for divestment remedies in the form of up-front buyer solutions. This type of remedy is most in line with the general objective of merger control to prevent undesired anti-competitive effects from occurring in the first place. This is the case because the merger can only be implemented once the up-front buyer condition is fulfilled, which usually occurs when the divestment business is sold and transferred to a suitable buyer.<sup>56</sup> In contrast, if the clearance decision only contains an obligation to divest, **competitive harm** may occur during the period between completion of the merger and implementation of the divestment remedy. In most of the cases this is not acceptable.<sup>57</sup> The same problems arise if the divestment remedy is formulated as a condition subsequent, i.e. the clearance lapses if a divestment to an acceptable buyer is not implemented within the time period specified in the decision. Furthermore, an up-front buyer solution creates a strong incentive for the parties to the merger to implement the divestment as soon as possible in order to complete the merger transaction with the least possible delay. This in turn reduces uncertainties as to whether an effective divestment will occur in a timely manner. If a remedy that foresees an up-front buyer divestment is not implemented within the specified timeframe, the condition can no longer be met and the conditional clearance decision

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<sup>54</sup> See BKartA, decision of 10.5.2007, B3-587/06 – *Klinikum Region Hannover/Landeskrankenhaus Wunstorf*, p. 2 et seq., 60 et seq.

<sup>55</sup> BGH (Federal Court of Justice), decision of 7.2.2006, KVR 5/05 – *DB Regio/üstra*.

<sup>56</sup> See BKartA, Biennial Report 2005/2006, Bundestags-Drucksache 16/5710, p. 20.

<sup>57</sup> See OLG Düsseldorf (Higher Regional Court), decision of 22.12.2008, VI-Kart 12/08 (V) – *Globus/Distributa*, para. 19 (juris).

takes the effect of a prohibition decision.<sup>58</sup> In practice, merging parties have been able to meet the requirements of up-front buyer solutions within the required time limits. With regard to other divestment remedies, the experience has often been different.

- 31 **Conditions subsequent** and obligations are only accepted in exceptional cases, as these involve a toleration of negative effects on competition for a certain period.<sup>59</sup> The use of these types of divestment remedies allows the parties to implement a concentration as soon as the clearance decision is issued. If the divestment does not occur in the specified timeframe, the condition subsequent is met and the clearance lapses. As a consequence, the concentration has to be dissolved.
- 32 In the case of **obligations**, the legal consequences of non-compliance with the obligation are somewhat different. The clearance does not automatically lapse but it may be withdrawn by the Bundeskartellamt. In addition, the Bundeskartellamt may enforce obligations by taking recourse to measures foreseen in the administrative procedure, such as penalty payments to compel compliance (Section 86a GWB in conjunction with Sections 11, 13 VwVG).<sup>60</sup>
- 33 Obligations and conditions subsequent might appear less burdensome from the point of view of the parties to the concentration, and may therefore seem preferable for reasons of proportionality. However, in most cases these types of remedies are not sufficiently effective in removing the competitive harm created by the proposed merger with the required degree of certainty. In these cases, it is proportionate to require a divestiture in the form of an up-front buyer solution.

**Düsseldorf Higher Regional Court *Globus/Distributa*<sup>61</sup> – obligations and conditions subsequent only in exceptional cases**

In 2007 the Bundeskartellamt cleared the acquisition of the Distributa group by its competitor Globus subject to the condition subsequent that four out of a total of 31 DIY stores be divested to an

<sup>58</sup> See BKartA, decision of 12.3.13, B3-132/12 – *Asklepios/Rhön* (cleared subject to up-front buyer divestment of a local hospital and a medical care center in the affected regional market to an independent hospital operator). See also BKartA, press release published 30.7.2013, “Participation of Asklepios Group in rival Rhön-Klinikum retroactively prohibited” (Asklepios decided not to implement the divestment remedy after the merger had been cleared. The condition precedent was therefore not fulfilled and the concentration thus deemed to be prohibited).

<sup>59</sup> See OLG Düsseldorf (Higher Regional Court), decision of 22.12.2008, VI-Kart 12/08 (V) – *Globus/Distributa*, para. 19 (juris).

<sup>60</sup> Section 86a (2) GWB provides for a penalty payment of at least EUR 1,000 and not more than EUR 10 million.

<sup>61</sup> OLG Düsseldorf (Higher Regional Court), decision of 22.12.2008, VI-Kart 12/08 (V) – *Globus/Distributa* (juris).

independent acquirer. The aim of the divestment was to eliminate competition issues in four regional DIY retail markets in several regions in the German states of Rhineland-Palatinate and Saarland.

After the clearance decision had been issued, Globus completed the concentration and subsequently lodged several appeals with the ultimate objective to have the remedies annulled. Globus did not implement the divestments. Therefore, the Bundeskartellamt opened divestiture proceedings because the time limit for the divestment had expired, and, as a consequence, clearance had lapsed. The Düsseldorf Higher Regional Court (OLG Düsseldorf) upheld the Bundeskartellamt's decision and dismissed several appeals. Globus was therefore faced with the obligation to undo the entire transaction. In the light of these consequences, it ultimately sold the stores to a suitable buyer.

The Court explained in its judgement that the use of conditions subsequent or obligations was only lawful in exceptional cases (emphasis added):

"In cases such as the present one, where the Bundeskartellamt cleared the concentration subject to a condition subsequent (or an obligation) and where the parties to the merger were therefore allowed to implement the transaction immediately (in contrast to a suspensive condition [i.e. an up-front buyer solution]), strict requirements must be imposed with regard to the design of the remedies. This is because the use of a condition subsequent (or obligation) is tantamount to temporarily tolerating a merger with anti-competitive effects. Where in an **exceptional case** the merging parties' interest in implementing the transaction prior to the divestment weighs stronger than the general objective to protect competition, **the negative effect on competition can be tolerated for a transitional period** in which the remedy is implemented, provided this period is kept as short as possible.<sup>62</sup> (Unofficial translation of the decision's wording provided by the Bundeskartellamt.)

- 34 As far as up-front buyer solutions are concerned, the remedy's **implementation** is usually **completed** once the ownership rights in assets or shares have been effectively transferred to the buyer of the divestment business. In some cases, it may be sufficient for the merging parties to take all the steps that are necessary to transfer the relevant ownership rights, even though the transfer only becomes effective once a further permit or registration have been issued by a government authority, such as registration in the company register or real estate register, provided the merging parties have requested the relevant registration and that the request is sufficient to trigger the registration.<sup>63</sup> In appropriate cases, ancillary clauses may also provide that an up-front buyer divestiture commitment is fulfilled with the legally binding conclusion of all contracts necessary for the transfer. Any necessary merger control proceedings have to be terminated by that time. Moreover, an undue delay between signing and closing of the transaction should be avoided. In such cases, the Bundeskartellamt will include a second time frame for the closing of the transaction in the ancillary clauses. However, this second deadline can be designed as condition subsequent.<sup>64</sup>

<sup>62</sup> OLG Düsseldorf (Higher Regional Court), decision of 22.12.2008, VI-Kart 12/08 (V) – *Globus/Distributa*, para. 19 (juris).

<sup>63</sup> See for transfer of real estate e.g. BKartA, decision of 2.6.2005, B3-123/04 – *H&R WASAG/Sprenstoffwerke Gnaschwitz*, operative part of the decision no. I.1.b (p. 2) and for the transfer of a company BKartA, decision of 17.2.2009, B2-46/08 – *Danisco/Nordzucker*, para. 4.

<sup>64</sup> See for example BKartA, decision of 22.11.2013, B6-98/13 – *Funke/Springer*, operative part I.A.3 (one month).

In these cases it has to be ensured that appropriate measures are taken to preserve the full value of the companies or assets which are to be divested in the period between the signing of the binding agreement and the effective transfer of the relevant ownership rights.<sup>65</sup>

35 If there are doubts as to whether a divestiture remedy can be implemented, in particular strong uncertainties about the availability of suitable companies that may be interested in acquiring the divestment business, the Bundeskartellamt may require the parties to the merger to find a suitable purchaser before the merger review procedure is completed. In such a case, the merging parties conclude a legally binding agreement with the purchaser and might even transfer the divestment business before the Bundeskartellamt issues the decision (**fix-it-first remedy**).<sup>66</sup> This approach enables the Bundeskartellamt to determine whether the divestment package can indeed be sold before it concludes its merger control proceedings. If the Bundeskartellamt subsequently clears the merger, the purchaser does not need to be approved by the authority again. Fix-it-first solutions are only accepted if they are tailored to solve the competition issues identified in the merger proceedings. In contrast, if the acquiring company requests the seller to restructure the target company or to close down parts of the business prior to the transfer of the divestment business, this may be, in the opinion of the Bundeskartellamt, a violation of the stand-still obligation (Section 41(1) 1 GWB).<sup>67</sup>

36 In general, it is also possible to **withdraw** a merger notification while the review proceeding is still pending and to subsequently re-notify a modified version of the merger project.<sup>68</sup> However, the merging parties should be aware that there may be risks involved in restructuring the transaction in order to avoid the competition issues without closely cooperating

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<sup>65</sup> See e.g. BKartA, decision of 23.2.2005, B10-122/04 – *Remondis/RWE-Umwelt*, operative part of the decision no. I.B.2-I.B.5 (p. 7 et seq., 10), 121 et seq. (example from the context of obligations).

<sup>66</sup> See e.g. BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 56 (conclusion of sale and purchase agreement regarding company that owns production plant prior to decision clearing the merger subject to remedies); BKartA, decision of 17.2.2009, B3-129/12 – *Universitätsklinikum Heidelberg/Kreiskrankenhaus Bergstraße*, para. 9 (Merger cleared without commitments, but cooperation agreement between Universitätsklinikum Heidelberg and a hospital operator active in the region of Heidelberg – who is not identified in the public version of the decision – was modified and limited during ongoing second phase investigations.).

<sup>67</sup> See BKartA, decision of 03.12.2014, B2-96/14; different view: OLG Düsseldorf (Higher Regional Court), decision of 15.12.2015, VI Kart 5/15 [V], not final.

<sup>68</sup> This approach is generally in line with procedural rules, as confirmed by the BGH in the *Phonak/ReSound* case. See BGH (Federal Court of Justice), KVR 1/09 – *Phonak/Resound*, para. 28 (juris); see also BKartA, case summary of 20.4.2010, “Withdrawal of notification in EDEKA/RATIO merger proceedings”; BKartA, press release published 4.9.2014, “The Bundeskartellamt clears acquisition by the Remondis group of four Sita waste management sites in Baden-Württemberg” (B4-89/13).

with the competition authority.<sup>69</sup> In some constellations there may be a danger that a divestment may not be sufficient to solve the competition issues, e.g. because the divestment buyer that was chosen by the merging parties may not be suitable, or because the divestment business is not viable and the divestment can therefore not ensure that an effective competitor remains after the concentration. Withdrawal and modification of the merger project is also not an option if the modified transaction does not result either in addressing the competition problem or in turning the merger project into a transaction that genuinely does not meet the jurisdictional thresholds for notification. Withdrawal is not accepted if its objective is to circumvent merger review. For example, if merging parties intend to avoid merger review by engaging a trustee to acquire the target business, this usually does not solve the competition issues, because trustee solutions often tend to preserve the acquirer's ability to exercise influence on the target business.

## **B. Types of remedies**

37 The following section provides an overview of a series of typical commitments which may be suitable to remedy the expected harm to competition. Divestiture remedies (I.) are the most common and effective type of remedy. In some cases other measures may also be acceptable, for example the dissolution of joint ventures and the severance of other links between companies (II.), or market access remedies, in particular access to important infrastructure (III.) The purpose of additional measures (IV.) is to ensure the full effectiveness of the remedies.

### **I. Divestiture remedies**

38 In most cases the competition problems are most effectively remedied by the sale of a company or business unit of the acquirer or the target to an independent third party (see A.III.1., para. 23). The **divestment business**<sup>70</sup> has to be viable and competitive on a permanent basis (1.). There has to be at least one **suitable buyer** interested in purchasing the divestment package. The buyer has to be independent of the merging parties and it has to

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<sup>69</sup> This divestment can also constitute a notifiable merger. Insofar as this second merger in itself does not give rise to any competition problems, the corresponding merger clearance (or the fact that this divestment is not notifiable) does not imply that the divestment solves the competition problems arising from the first merger.

<sup>70</sup> The term "divestment business" is used to refer to all assets and contractual relationships to be divested, irrespective of how the divested unit is constituted legally and organisationally.

be sufficiently certain that in the foreseeable future the buyer will use the acquired business to operate on the markets affected by the merger as a competitor, independently of the merging parties (2.) and (3.).

## **1. Requirements placed on the divestment business**

39 The following section describes key requirements the divestment package needs to fulfil in order to be suitable. The first part describes the **most common and effective option** of divesting an existing business that can operate on a stand-alone-basis, i.e. independently of the merging parties (a). This part also explains how the divestment business and its resources should be defined in the commitment decision (b). The second part describes **less common situations** which may be acceptable in individual cases (c-e). In some instances it may become necessary to include in the divestment package further assets or business units outside the markets directly affected by the merger (f). A similar situation is addressed by remedies that include the divestment of “crown jewels”,<sup>71</sup> as a fall-back solution (g).

### **a) Existing, stand-alone business**

40 As a rule, the divestment package has to be an existing, stand-alone business that is equipped with all the necessary resources to compete effectively and on a permanent basis

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<sup>71</sup> “Crown jewel solutions” are remedies that are implemented in a two-step divestiture process. In such a case, the first divestment business will be replaced (or complemented) by an alternative divestment business, the so-called crown jewels, if the first divestiture is not implemented within a given period of time. The divestment business that is accepted in the context of a crown jewel solution is chosen with a view to ensure that the crown jewels, i.e. the divestment business can definitely be sold without any difficulty (see also the annex “Definitions”, “crown jewels”).

with the merging parties<sup>72</sup> (in the following “**competitiveness**”). This requires that the divestment business is **viable, marketable**, and represents a **sustainable value**. In practical terms this means that all the assets (e.g. production facilities and IP rights), personnel, as well as all the relevant business relations with suppliers and customers have to be transferred with the divestment business.

## **b) Definition of the divestment package**

41 In the commitment proposal and, ultimately, in the commitment decision, the divestment package should be described as **precisely** and **comprehensively** as possible. The description must list all the components that will be part of the package.<sup>73</sup> The divestment package must in particular comprise:

- all relevant **tangible assets** (e.g. production sites, sales outlets, logistics and storage sites, including stock and inventories, key facilities such as IT and R&D, all ownership and use rights, as well as all contractual rights; if rental or lease agreements are concerned, the purchaser must be allowed to enter into the contractual relationship with the owner of the mentioned property in place of the merging parties),<sup>74</sup>

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<sup>72</sup> See BKartA, decision of 16.1.2007, B6-510/06 – *Weltbild/Hugendubel*, operative part of the decision no. I.1, I.2 (p. 2 et seq.) (divestment of all shares in a company operating a bookshop); BKartA, decision of 8.6.2006, B4-29/06 – *Telecash/GZS*, para. 1 et seq., 127 (divestment of a subsidiary active as a competitor on the German market for network operation services); BKartA, decision of 28.4.2005, B10-161/04 – *Asklepios-Kliniken/LBK Hamburg*, operative part of the decision no. A.1 (p. 2 et seq.), para. 80 (divestment of a hospital); BKartA, decision of 17.8.2004, B7-65/04 – *GE/InVision*, operative part of the decision no. A.1 (p. 2) (divestment of a subsidiary active as a competitor on the nationwide retail market for stationary x-ray units for non-destructive testing systems for macrostructural analysis); BKartA, decision of 19.12.2001, B8-130/01 – *BP/E.ON*, p. 4 et seq., 25 et seq. (inter alia, divestment of petrol stations). The divestment of a stake in an existing, stand-alone business may also be a suitable measure, cf. BKartA, decision of 30.4.2010, B8-109/09 - *RWE/EV Plauen, SW Lingen, SW Radevormwald*, para. 107 et seq. (stake in public utility company). An analysis of remedies imposed by the US FTC has confirmed that divestments of ongoing businesses were the most successful measure for maintaining competition in the relevant market, see *The FTC's Merger Remedies 2006-2012*, Januar 2017, available at [https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100\\_ftc\\_merger\\_remedies\\_2006-2012.pdf?utm\\_source=govdelivery](https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf?utm_source=govdelivery).

<sup>73</sup> See BKartA, model text for clearance of a merger project subject to remedies (here: conditions precedent/up-front buyer) commitments in merger control proceedings, 2005, Nr. 2.1-2.4 (available at [http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions\\_precedent.pdf?\\_\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions_precedent.pdf?__blob=publicationFile&v=4)).

<sup>74</sup> See e.g. BKartA, decision of 25.9.2008, B1-190/08 – *Strabag/Kirchner*, p. 7 (asphalt mixing plant); Bundeskartellamt, decision of 2.6.2005, B3-123/04 – *H&R WASAG/Sprengstoffwerke Gnaschwitz*, p. 2 (safe storage place for explosives).

- all relevant **intangible assets** (e.g. patents, brands, licences, know-how, including software and, if applicable, data<sup>75</sup>),
- all **permits and authorizations** required for the permanent and independent operation of the divestment business (e.g. operating licences, approvals, and certifications by governmental organizations, as well as quality marks and certification marks, etc.),<sup>76</sup>
- the **personnel** that is part of the divestment business or is required for the permanent and independent operation of the business (in particular key personnel,<sup>77</sup> e.g. staff and managers with contacts to key customers or key suppliers, or with specific skills or know-how with regard to functions, such as R&D, IT, production or logistics, that are important for the competitiveness of the divestment business; the purchaser must be allowed to enter into the rights and duties of the employment contracts in place of the merging parties,
- all (significant) **documents and records** relating to the divestment business,<sup>78</sup> and
- all **contracts** necessary for the operation of the divestment business (e.g. contracts with suppliers and customers, as well as leasing contracts); the parties to the merger should ensure that the purchaser is allowed to enter into the existing contractual relationships in place of the merging parties.

42 In some of the situations mentioned above it may be necessary to oblige the relevant merging party to use its best efforts to obtain the other contractual party's consent for the divestment buyer to enter into the existing agreement in the merging party's place. This applies for example with regard to lease contracts in respect of production sites, sales outlets or logistics facilities. In many cases, the relevant merging party is not in a position to unilaterally assign the contract to the buyer of the divestment business, but he has to use his best efforts to ensure that the contract is transferred promptly and within the divesti-

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<sup>75</sup> See e.g. BKartA, decision of 13.8.2015, B9-48/15 – *WM/Trost*, para. 331 et seq.

<sup>76</sup> See e.g. BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 34 (transfer of sugar production quota).

<sup>77</sup> See for key personnel in the market for cash services BKartA, decision of 18.7.2013, B4-18/13 – *Prosegur/Brink's*, para. 323 (in addition to customer contracts and armoured vehicles/security vans in particular the transfer of key personnel: the employees responsible for collecting cash at bank branches and shops with security vans. Key role since they were known in the bank branches concerned, familiar with the localities and to whom the customer's employees in the branches had established a relationship of trust).

<sup>78</sup> See BKartA, decision of 15.3.2005, B4-227/04 – *Smiths Group/MedVest*, p. 2.

ture period. Similar issues arise when the **transfer of customer agreements** is an essential element of the remedy package.

- 43 In the situations described in the previous paragraph it may occur that the other contractual party does not consent to an assignment of the contract and is not willing to enter into a new agreement with the buyer of the divestment business. In such a case, as a fall-back solution, it may be necessary and sufficient to conclude a **sublease** agreement between the relevant merging party and the divestment buyer, provided that it enables the divestment buyer to use the relevant facility in the same way as the merging party and according to the same commercial conditions.<sup>79</sup> It should also be ruled out that the merging party – as the original lessee – is in a position to impede the divestment buyer’s use of the property. This fall-back solution is not acceptable, however, if there is a structural link between the merging party and the lessor, for example a minority stake or a comparable contractual link.
- 44 In markets where brands play an important role, e.g. in the area of consumer goods, it is often necessary to include the rights to use **established brands** in the divestment package.<sup>80</sup>
- 45 **Licences** for patents or other industrial property rights or the transfer of know-how are often an important element of the divestment package.<sup>81</sup> As a rule the licence has to be an exclusive licence and the licensor should not retain its own right of use to ensure that the market position of the licensor is transferred to the licensee.<sup>82</sup> It is not always necessary to grant a worldwide licence. The licence has to cover at least the countries where the divestment business manufactures or distributes its products, provided activities in these countries are relevant in the context of the merger control procedure (see however B.I.1.f., para. 54). Licence agreements which allow not only the new licensor, i.e. the buyer of the di-

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<sup>79</sup> See BKartA, decision of 28.10.2010, B2-52/10 – *Edeka/Trinkgut*, p. 6.

<sup>80</sup> See e.g. BKartA, decision of 25.4.2014, B6-98/13 – *Funke/Springer*, operative part of the decision no. A.2.1 (S. 4) und para. 352 (brands and title rights with regard to TV listings magazines); BKartA, decision of 27.9.2000, B6-88/00 – *Springer/Jahr*, p. 1 (divestment of two magazines including brands and title rights); BKartA, decision of 25.2.1999, B9-164/98 – *HABET/Lekkerland*, operative part of the decision no. 1.B (p. 2) and p. 24 et seq. (right of purchaser of divestment business to use a brand name especially known in Berlin).

<sup>81</sup> See e.g. BKartA, decision of 3.2.2012, B3-120/11 – *OEP/Linpac*, operative part of the decision no. A.2.3 (p. 4); BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 6; BKartA, decision of 18.7.2008, B5-84/08 – *Stihl/ZAMA*, p. 5, 7 et seq.; BKartA, decision of 8.2.2007, B5-1003/06 – *Atlas Copco/ABAC*, p. 4 (exclusive, royalty-free licence as part of the divestment business); BKartA, decision of 15.3.2005, B4-227/04 – *Smiths Group/MedVest*, operative part of the decision no. 1.2 (p. 3).

<sup>82</sup> In exceptional cases, it can be sufficient to grant an exclusive licence (i.e. without divesting a business) to compensate for the expected impediment to effective competition; see in this regard B.III.2, para. 78 et seq.

vestment business, but also the former licensor to use the patents and other intellectual property rights covered by the licence agreement can only be accepted in exceptional cases. An example:

**Bundeskartellamt vertical merger *Stihl/Zama*<sup>83</sup> – divestment of a business unit and patent licences for important input products**

Stihl manufactures, inter alia, various handheld petrol-driven power tools. According to the Bundeskartellamt's investigation, the company has a dominant position in the German markets for petrol chainsaws, petrol brushcutters, blowers and hedge trimmers. The target company, Zama, manufactures diaphragm carburetors for use in handheld power tools. The acquisition of Zama would have strengthened Stihl's position in the market. After the merger, Stihl would have had the ability and the economic incentive to (fully or partially) foreclose other manufacturers of the power tools described above from access to diaphragm carburetors, an important input product<sup>84</sup> offered on a world-wide market. This is why the Bundeskartellamt only cleared the concentration subject to an up-front buyer remedy. Zama's business in the USA had to be divested to a suitable purchaser which was independent of the merging parties. Pre-merger Zama USA developed diaphragm carburetors for Stihl's competitors. The business divisions based in Hong Kong and Japan, which, pre-merger, had offered their development capacity to a large extent to Stihl, could then be acquired by Stihl.

In addition to the divestment of Zama's business unit located in the USA, the clearance decision provided that the independent purchaser of the divestment business was to be granted an irrevocable licence for an unlimited period for the patents and other intellectual property rights owned by Zama Japan and Zama Hong Kong. The licence agreement had to permit the purchaser, in the same way as Zama Japan and Zama Hong Kong, to use and develop the patents and other intellectual property rights to develop, manufacture and distribute the relevant carburetors.<sup>85</sup> In this merger case it was not necessary to require the merging parties to grant the purchaser of the divested company an exclusive license that would also exclude the licensor from using the IP rights, because the target company's market position in the diaphragm carburetors market did not have to be transferred completely to the purchaser. In order to eliminate the competition problem it was sufficient to ensure that a second independent supplier of this important input product would remain available as an alternative source apart from Walbro, and in addition to Stihl which, post-merger, would be a vertically integrated supplier.<sup>86</sup> It was therefore sufficient to require Stihl not to grant any licences to competitors of the divestment business.

- 46 Furthermore, the transfer of contractual relationships can be an important part of a divestment package. This may be the case if **long-term purchasing, supply or service agreements** foreclose competitors, either on upstream markets from access to supplies, or

<sup>83</sup> See BKartA, decision of 18.7.2008, B5-84/08 – *Stihl/Zama*.

<sup>84</sup> Diaphragm carburetors can be used in any position, i.e. also in tilted position or overhead.

<sup>85</sup> See BKartA, decision of 18.7.2008, B5-84/08 – *Stihl/Zama*, operative part of the decision no. 3.2 (p. 7). The license agreement must not oblige the purchaser to back-license any further product developments to the licensor.

<sup>86</sup> See BKartA, decision of 18.7.2008, B5-84/08 – *Stihl/Zama*, para. 71.

on down-stream markets from access to customers of the divestment business.<sup>87</sup> If these contractual relationships are not transferred together with the divestment business but remain with the merging parties, the competitiveness of the divestment business once acquired by the divestment buyer may be significantly harmed. In this case the market position would not be successfully transferred to the divestment purchaser. For example, long-term agreements between local municipalities and waste management businesses are a crucial element that determines their actual market position on many waste disposal markets. As a consequence, the isolated divestment of particular sites including personnel, vehicles and sorting systems, was not sufficient to solve competition issues in cases that involved the merger of waste management companies. When mergers in this sector were cleared subject to commitments, it was always necessary to transfer important waste disposal contracts as well.<sup>88</sup> Whether these contracts can be assigned to the divestment buyer can be questionable in practice. It has to be clear that the relevant municipalities are willing to give their consent. Another requirement is that the remaining contract period of the assigned agreements is sufficiently long. Otherwise the purchaser will not be in a position to establish itself as a reliable service provider and credible competitor on the relevant waste market before the contracts are up for renegotiation or subject to a new bidding procedure.

### c) Carve-out

- 47 In exceptional cases the divestment of a business unit which is not an existing business that could operate on a stand-alone-basis may also be acceptable as a remedy ("carve-out"). Common examples are a branch, a sales outlet, a branch office or a production site. They have in common that they already form their own **organizational entity**. This unit has to be

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<sup>87</sup> See e.g. BKartA, decision of 13.8.2015, B9-48/15 – *WM/Trost*, operative part of the decision no. A.2.3 (p. 3) (transfer of customer contracts); BKartA, decision of 25.4.2014, B6-98/13 – *Funke/Springer*, operative part of the decision no. A.2.2 (p. 5) (transfer of all rights and obligations arising from subscription contracts); BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 6 (contracts with suppliers and customers); BKartA, decision of 15.3.2005, B4-227/04 – *Smiths Group/MedVest*, operative part of the decision no. 1.2 (p. 2 et seq.) (transfer of all customer contracts).

<sup>88</sup> See e.g. BKartA, decision of 6.4.2006, B10-151/05 – *Sulo/Cleanaway*, operative part of the decision (p. 3 et seq.) and para. 269 et seq.; BKartA, decision of 23.2.2005, B10-122/04 – *Remondis/RWE Umwelt*, operative part of the decision (p. 3 et seq.) and para. 309 et seq., 312 et seq.

separated from the entire enterprise in the divestment process (“carve-out”).<sup>89</sup> In the opposite situation a business unit which should remain with the parties to the merger is separated from the divestment business (“reverse carve-out”). In this case the divestment of the company with the activities remaining after the reverse carve out is the subject of the commitment to divest.

48 Also in the context of a carve-out, the divested business has to meet the requirements set out in the previous section. In addition, the divestment package needs to fulfil a number of additional specific requirements. The decisive criterion is whether it is sufficiently certain that the carved-out part of the company will be **competitive** on a permanent basis.

49 The carved-out part has to be clearly separable from the rest of the company, it needs a separate organisational structure and it has to be **able to operate on its own**, independently from the merging parties. Unsuitable for a carve-out are business units that overlap with others and require a continued cooperation with the merging parties for their operation.<sup>90</sup> In most cases this jeopardises the competitiveness and independence of the carved-out business unit. Furthermore, if the divested business and the parties to the merger continue to operate in the same market, this can also raise antitrust issues (Section 1 GWB and Art. 101 TFEU).

50 In a number of cases the Bundeskartellamt has considered the carved-out business as **insufficient**:

- The permanent viability of a carved-out production line was denied because it continued to be **dependent** on the selling company, lacked profitability when operated as a stand-alone business and had insufficient production capacities.<sup>91</sup>
- If the merger affects an industry with a **significant level of innovation** and a corresponding level of R&D expenditure, the mere transfer of production and distribution capacities can be insufficient if R&D capacities are not transferred as well.<sup>92</sup>

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<sup>89</sup> See e.g. BKartA, decision of 8.5.2009, B8-32/09 – *Shell Deutschland Oil/Lorenz Mohr*, p. 1 et seq., 25-27 (transfer of a petrol station); BKartA, decision of 5.3.2009, B8-163/08 – *SaarFerngas Landau/Energie Südwest*, p. 2 (carve-out and divestment of Energie Südwest AG Landau’s gas division); BKartA, decision of 22.8.2005, B1-29/05 – *Werhahn/Norddeutsche Mischwerke* (in particular divestment of asphalt mixing plants and companies operating asphalt mixing plants).

<sup>90</sup> See e.g. BKartA, decision of 18.6.2009, B3-215/08 – *GNH/Werra-Meißner*, para. 230 et seq.

<sup>91</sup> See BKartA, decision of 27.2.2008, B5-198/07 – *A-Tec/Norddeutsche Affinerie*, para. 135 et seq., 152 et seq. (production line for oxygen-free copper billets would have been dependent on the parties, who would have had to use a continuous casting line together with the purchaser; in addition, the divestment business could only operate economically if vertically integrated with the production of semi-finished product and cathodes, thus prohibition).

- The carving out and divestiture of sales activities without also transferring the corresponding production capacities were not considered sufficient because strong **customer loyalty** made it very likely that customers would defect to the manufacturer, i.e. the merging party selling the divestment business. To transfer the market position it would therefore have been necessary to transfer both production and distribution.<sup>93</sup>

**Bundeskartellamt *Nordhessen/Werra-Meißner*<sup>94</sup> – divestiture of cardiology or surgery hospital services**

The Bundeskartellamt prohibited a merger between two municipal hospital operators. Gesundheit Nordhessen operates six hospitals with around 1,700 beds in the greater area of the city of Kassel. It intended to acquire Gesundheitsholding Werra-Meißner, which operates two hospitals with around 500 beds in the adjacent administrative district of Werra-Meißner.

The planned merger would have strengthened the dominant position of the target company on the market for acute care hospital services in the Werra-Meißner district. Gesundheit Nordhessen was the second largest provider of hospital services in this area.<sup>95</sup>

The parties proposed two different divestment remedies to prevent a prohibition of the merger. Both proposals were rejected by the Bundeskartellamt as insufficient to remove the competition concerns.

With their first proposal, the parties offered to divest the cardiology “divisions” of two hospitals in the affected geographic market to one of their competitors. These “divisions” did not form separate organisational units but were part of the Department of Internal Medicine.<sup>96</sup> With their second (alternative) proposal, the parties offered to sell the surgery departments of the two hospitals belonging to Gesundheit Werra-Meißner, which were separate organisational units within the hospitals, but did not amount to a “stand-alone” business.<sup>97</sup>

In both alternatives, the divestment business would have provided its services at the premises of the two hospitals owned by Gesundheit Werra-Meißner. The two hospitals would have undertaken not to provide these specific hospital services themselves. In both cases, the parties and the buyer would additionally have concluded a tenancy agreement for the rooms in the two hospitals, an agreement

<sup>92</sup> See BKartA, decision of 11.4.2007, B3-578/06 – *Phonak/ReSound*, para. 337 et seq. (the proposed divestment of Interton did not contain any reference that this business had its own research and development capacities independent from the target GN-Resound, thus prohibition; annulled by the Federal Court of Justice on other grounds).

<sup>93</sup> See BKartA, decision of 24.3.2004, B4-167/03 – *Synthes-Stratec/Mathys*, para. 103 et seq. (merger of medical device manufacturers with overlaps, inter alia, in the production and distribution of implants and associated specialist instruments for the treatment of trauma cases; proposed divestiture commitment was limited to Mathys’ trauma cases distribution business; in particular sales employees and customer lists, thus merger prohibited).

<sup>94</sup> BKartA, decision of 18.6.2009, B3-215/08 – *Gesundheit Nordhessen/Werra-Meißner*. The example in the English version has been simplified and shortened as compared to the original version in German.

<sup>95</sup> *Ibid.* para. 227 et seq.

<sup>96</sup> *Ibid.* para. 237

<sup>97</sup> *Ibid.* para. 243 et seq.

for the hospitals to supply the necessary nursing and medical staff and (for the divested cardiology “unit”) an agreement for the buyer to use the hospital's medical equipment.<sup>98</sup> The buyer would have had to cooperate closely with the merging parties’ hospitals, e.g. to coordinate the use of operating rooms or the services of anaesthetists. With regard to the surgery “unit” it would have been inevitable for the buyer to coordinate the allocation of cases with the merging parties given that the medical services provided by the divestment business were not clearly distinguishable from the services provided in other departments.<sup>99</sup> With regard to the cardiology “divisions” the buyer would hardly have been able to invest in medical equipment itself because it would have been contractually obliged to use the existing equipment of its competitor.<sup>100</sup> As the divestment business would have been dependent on the infrastructure and human resources of the merging parties, the Bundeskartellamt was not convinced that the market position would be transferred to the buyer on a permanent basis and that the buyer would be able to operate as an effective competitor.<sup>101</sup>

#### d) Mix-and-Match solutions

- 51 A divestment package in which assets and personnel of the purchaser and the target company are combined (mix-and-match) often raises **serious issues** as to whether the divestment business will be viable and competitive. In most instances it is not sufficiently certain that the formerly separate parts will be able to work together effectively, that they can be integrated quickly after the divestment remedy has been implemented, and that the new business unit will be able to operate reliably. Depending on the circumstances of the particular case and in conjunction with additional requirements regarding the purchaser of the divestment business, a mix-and-match solution can be acceptable in exceptional cases.<sup>102</sup>

#### **Bundeskartellamt and Düsseldorf Higher Regional Court *Xella/H+H*<sup>103</sup> – “mix and match” solution in aerated concrete case**

The takeover of the Danish manufacturer of aerated concrete H+H by the market leader Xella would have resulted in a dominant position for Xella on the regional markets for aerated concrete and lightweight concrete blocks in northern and western Germany. In Germany H+H manufactured exclusively aerated concrete and had one production site in each of the two regional markets affected by the merger. Xella was the leading manufacturer of aerated concrete and calcium silicate bricks in Germany with production sites across the entire country.

<sup>98</sup> Ibid. para. 232 et seq.

<sup>99</sup> Ibid. para. 251.

<sup>100</sup> Ibid. para. 239.

<sup>101</sup> Ibid. para. 252 et seq.

<sup>102</sup> See e.g. BKartA, decision of 25.3.2014, B6-98/13 – *Funke Medien Gruppe/Axel Springer*, operative part of the decision no. A.2 (p. 3 et seq.) and para. 310 et seq. (divestment of TV listings magazines, in particular brands and title rights, and the shares in the companies that are the contracting parties of the subscription agreements with end customers, as well as domains, archives, rights of use, data collections, printing contracts; personell only if requested by purchaser).

<sup>103</sup> BKartA, decision of 12.3.2012, B1-30/11 – *Xella/H+H*; OLG Düsseldorf (Higher Regional Court), decision of 25.9.2013, VI Kart 4/12 (V).

The takeover was prohibited by the Bundeskartellamt. The commitments offered by Xella were not sufficient to eliminate the negative effects on competition. Xella had offered, among other commitments, to sell its own aerated concrete production site at Wedel in the northern regional market, which had so far been integrated into Xella's central distribution structure. Xella proposed to combine the production facility at Wedel with the customer base of the H+H Wittenborn production site, which it still intended to acquire. Apart from the customer lists the proposed divestment package included the contractual relations between H+H and its customers, the sales staff employed by H+H for this specific geographic market and, if required, the H+H brand. Furthermore, Xella undertook not to solicit these customers for a period of two years. Xella intended to guarantee the purchaser a sales volume at the Wittenborn works which amounted to 90 percent of H+H's sales effected by the plant in the previous year.<sup>104</sup>

In the Bundeskartellamt's view, this combination of divested assets and resources from different businesses was not suitable to transfer (a sufficiently large portion of) H+H's previous market position at the non-divested Wittenborn plant to a potential purchaser. In the sector affected by the takeover the divestiture of customer relationships together with production capacities was not sufficient to guarantee the actual transfer of customer relationships to the buyer of the divestment business. The customers of H+H were free to switch supplier at any time. The envisaged customer allocation measures would have only resulted in a restriction of competition between Xella and the purchaser of the divestment business to the detriment of the customers. The customers of the Wittenborn plant would have had no incentive to follow the purchaser to another plant. On the contrary, most customers would have had to travel a longer distance to reach the Wedel plant (in comparison to the previous supplier, the Wittenborn plant), which would have resulted in increased transport costs. This assessment was confirmed in the market test by comments submitted by potential purchasers of the Wedel plant. They did not expect to be able to win over a major part of the Wittenborn clientele to the Wedel plant.<sup>105</sup>

Ultimately, it was not to be expected that the divestiture of the Wedel aerated concrete works together with a list of customers would be sufficient to enable a suitable purchaser to compensate for Xella's increased market position in the northern regional market after the acquisition of H+H.<sup>106</sup>

The Düsseldorf Higher Regional Court also held that the commitments were not sufficient. (It based its assessment on a broader product market definition, on which the Bundeskartellamt had only relied as a fallback position). The court confirmed the Bundeskartellamt's assessment of the proposed "mix and match" solution and its shortcomings.<sup>107</sup>

#### e) Divestment of individual assets

- 52 In very exceptional cases the divestment of individual assets can also be a suitable remedy. But also in these cases it has to be sufficiently certain that the **market position** linked to the

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<sup>104</sup> BKartA, decision of 12.3.2012, B1-30/11 – *Xella/H+H*, para. 585.

<sup>105</sup> *Ibid.* para. 593 et seq.

<sup>106</sup> *Ibid.* para. 591 et seq.

<sup>107</sup> OLG Düsseldorf (Higher Regional Court), decision of 25.9.2013, VI Kart 4/12 (V) - *Xella/H+H*, para. 104-114 (juris).

divested assets is permanently transferred to the purchaser and that this will remedy the competition problems caused by the merger.<sup>108</sup>

- 53 Under very specific circumstances the Bundeskartellamt has accepted a remedy that was in essence limited to granting an irrevocable and indefinite **exclusive licence**.<sup>109</sup> This is a behavioural commitment, the effect of which on the market is comparable to a divestment remedy if the exclusive licence is indeed sufficient to transfer the market position. The divestment of a business or business unit is, however, preferable and in most cases necessary because it involves a much lower degree of uncertainty and risk as to whether the market position and the competitive position of the divestment business are permanently transferred.

**f) Broader scope of divestment in the interest of a better strategic fit of the takeover package**

- 54 In individual cases it may be necessary to include, apart from the divested company or business unit, specific human resources or assets in the divestment package, to ensure that the divestment business is readily marketable and competitive:
- activities on a **neighbouring** product or geographic **market** or in neighbouring facilities provided that the divestment business, which operates in the area that raises competition concerns, is only economically viable if combined with the neighbouring activities;
  - specific functions, e.g. **central functions** which a purchaser may not readily substitute, especially in situations in which one group company provides particular services to all the other companies within the same group;
  - additional business units, which are not directly connected to the competition issues raised by the merger, but which have to be included in order to ensure that the di-

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<sup>108</sup> See e.g. BKartA, decision of 25.3.2014, B6-98/13 – *Funke Medien Gruppe/Axel Springer*, operative part of the decision no. A.2 (p. 3 et seq.) and para. 304 et seq. (divestment of TV listings magazines, in particular brands and title rights, and the shares in the companies that are the contracting parties of the subscription agreements with end customers, as well as domains, archives, rights of use, data collections, printing contracts; personell only if requested by purchaser).

<sup>109</sup> See in the area of active substances for plant protection products e.g. BKartA, decision of 22.5.2003, B3-6/03 – *BASF/Bayer CropScience AG*, operative part of the decision I.1 und 2. (p. 1 et seq.) and para. 105 et seq. (license for three out of five of the parties' substances – fungicides – for the foliar treatment of wheat).

vestment package is a **better strategic fit** for possible purchasers; for example, profitable market entry may require a minimum scale of activities.

**Bundeskartellamt *Edeka/Tengelmann*<sup>110</sup> – divestiture of a suitable package of food retail outlets**

The Bundeskartellamt cleared subject to divestments (up-front buyer solution) plans by Edeka (Germany's leading food retailer) and Tengelmann (at the time of the decision the fifth largest food retailer in Germany) to merge their two discount chains Netto and Plus in a jointly controlled joint venture.

Without the divestments the proposed merger would have raised serious competition concerns in around 70 regional markets. In the assessment of the competition situation on the regional markets affected by the merger, the Bundeskartellamt also took into consideration the competitive landscape of the neighbouring geographic markets.<sup>111</sup> It turned out that the regional markets that raised concerns and the neighbouring markets formed clusters in which Edeka was the market leader.<sup>112</sup> Therefore, the parties' strong market position could not be countered by strong competitors on neighbouring markets.

The parties offered to divest all Plus outlets in the markets which the Bundeskartellamt considered problematic to avoid a prohibition of the merger. All in all, this concerned approx. 400 outlets. As part of the remedies, additional outlets (outside the regional markets affected) had to be added where this was necessary to form a suitable package for the potential buyer.<sup>113</sup> In order to be effective, the package(s) had to consist of one cohesive network of outlets within the respective clusters. Infrastructure facilities of the parties, in particular warehouses or logistical facilities, were to be included as well where this was required by the buyer for an efficient supply of the acquired outlets.<sup>114</sup>

**g) Divestiture of crown jewels**

- 55 In exceptional cases, the divestiture of so-called “crown jewels” may offer a way out in cases in which (based on a market test) it was not possible to reduce to a level acceptable to the Bundeskartellamt the uncertainty as to whether a suitable purchaser would be interested in acquiring the divestment business. In practice, crown jewel solutions become relevant when merging parties are not in a position to offer an alternative divestment business that neither raises the mentioned uncertainties with regard to potential buyers nor impos-

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<sup>110</sup> BKartA, decision of 30.6.2008, B2-333/07 – *Edeka/Tengelmann*. The example in the English version has been simplified and shortened as compared to the original version in German. Please note that this case description concerns the merger of the parties' discount chains, which was cleared with remedies in 2008, not the prohibition case of 2015.

<sup>111</sup> *Ibid.*, p. 32 et seq.

<sup>112</sup> *Ibid.*, p. 47 et seq.

<sup>113</sup> BKartA, decision of 30.6.2008, B2-333/07 – *Edeka/Tengelmann*, operative part of the decision I.1.c (p. 3) und p. 135 et seq.

<sup>114</sup> *Ibid.*

es a heavier economic burden on the merging parties if divested.<sup>115</sup> These situations are not very common. The term “crown jewel” is used for a divestment business that can be expected to be sold to a suitable purchaser without any difficulty whatsoever. In many cases, this will be a business that is more attractive for potential buyers than the divestment business offered initially by the merging parties. At the same time, the crown jewel business also has a higher value for the merging parties and they would therefore prefer not to be obliged to sell it.<sup>116</sup> The divestment of crown jewels is part of a **two-step procedure**. During a first divestment period, the merger parties have the opportunity to find a suitable purchaser for the initial divestment business and to implement the sale. If they don’t succeed, a second divestment period is triggered, during which the crown jewels have to be sold.

- 56 The two-step crown jewel procedure can also be a solution in cases where there are **other obstacles** for the divestment of a particular business, e.g. pre-emption rights of co-shareholders in joint-venture agreements or difficulties in assigning contracts or IP rights (in particular licenses) to the buyer of the divestment business. In many cases, the time period before a decision has to be taken in a merger control procedure is not sufficient to clarify whether these obstacles can be overcome.

**Bundeskartellamt *Werhahn/Norddeutsche Mischwerke*<sup>117</sup> – “Crown jewel” remedy and pre-emption rights of co-shareholders in joint venture**

The Bundeskartellamt cleared, subject to remedies, the merger between the two largest producers of asphalt and crushed rock in Germany. On account of the limited transportability of these products, the relevant geographic markets were regional. In many markets the merger could only be cleared subject to divestiture remedies. In one regional market the parties offered a so-called “crown jewel” remedy.<sup>118</sup>

The offer of a crown jewel remedy was required because there were serious doubts as to whether the merging parties would be able to find suitable purchasers for two minority holdings (25 percent respectively) in a joint venture operating an asphalt plant. An important obstacle to the divestment

<sup>115</sup> In place of a “crown jewel” solution, in some cases, it can be sufficient to determine two divestment businesses to be sold alternatively at the merging parties’ option within a certain period of time, see in this regard e.g. BKartA, decision of 8.9.2008, B8-96/08 – *EnBW/EWE*, operative part of the decision no. A.1, A.3.1, A.3.3 (p. 3 et seq.), (divestment of EWE’s shares in VNG or EnBW’s associated company GESO; the choice of the actual divestment business had to be communicated to the Bundeskartellamt within a certain period of time, otherwise divestiture trustee chooses divestment business); in this context see also BKartA, decision of 24.8.2009, B8-67/09 – *EnBW/VNG*, para. 85 et seq.

<sup>116</sup> In addition, the initial divestment business as well as the crown jewels need to be viable and competitive. In both alternatives the divestment to a suitable buyer must also remove the competitive issues raised by the merger. The two divestment businesses do not have to be mutually exclusive. The second option can be a divestment business that includes the first one and complements it with further assets or activities.

<sup>117</sup> BKartA, decision of 22.8.2005, B1-29/05 – *Werhahn/Norddeutsche Mischwerke*. The example in the English version has been simplified and shortened as compared to the original version in German.

<sup>118</sup> *Ibid.* operative part of the decision no. A.30 (p. 7), para. 145.

was that the purchasers would have to be approved by the other shareholders as well, all within the given implementation period. With the merger, the acquirer's share in the joint venture would have increased to 50%.

The two minority holdings were less valuable to the merging parties than the acquirer's majority holding (of just under 60 percent) in another asphalt plant, which generated more turnover and had a conveniently central location in the relevant regional market. Therefore, the merging parties were given the opportunity to sell the two minority shareholdings. If the sale to a suitable purchaser could not be achieved within the first divestiture period, the majority holding in the more attractive plant (that was not subject to pre-emptive rights of the co-shareholders) was to be sold instead.

Ultimately the parties did not manage to obtain the co-shareholders approval and had to resort to the crown jewel solution. Selling the majority took longer than the designated period but other than that did not raise any difficulties for the divestiture trustee.

- 57 The overall **divestiture period** for both consecutive steps of the divestment should not be substantially longer than the general divestment periods indicated in this guidance document (see C.VI., para. 159). Otherwise, the implementation of the divestment only becomes effective at a rather late stage in those cases in which the sale of the initial divestment is not successful and the crown jewels have to be divested. A substantially longer divestiture period would also jeopardise the divestment business's economic viability and competitiveness. A reasonably long divestiture period in crown jewel remedies may still call for additional measures to safeguard the viability and competitiveness of the divestment business (see B.IV., para. 88-106).

## 2. Requirements placed on the purchaser

- 58 For a divestiture remedy to be successful suitable purchasers, which are likely to be interested in the divestment package, need to be available with a sufficiently high degree of likelihood. A suitable purchaser has to be capable (a) and must have the incentive (b) to successfully operate the divestment business in competition with the merging parties. Also, the divestiture to the purchaser must not create other competition problems (c). Typically the divestment business has to be sold to a single purchaser (d).
- 59 The Bundeskartellamt has to decide within short time limits whether a proposed purchaser is a suitable buyer for the divestment business. In principle, the competition authority is obliged to investigate whether the proposed buyer fulfils all the requirements (Untersuchungsgrundsatz). However, the short timeframe limits the **scope for investigations**<sup>119</sup>

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<sup>119</sup> See in particular for market testing of commitment proposals C.III, para. 117-123.

that are feasible within this context.<sup>120</sup> Therefore, it falls on the merging parties to assist the authority in its investigation as to whether the proposed commitment is suitable to remedy the competitive harm by providing the facts required for such an assessment. The merging parties' duty to cooperate<sup>121</sup> intensifies depending on the remaining time available to the Bundeskartellamt until the expiry of the time limit for the merger control procedure. The later the merging parties submit their commitment proposal, the more extensive are their duties to cooperate in the investigation. These duties concern in particular the provision of information relevant for the assessment of the requirements a suitable buyer would need to fulfil for it to be a viable and effective competitor of the merging parties on the markets affected by the merger. This also includes information about possible links between the proposed buyer of the divestment business and the merging parties.

#### a) Capabilities

60 The purchaser must have the necessary **expertise** in the relevant industry, sufficient **experience** and the requisite **financial resources** to enable it to successfully operate the acquired business in the market. In particular cases, financial investors fulfilling these requirements can thus be appropriate purchasers. In some cases however, depending on the industry affected, the purchaser must already be a competitor in the market affected by the concentration. This will in particular be necessary where specific expertise or specific resources are required to successfully compete in the particular market.<sup>122</sup>

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<sup>120</sup> See BKartA, decision of 16.1.2007, KVR 12/06 – *National Geographic II*, para. 15 (what the Bundeskartellamt is required to investigate is limited by the short time-limits applicable to merger control proceedings; decided in the context of consumer surveys and competitive assessment).

<sup>121</sup> See in the context of an abuse of a dominant position, BGH (Federal Court of Justice), decision of 14.7.2015, KVR 77/13 – *Wasserpreise Calw II*, para. 30.

<sup>122</sup> See e.g. BKartA, decision of 18.7.2013, B4-18/13 – *Prosegur/Brinks*, operative part of the decision no. I.5.C (p. 9) (provider of cash handling services in Germany); BKartA, decision of 3.2.2012, B3-120/11 – *OEP/Linpac*, operative part of the decision no. I.A.4.2 (p. 6) (actual competitor on the market for the production of beverage crates); BKartA, decision of 27.12.2010, B2-71/10 – *Van Drie/Alpuro*, operative part of the decision no. I.5.C) (p. 5) (experience in the veal fattening sector, slaughtering of calves or distribution of veal); BKartA, decision of 30.6.2008, B2-333/07 – *Edeka/Tengelmann*, operative part of the decision no. I.5.B) (p. 8) (food retailer); BKartA, decision of 15.3.2005, B4-227/04 – *Smiths Group/MedVest*, operative part of the decision no. 2.2 (p. 5) (producer and distributor of monitoring sets or neighbouring products of intensive-care medicine); BKartA, decision of 17.6.2002, B10-124/01 – *Trienekens/SW Düsseldorf*, operative part of the decision no. I.2.B) (p. 6) and para. 178 (active on market for commercial waste burning alternatively on neighbouring markets or upstream or downstream markets); BKartA, decision of 22.8.2001, B6-56/01 – *SV-C/WEKA*, para. 46 (active on market for specialist magazines for electronic engineering or on neighbouring markets).

## b) Independence and incentive to compete

- 61 A suitable purchaser needs to have the necessary economic incentives to successfully operate the divestment business as a competitor of the merger parties and other competitors.<sup>123</sup> This means first of all that the purchaser must be **independent** of the merging parties and their affiliated companies (Section 36(2) GWB).<sup>124</sup> Neither interlocking directorships nor shareholdings (of whatever size) can be tolerated.<sup>125</sup> Minority interests frequently open up possibilities to influence the associated company's competitive behaviour. In many instances the same is true for the other links mentioned above, e.g. if a CEO or managing director of one of the purchaser's group companies also holds a position on a board of one of the merging parties. The same applies if he or she is an employee of one of the merging parties. If the purchaser holds capital interests, it participates in the profits and losses of the affiliated company, which means that its incentives to compete with the merging parties are reduced if the divestment business operates on the same market as the merging parties, or on an upstream or downstream market. For all these reasons, as a rule, purchasers with the described links with the merging parties are not accepted (Section 18(3) no. 4 GWB).
- 62 The divestment purchaser's independence must not be jeopardized either by other links with the merging parties, such as **contractual arrangements** that allow the purchaser to act by order and for the account of the merging parties.<sup>126</sup> It is obvious that companies acting as trustees of the merging parties are not eligible as purchasers of the divestment business. Other contractual links relating to the markets affected by the merger can also raise reasonable doubt about the independence of the purchaser and its incentive to exploit the divestment business's full competitive potential. This applies for example to supply agree-

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<sup>123</sup> In this context, it also has to be taken into account what are the interests the purchaser is pursuing when acquiring the divestment business, see for example BKartA, decision of 12.3.2007, B8-62/06 – *RWE Energy/Saar Ferngas*, p. 52 (proposed commitment to divest shares in several municipal utilities was not sufficient since the requirements for the purchaser as formulated in the text of the proposed commitment were too low; in this case a financial investor was not sufficient, but it was necessary that buyer pursues strategic interests in the energy sector).

<sup>124</sup> In individual cases, it can be questionable whether the buyer is independent if the buyer is an employee of the divestment business and if an independent competitive behaviour with respect to one of the merging parties cannot be expected, see e.g. BKartA, decision of 18.7.2008, B5-84/08 – *Stihl/ZAMA*, operative part of the decision no. 1.5.1 (p. 4).

<sup>125</sup> See BKartA, Clearance of a Merger Project subject to Remedies (here: Conditions precedent/up-front buyer), 2005, No. 4.2.  
([http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions\\_precedent.pdf?\\_\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions_precedent.pdf?__blob=publicationFile&v=4)).

<sup>126</sup> Ibid.

ments if they carry a significant economic weight. Similar issues are possibly at stake with regard to Cooperation agreements raise similar concerns, e.g. if they concern the markets affected by the concentration or neighbouring product or geographic markets.

63 A purchaser must provide a **convincing business plan** setting out how it will successfully continue the divestment business's operation and how it will fully exploit its competitive potential, in particular on the markets on which the concentration has raised competitive concerns. Otherwise, it cannot be accepted as a suitable purchaser. The requirements are not met, in particular, in the following scenarios:

- The purchaser plans to use the acquired business for activities that differ from the divestment business's current activities, e.g. **operation on other markets**.<sup>127</sup>
- The acquired divestment business will be **resold to a third party** in the foreseeable future.<sup>128</sup>
- If the purchaser has an incentive to **break up** the divestment business.
- A **vendor loan** will possibly reduce the purchaser's entrepreneurial risk and may lead to a situation in which the divestment business's operation becomes dependent on the lender, i.e. one of the merging parties. The use of a vendor loan may indicate that the purchaser does not have a sufficient interest to use the divestment business in order to compete with the merging parties and to make full use of its competitive potential. An example:

**Bundeskartellamt *Funke/Springer*<sup>129</sup> – Vendor Loan**

The media corporation Funke Media Group intended to buy the TV programme magazine business of the Axel Springer Group. To compensate for the expected lessening of competition the parties of-

<sup>127</sup> See BKartA, decision of 20.11.2003, B8-84/03 – *E.On/Stadtwerke Lübeck*, para. 58 (The purchaser, a local utility company, was proposed together with the commitments. It was to be expected that the purchaser would not use the power plant capacity offered as a divestment business to acquire new and larger customers (distributors or large industrial customers), but to optimize its own requirements necessary to fulfil its service obligation with regard to the supply of private households and other smaller customers; this was not sufficient to compensate for the strengthening of a dominant position on the upstream market).

<sup>128</sup> See e.g. BKartA, decision of 24.8.2007, B5-51/07 – *Cargotec/CVS Ferrari*, para. 142 et seq. (individual members of the Ferrari family, the seller, were proposed in the divestiture commitment as purchasers for the business units reach stacker and straddle carrier; according to the initial explanations provided by the seller's legal advisors, the Ferrari family intended to withdraw from the operation of the target company in the context of retirement; this made a sustainable mid-term strategy of the buyer to operate the divestment business as a competitor of the merging parties questionable).

<sup>129</sup> BKartA, decision of 25.3.2014, B6-98/13 – *Funke Medien Gruppe/Axel Springer*. The example in the English version has been simplified and shortened as compared to the original version in German.

ferred to sell several programme magazines to another media company (Klambt). The parties' initial plan was to finance the purchase price with the help of a vendor loan granted by Funke to Klambt. Together with another loan to Klambt and a guarantee provided both by Springer, the financing granted by the merging parties would have accounted for well over 75 percent of the total purchase price. The loan agreements had a term of more than 20 years. The agreements obliged Klambt to share the profits with Funke and to disclose to them sensitive information relating to the divestment business.<sup>130</sup> The loan agreements also contained early termination rights to Funke's benefit. The divestment business would be operated by a newly established and separate subsidiary of the Klambt group. The subsidiary would be solely liable for the repayment of the loans.

These terms and conditions raised considerable doubts that Klambt, as the purchaser of the divestment package, would be sufficiently independent of Funke,<sup>131</sup> the purchaser in the original merger transaction. The financing scheme also raised doubts whether Klambt would be capable and willing to bear the economic and entrepreneurial risk of operating the TV programme magazine business. Klambt's equity ratio in the project was very low and its entrepreneurial risk correspondingly limited. This was not sufficient to expect Klambt to compete vigorously with Funke.

The merger project could ultimately be cleared after the financing scheme had been fundamentally revised. In the new scheme Funke no longer granted a vendor loan and Klambt roughly doubled its equity ratio. The new (and solely liable) subsidiary of Klambt was expected to have an equity ratio of about 30 percent within five-to-six years after the transaction, which would enable it to make investments on its own. Funke's share in the financing scheme was replaced by a subordinated loan and a guarantee to secure a bank loan granted both by Springer. This did not raise any concerns because Springer, having sold its programme magazines to Funke, was no longer active in the market. The loan agreements did not contain any of the rights for the lender or guarantor provided for in the previous agreements and had a significantly shorter term. Klambt could thus be regarded as a suitable purchaser.<sup>132</sup>

### c) Prima facie no competition issues raised by implementation of commitments

- 64 Another requirement is that the acquisition of the divestment business by the purchaser will, prima facie, not result in a significant impediment to effective competition (SIEC). If the acquisition would lead to a breach of **Section 1 GWB** or **Art. 101 TFEU**, the purchaser would also not be acceptable.<sup>133</sup> For instance, if the purchaser and one of the merging parties are co-shareholders in a joint venture, this may raise competition concerns if it results in a coordination of their competitive behaviour outside the joint venture. This applies in particular in situations where both parent companies are active on the same market as the joint

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<sup>130</sup> Ibid. para. 19 et seq., 344 et seq.

<sup>131</sup> Ibid. para. 339 et seq.

<sup>132</sup> Ibid. para. 344 et seq.

<sup>133</sup> See e.g. BKartA, decision of 16.11.2011, B2-36/11 – *Tönnies/Tummel*, para. 290. In this case, Tönnies proposed as a commitment to prolong a contract with a competitor to provide slaughtering services. This commitment proposal was rejected, inter alia, because it would have resulted in an objectionable cooperation between the two most significant slaughterers of sows in Germany, which could possibly have violated Section 1 GWB and Article 101 TEUF, respectively.

venture.<sup>134</sup> In this case the joint venture would have to be broken up while in the meantime the competition problem raised by the initial merger would not be addressed. The divestment to a buyer that is – like one of the merging parties – a co-shareholder in a joint-venture is therefore not an acceptable solution.

#### **d) Number of purchasers**

- 65 As a rule, the divestment package is sold to one **single purchaser**. In most cases this is the only way to ensure that the competitive potential of the divestment business is fully preserved.<sup>135</sup>
- 66 In **exceptional cases** it may be an option to allow the divestment package to be split among several purchasers, provided that each of the packages is viable and competitive. This may be the case, for example, if they are separate organizational units or economically viable clusters of sales outlets in different geographic markets.<sup>136</sup> It is crucial that the divestment achieves the required competitive effect, even though the divestment business and its competitive potential is divided between different purchasers. This requirement is not met if the breakup of the divestment business only results in the creation of several weak competitors on the same market in place of one strong competitor, or merely in a marginal improvement of the position of several existing competitors instead of creating one new powerful player.

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<sup>134</sup> See BGH (Federal Court of Justice), decision of 8.5.2001, KVR 12/99, – *Ost-Fleisch*, para. 36 et seq. (juris); BGH (Federal Court of Justice), decision of 4.3.2008, KVZ 55/07 – *Nord-KS/Xella*, para. 14 (juris).

<sup>135</sup> See e.g. BKartA, decision of 12.3.2013, B3-132/12 – *Asklepios/Rhön*, operative part of the decision no. A.4 (p. 5); BKartA, decision of 5.3.2009, B8-163/08 – *Saar Ferngas Landau/Energie Südwest*, operative part of the decision (p. 2); BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 12; BKartA, decision of 16.1.2007, B6-510/06 – *Weltbild/Hugendubel*, operative part of the decision no. I.1 (p. 2); BKartA, decision of 10.1.2007, B9-94/06 – *Praktiker/Max Bahr*, operative part of the decision no. 2.2 (p. 4); BKartA, decision of 22.12.2006, B4-1002/06 – *Remondis/SAS*, operative part of the decision no. A.I.3 (p. 2); BKartA, decision of 8.6.2006, B4-29/06 – *Telecash/GZS*, para. 4; BKartA, decision of 17.8.2004, B7-65/04 – *GE/InVision*, operative part of the decision no. A.2 (p. 2); BKartA, decision of 25.4.2002, B2-37/01 – *BayWA/WLZ*, operative part of the decision no. 1.1, 1.3 (p. 1 et seq.).

<sup>136</sup> In the area of food retailing see for example BKartA, decision of 31.3.2015, B2-96/14 – *Edeka/Kaiser's Tengelmann*, para. 907 (maximum of two purchasers). In the context of the permitted number of purchasers, the BKartA also takes into account whether several outlets of one company can only be operated together as one cluster in order to be economically viable. See BKartA, decision of 30.6.2008, B2-333/07 – *Edeka/Tengelmann*, operative part of the decision no. I.1.a (p. 2 et seq.) and p. 136; BKartA, decision of 13.8.2015, B9-48/15 – *WM/Trost*, operative part of the decision no. A.4.1 (p. 4) und para. 333 (up to three purchasers if no single purchaser is willing to acquire all sites; however, certain neighbouring sites had to be divested as one package to a single purchaser).

## II. Removal of links with competitors

- 67 Divestiture commitments, which were addressed in the previous section, focus mostly on situations where the divestment compensates for the elimination of a competitor: the divestment business is transferred to a suitable buyer, and, thereby, a new competitor is created or an existing competitor is strengthened. However, in other situations, it may be sufficient to dissolve **links** with other companies (as defined in Section 18(3) no. 4 GWB), in particular equity shares in a competitor or **contractual links** with a competitor. Removing a structural or contractual link with a competitor can, for example, be an effective remedy in the following case scenario: a pre-existing link between competitors in an oligopolistic market facilitated tacit collusion even before the merger. If the coordinated effects are strengthened by the merger, the obligation to sever the pre-existing link between the competitors could compensate for the competitive harm caused. A comparable situation arises if a link is created by the merger, and, as a result, tacit collusion between the main competitors is enabled, facilitated, stabilized or rendered more effective.<sup>137</sup> In such cases, it can sometimes be a sufficient remedy if the parties sever the link and divest the minority shareholding to a financial investor or co-shareholders, or dissolve the joint venture.<sup>138</sup>
- 68 It is not sufficient, however, if the merging parties contractually agree not to exercise their shareholder rights, e.g. by transferring voting rights to a trustee or limiting the **exercise of voting rights**. In doing so, the merging parties do not effectively lose their ability to exert a de facto influence on the corporate policies, and, in particular, the competitive behaviour of the linked company. For example, minority shareholders continue to have an incentive to consider the impact that their competitive behaviour may have on the company in which they hold a minority share. They participate in the company's profits and losses and share the risk of losing invested capital. In addition, monitoring compliance with a commitment not to exercise certain shareholder rights would require the continued control of the merging parties' conduct, which is inadmissible for a remedy.

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<sup>137</sup> See BKartA, Guidance document on substantive merger control (2012), para. 90, 96, 105, 112, 120.

<sup>138</sup> See BKartA, decision of 23.2.2005, B10-122/04 – *Remondis/RWE-Umwelt*, operative part of the decision no. I.A.1.4 (p. 5 et seq.) and para. 316 (since Remondis withdrew from the JV Interseroh, the merger no longer led to coordinated effects with regard to Remondis/RWE-Umwelt and Interseroh's activities in the area of disposal of commercial waste); BKartA, decision of 29.9.2006, B1-169/05 – *FIMAG/Züblin*, para. 98 et seq., see also para. 59 et seq. (after Strabag had withdrawn from Deutag, a very significant joint venture between Werhahn and Strabag (Fimag), tacit collusion between the two companies could not be expected to continue or to arise in the regional market for asphalt in Berlin).

- 69 In practice, links with competitors, which form a “**friendly environment**“ for the merging parties, are often only one reason for a significant impediment to effective competition.<sup>139</sup> In these cases, removing the links is only one element of the solution to the competition problem.
- 70 If **cooperation agreements** with competitors are terminated, this can help to remove the competition concerns raised by the merger. The same applies in the case of cooperation agreements of minor economic weight, if their application can at least be reduced and restricted to areas of business with no relevant impact on the merging parties’ competitive behaviour.<sup>140</sup> For example, in a merger of food retailers an important element of the remedy package was the following condition: The purchaser undertook not to enter into a joint purchasing co-operation with the competitor in which he acquired a minority stake.<sup>141</sup> Another example concerns cross-licensing agreements between competitors. In a merger case it was debated whether the termination of a cross-licensing agreement between producers

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<sup>139</sup> See BKartA, decision of 12.3.2012, B1-30/11 – *Xella/H+H*, para. 515 et seq., 533 et seq., 604, 608 (Xella, the leading supplier of aerated concrete and calcium silicate bricks, intended to acquire the aerated concrete manufacturer H+H. Xella offered to divest one production site for aerated concrete and one production site for calcium silicate as well as its minority shareholding in the joint venture BMO. Xella was linked with its major competitors, inter alia, by this joint venture. Dissolving this structural link was not sufficient since Xella would have continued to be linked to its major competitors by other joint ventures). See also B. I. d. See also BKartA, decision of 26.3.2002, B1-187/01 – *Haniel/Fels-Werke*, operative part of the decision no. I.1, I.2 (p. 2) as well as p. 29 et seq. and BKartA, decision of 26.3.2002, B1-263/01 – *Haniel/Ytong*, operative part of the decision no. I.2 (p. 2) as well as p. 29 et seq.

<sup>140</sup> See BKartA, decision of 13.8.2015, B9-48/15 – *WM/Trost*, operative part of the decision no. D.1-D.3 (p. 7 et seq.) and para. 340 et seq., see also para. 180 et seq. (merger cleared subject to remedies, inter alia, because both parties to the merger withdrew from their joint purchasing co-operation for automotive spare parts with other independent wholesalers; this reduced the increase in buyer power vis-à-vis manufacturers, which was a consequence of the merger); BKartA, decision of 15.3.2013, B3-129/12 – *UKHD/KKH Bergstraße*, para. 3, 9 (merger cleared without commitments, but co-operation agreement between Universitätsklinikum Heidelberg and a hospital operator active in the region of Heidelberg – who is not identified in the public version of the decision – was modified and limited during ongoing second phase investigations; sufficient in this exceptional case; the cooperation concerned, inter alia, agreements for the mutual assignment of patients, division of tasks between the two providers of hospital care, and coordination of service portfolios; the changes in the agreements were implemented before the merger proceedings were concluded); BKartA, decision of 13.1.1999, B9-184/98 – *CP Ships/TMM*, operative part of the decision no. 1 (p. 1) as well as para. 17 et seq., 21 et seq. (merger cleared subject to termination of membership in a liner shipper conference in the area of containerized liner shipping services).

<sup>141</sup> See BKartA, decision of 30.6.2008, B2-333/07 – *Edeka/Tengelmann*, operative part of the decision no. I.1.d (p. 3) and p. 136 (merger cleared subject to remedies; the joint purchasing co-operation with a competitor would have been problematic because procurement costs constitute a significant part of a food retailer’s total costs and, thus, coordinated purchasing would have had an important impact on the competitive behaviour of the two retailers; the flow of information between the two companies, which would have occurred in the context of the joint purchasing agreement, would have raised competition issues as well).

of hearing aids might contribute to reducing the probability of tacit collusion and averting harm to innovation.<sup>142</sup>

- 71 Removing links with other companies on **upstream or downstream markets** can also be an effective measure if these connections provide the merging parties with a particularly strong access to sales and procurement markets. Severing these links can contribute to decreasing the merging parties' market power (for market access issues in the context of long-term contracts with suppliers and customers see B.III.3., para. 158).<sup>143</sup>

### III. Market access and other behavioural remedies

- 72 Where the sale of a business or part of a business is not an option, behavioural remedies may sometimes, in appropriate cases, also be an effective measure to eliminate the competition problems caused by the merger project. In some cases, it may be sufficient to enable third companies to enter the market or to lower entry barriers to facilitate market entry, for example by providing access to important infrastructure (1.), granting licences for important technologies or disclosing information regarding interfaces (2.), and granting customers of the merging parties special rights to terminate their long-term contracts or opening up the award of long-term contracts to a public tender process (3.). The closure of capacities (4.) and the obligation to implement so-called "Chinese walls" to protect competitors' business secrets (5.) are not considered effective behavioural remedies for enabling market access.
- 73 Whether market access remedies are sufficient to eliminate the competition concerns depends on the **competitive harm** caused by the concentration in the case at hand. If, for example, the purchasing party acquires a close and significant competitor, the respective competitive effects can in most cases only be compensated by a divestment that transfers a comparable market position to a new or existing competitor, for example the divestment of an existing business unit to a suitable buyer. In contrast, if the merger will primarily raise

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<sup>142</sup> See BGH (Federal Court of Justice), decision of 20.4.2010, KVR 1/09 – *Phonak/GN Store*, para. 89 et seq. (juris); repealed BKartA, decision of 11.4.2007, B3-578/06 – *Phonak/GN Resound*, para. 333 et seq. ("can in principle reduce technology transfer [in a context in] which [it] restricts competition"; in the case at hand rejected, however, for other reasons).

<sup>143</sup> In one exceptional case, the divestment of contracts between a slaughterhouse and calves-fattening companies was expected to have an equivalent effect, see BKartA, decision of 27.12.2010, B2-71/10 – *Van Drie/Alpuro*, para. 29 et seq., 50 et seq., 274 et seq. (merger of the two leading European veal producers; investigations revealed that access to calves, in particular to fattening capacities, amounted to a considerable entry barrier for the production of veal).

pre-existing barriers to entry, for example through vertical integration, market access remedies may sometimes be sufficient to compensate for the negative impact on competition.

- 74 Remedies that lower entry barriers need to have a structural effect, i.e. a lasting impact on market conditions.<sup>144</sup> Remedies that will only provide market access with a **temporary effect** are not suitable. This is the case if, for example, it is to be expected that the market conditions will deteriorate again once the market access measures expire. The same applies if, despite the market access remedy, the parties to the merger are still able to hinder or even prevent entry to a certain market because of their strong position on upstream or downstream markets. On dynamic markets, remedies that only lead to a temporary market-opening may, however, be acceptable, provided the restriction to competition at issue can be expected to be permanently removed by the time the remedy expires.
- 75 With regard to their **effectiveness**, behavioural remedies have to meet the same standards as divestiture remedies. The divestiture of an existing business is the benchmark for the ability of a particular behavioural remedy to solve the competition issues identified in the merger investigation.<sup>145</sup> The remedy needs to be suitable, necessary and proportionate (see A.III., para. 11).
- 76 When designing market access remedies, it has to be ensured, in particular, that it will not become necessary to apply **continued control** in order to enforce the measure (Section 40(3) sentence 2 GWB). This requirement is explained in detail in a prior section of the present guidance document (see A.III.2., para. 26-29).

## 1. Access to infrastructure

- 77 If merging parties allow third parties access to their infrastructure, this can have a positive impact on market conditions, sometimes opening up markets for competition. This applies in particular to **network based industries** or industries with high sunk costs, provided that a

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<sup>144</sup> See BGH (Federal Court of Justice), decision of 7.2.2006, KVR 5/05 – *DB Regio/üstra*, para. 56 (juris); see for the BKartA's case practice for example BKartA, decision of 16.11.11, B2-36/11 – *Tönnes/Tummel*, para. 291 et seq. (closure of slaughtering capacities not sufficient), for this case see B.III.4, para. 83.

<sup>145</sup> See explanatory memorandum to the 8<sup>th</sup> amendment to the German Competition Act (8. GWB-Novelle), Bundestagsdrucksache BT-Drs. 17/9852, p. 30. Phrased in a similar way by the European Commission (Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ 2008/C267/01, para. 61): "The Commission therefore may accept other types of commitments, but only in circumstances where the other remedy proposed is at least equivalent in its effects to a divestiture."

similar effect has not already been achieved by respective regulatory requirements applicable to the sector.<sup>146</sup>

- 78 An example is the case of a vertically integrated company owning a network that amounts to a **natural monopoly**. In this case, other companies can only compete with the vertically integrated firm on downstream markets if they can obtain access to the network. However, access to the infrastructure may not always be sufficient to address the competition problem caused by the particular merger. The same applies when access to one of several parallel networks is at issue.
- 79 Whether network access is sufficient depends on the **competitive harm** resulting from the merger. If the merger eliminates an independent network operator, which competes with other network operators, it is questionable whether network access granted to a service provider (which will not operate its own network) will be sufficient to actually compensate for the competitive harm. In order to address this issue it is necessary to assess the competitive conditions on the markets affected by the merger. In the mobile communications sector, product innovation depends largely on the type of access to a mobile network, which is only available to a network operator. Thus, in the “German mobile communications merger” *Telefónica Deutschland/E-Plus*, which was assessed by the European Commission, the Bundeskartellamt did not consider the divestment of network capacity, i.e. a form of network access, to be a sufficient remedy compensating for the reduction from four to three mobile network operators in Germany which resulted from the merger of two close competitors.<sup>147</sup> In the “British mobile communications merger” the Commission rejected commitments to divest network capacity as not being sufficient.<sup>148</sup> In other markets, similar questions arise such as, in particular, whether access to infrastructure enables the third party to offer a competitive product. For example, the European Commission rejected an

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<sup>146</sup> The BKartA’s case practice in this area focuses, in particular, on the energy sector because equivalent rules of sectoral regulation did not exist in this area in the past. See e.g. BKartA, decision of 28.5.2001, B8-29/01 – *EnBW/Schramberg*, operative part of the decision no. I.A (p. 2) (Clearance subject to remedies. EnBW and the municipality of Schramberg intended to create a joint venture to operate a gas supply network. The merging parties’ commitment included, inter alia, providing non-discriminatory access to the JV’s gas supply network in order to use it for gas transit, and to allow third parties to build a physical connection to the network at a location of their choice); see also for comparable remedies e.g. BKartA, decision of 18.5.2001, B8-291/00 – *Trienekens/Stadtwerke Viersen*, operative part of the decision no. I.1, I.3 (p. 2).

<sup>147</sup> The BKartA has raised this point with regard to the German mobile communications market in its critical comments to the EU Commission regarding the Commission’s draft decision in the merger case *Telefónica Deutschland/E-Plus* (EU Commission, COMP/M.7018). For the German mobile phone merger see also BKartA, Biennial Report 2013/2014, p. 42 et seq., 93.

<sup>148</sup> European Commission, decision of 11.5.2016, COMP/M.7612 – *Hutchison 3G UK/Telefonica UK*, para. 2620 et seq., 2914 et seq.

access commitment in a merger of two logistics companies concerning the international delivery of small parcels. The Commission reached the conclusion that a service provider active on these markets can only offer a competitive product, if it operates its own Europe-wide air freight network. Otherwise it would not be in a position to ensure overnight delivery.<sup>149</sup>

## 2. Licences and disclosure of interfaces

- 80 Commitments to grant a licence are not only relevant in the context of the divestment of a business (see B.I.1.b, para. 45), i.e. when the transfer of the divestment business together with an exclusive licence has the effect of transferring a market position to the buyer (see B.I.1.e, para. 53) or when a licence can play a role to ensure the viability of a divestment business that needs to be carved out of the target company (see B.IV.3., para. 96 et seq.). In exceptional cases, granting a licence (without the divestment of a business) can also constitute a suitable remedy if the effects of the merger are limited to raising entry barriers, and provided that licensing technology as such is sufficient to enable **market entry** of a competitor or to facilitate entry to an extent that is sufficient to compensate for the competitive harm.<sup>150</sup>
- 81 It is necessary to grant **irrevocable non-expiring** licenses. They have to be granted in a **non-discriminatory** and **transparent procedure**. If the licensor is a competitor, the licensing terms have to be phrased in such a way as to exclude the transfer of sensitive information to the licensor. The terms of the licence must not impede the licensor's competitiveness in any other way either. In particular, the terms of the licence may not place the licensor in a position where it can influence the licensee's competitive behaviour. When designing a licence remedy it should be taken into account that a continuing contractual relationship between competitors on the basis of the licensing agreement can raise problems in the future, for example, if negotiations on licensing fees become necessary. Therefore, even if a licence meets the conditions set out above, a licensing remedy may not be acceptable.

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<sup>149</sup> See European Commission, decision of 30.1.2013, COMP/M.6570 – *UPS/TNT*, para. 1852 et seq.; 1949 et seq. (prohibition; divestment of local branches of TNT and access for the purchaser to UPS' European-wide airfreight network not sufficient as a remedy).

<sup>150</sup> See the similar case of an amicable settlement of a patent dispute BKartA, decision of 29.5.2002, B4-171/01 – *Getinge/Heraeus*, operative part of the decision no. I.1 (p. 2) and p. 46 et seq. (The settlement of a patent dispute enabled Trumpf, Getinge's only competitor in the market for operating table systems, to use essential patents for operating table systems and accessories; the previous level of residual competition was therefore secured; competitive harm as a result of the conglomerate merger with a producer of surgical lighting systems was excluded).

82 Access to important **know-how** not protected by intellectual property rights can also play a similar role. Furthermore, the disclosure of relevant information on software or hardware **interfaces** can have a comparable impact in cases where non-vertically integrated suppliers cannot enter an upstream or downstream market without access to information on these interfaces.<sup>151</sup>

### 3. Long-term contracts with suppliers or buyers

83 Long-term or exclusive contracts can constitute a significant barrier to entry if they hinder market entrants and expanding competitors from building contractual relationships with customers or suppliers of the merging parties. If merging parties open up long-term contracts with suppliers or buyers, this can lower barriers to entry. In very exceptional cases, such a remedy may compensate for the competitive harm caused by a merger, provided that the merger's competitive effect is essentially limited to increasing the barriers to entry without strengthening the parties' market position in any other way (see the following example). However, if a significant competitor is eliminated as a result of the merger, lowering entry barriers will, in practice, not be sufficient to eliminate the competitive harm. Market opening measures in the case of long-term contracts can include the provision that a merging party must terminate its exclusive contract with a distributor,<sup>152</sup> or grant its contractual partners **special rights to terminate long-term agreements**.

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<sup>151</sup> See e.g. European Commission, decision of 26.1.2011, COMP/M.5984 – *Intel/McAfee*, para. 128 et seq., 306 et seq., 336 et seq. In the context of German merger control, the commitments would also have to comply with the requirement not to subject merging parties' conduct to a continued control.

<sup>152</sup> See BKartA, decision of 2.6.2005, B3-123/04 – *H&R WASAG/Sprengstoffwerke Gnaschwitz* p. 3, 13 und 33 et seq. (Merger of two producers of industrial explosives. Availability of safe storage sites for explosives is of particular importance for producers' market position. Competition issues in most geographic areas solved by divestment of storage sites. Divestment was not possible in one regional market. The following remedy was accepted: merging party terminates rental contract for storage facility owned by its distributor. Merging party also terminates exclusive distribution contract with this distributor. As a result, market access by other manufacturers was facilitated. This was considered to be sufficient in the circumstances of the particular case and in the context of the specific market situation.) Termination of an exclusive supply contract is not sufficient if the agreement violates competition law and is therefore not enforceable, cf. BKartA, decision of 22.7.2004, B8-27/04 – *Mainova/AVG*, para. 53 (existing long-term supply contract between the acquiring energy supplier and the acquired public utility, commitment to partially open this contract rejected).

### **Bundeskartellamt<sup>153</sup> *Liberty Global/KabelBW* – special termination rights**

The merger between the neighbouring cable network operators Kabel Baden-Württemberg (KabelBW) and Liberty Global (Unitymedia) raised competition concerns mainly with regard to the supply of housing associations with television services by broadband cable or fixed telecommunications networks (IPTV). Retail TV multi-user service contracts are contracts concluded between housing associations and network operators. The three big regional cable networks (KDG, Unitymedia and KabelBW) were jointly dominant. The market was characterised inter alia by long-term contracts with the owners of large premises with a large number of housing units (mainly apartments). The long-term contracts created considerable barriers to entry. According to the Bundeskartellamt's assessment, the merger would have rendered tacit collusion between the regional cable network operators more stable. They already limited their activities to their home network areas. As a result of the merger, the number of companies participating in implicit coordination would have been reduced from four to three on a national market for retail TV service contracts for multiple-users. The Higher Regional Court of Düsseldorf (OLG Düsseldorf) defined the geographic markets more narrowly as consisting of the respective regional network area of each of the two merging parties. On this basis, the OLG Düsseldorf concluded that the merger would have eliminated potential competition by the neighbouring cable operator KabelBW on the regional market in the network area of the purchaser Unitymedia.

Liberty Global offered, amongst other things, the commitment to grant an irrevocable special termination right to certain housing associations with regard to the ongoing long-term contracts they had concluded with the merging parties. The idea was to strengthen competition by the smaller operators that were not part of the implicit collusion. The termination right applied to certain contracts of Unitymedia and KabelBW that were an attractive target for independent operators, because they covered a large number of housing units and would have otherwise bound the customers for a sufficiently long remaining contract term, i.e. more than three years. In total, the contracts accounted for 35 to 45 percent of the housing units supplied by the merging parties.

This commitment was accepted by the Bundeskartellamt. Together with the other commitments offered it was considered as sufficient to compensate for the merger's negative impact on the market. According to the Bundeskartellamt's assessment, stabilising tacit collusion was remedied by

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<sup>153</sup> BKartA, decision of 15.12.2011, B7-66/11 – *Liberty Global/Kabel BW*; initially annulled by OLG Düsseldorf (Higher Regional Court), decision of 14.8.2013, VI-Kart 1/12 (V) – *Signalmarkt*; later withdrawal of appeals while appeals against the refusal to grant leave was pending before the BGH (Bundesgerichtshof); thus, decision of BKartA final.

lowering entry barriers for third suppliers, such as Deutsche Telekom.<sup>154</sup> In contrast, the Court concluded that the commitments were not sufficient to compensate for the elimination of the future potential competitor KabelBW in an adequately effective and sustainable way.<sup>155</sup>

84 Another group of cases concerns the conclusion of long-term contracts by public entities. A possible remedy open to public entities is to put concessions or supply contracts out for tender which were previously awarded on the entities' own discretion. In such a case the entities would also undertake to take the decision on awarding the contract in a transparent and non-discriminatory **public procurement procedure**. Competitive tendering according to public procurement principles can be a feasible solution, in particular, where the affected markets are characterised by competition "for the market" and competition for access to the market only happens occasionally. This applies for example to the public transport sector, where concessions are awarded on a long-term basis for specific transport routes or areas. Commitments to apply public procurement principles might compensate for the anti-competitive effects of a merger, provided there is not already an obligation under public procurement law to put the services affected by the merger out for tender.<sup>156</sup> For example, the competition problems arising through the merger of two public transport companies, DB Regio (Deutsche Bahn) and *üstra* intalliance (a subsidiary of Hannoversche

<sup>154</sup> BKartA, decision of 15.12.2011, B7-66/11 – *Liberty Global/Kabel BW*, para. 343 et seq.

<sup>155</sup> *Ibid.* para. 306. See also OLG Düsseldorf (Higher Regional Court), decision of 14.8.2013, VI-Kart 1/12(V) – *Signalmarkt*, para. 109 et seq. (juris) (judgment lapsed after appeals against BKartA's decision had been withdrawn while appeal to Federal Court of Justice on questions of law had been pending). The OLG Düsseldorf's assessment of the remedies was based on the following appraisal of the court: "Due to concrete indications it was to be expected with a reasonable degree of probability that potential competition by Kabel BW [in a neighbouring geographic market] would arise within the forecast period of 3 to 5 years." In order to compensate for the the loss of future potential competition, it would have been necessary that the special termination rights in respect of the long-term contracts "would have resulted – in all likelihood – in strengthening Unitymedia's actual competitors and in actually creating a potential competitor." (*ibid.* para. 140). According to the OLG Düsseldorf, the housing associations lacked adequate incentives to exercise their option to terminate the contracts. In addition, once the contracts had been terminated, not only their competitors, but also Unitymedia and KabelBW would be able to offer their clients new contract proposals. (*Ibid.* para. 138 et seq.). The Bundeskartellamt, on the other hand, based its analysis of the merger's anti-competitive effects – i.e. stabilizing existing tacit collusion between the main providers of retail TV services – in particular on the following assessment: "The time and intensity of competition from KabelBW is difficult to predict and it appeared to be likely only in the long run [that KabelBW would compete with Unity Media for contracts in its traditional area of supply]." In addition, in the counterfactual, "the competitive situation would not change significantly within the next few years." (BKartA, decision of 15.12.2011, B7-66/11 – *Liberty Global/Kabel BW*, para. 306 et seq.).

<sup>156</sup> In this context, it should be noted that it is not sufficient as a commitment to comply merely with public procurement laws. The BKartA already takes into account in its competitive assessment the fact that market players are subject to the provisions of public procurement law. See BKartA, decision of 2.12.2003, B9-91/03 – *DB Regio/üstra*, p. 66; confirmed by BGH (Federal Court of Justice), decision of 7.2.2006, KVR 5/05 (see A.III.2, para. 25). For the context of public transport see also BKartA, decision of 3.7.2002, B9-164/01 – *DB AG/Stadt- und Regionalbus Göttingen*, operative part of the decision no. II.1 (p. 2 et seq.), p. 46 et seq.

Verkehrsbetriebe) could be solved by their commitment to issue calls for tender. The case concerned public transport by bus and rail in the Hanover area. The commitments required the municipality to award all public passenger transport services by bus, and DB Regio to award all public passenger transport services by rail in (Europe-wide) public tender procedures. It was stipulated that a public procurement procedure had to be initiated within a defined period of time.<sup>157</sup>

#### 4. Closure of capacities not suitable to remedy competitive harm

85 The closure of facilities or the reduction of capacities are not sufficient to compensate for the elimination of an active competitor and the increase in the parties' market shares resulting from the merger. Neither are these measures sufficient to encourage market entry. In many cases, their effect is limited to reducing the capacity available on the market and decreasing the number of **alternative sources** available to customers. Also in many cases, it is to be expected that upon the closure of a facility, customers of the merging parties will switch to another one of their facilities. This will especially be the case, if the merging parties are close competitors.<sup>158</sup> In most cases, there is no indication that the closure will increase the competitive potential of other market participants. In addition, it cannot be excluded that the merging parties will increase their capacities through internal growth in order to recover quickly any sales volumes they may not have been able to generate in the meantime. Finally, the closure or reduction of capacities would not be an acceptable remedy insofar as the enforcement of these measures requires a continued control of market conduct.

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<sup>157</sup> BKartA, decision of 2.12.2003, B9-91/03 – *DB Regio/üstra*, operative part of the decision and p. 64 et seq., in particular 67 et seq. (Staggered scope of application: at least 50 percent within six years and 100 percent within nine years [üstra], respectively, 30 percent within three years and 100 percent within 9 years [DB Regio]). The objective of the remedy design was also to avoid intervening in ongoing concession contracts).

<sup>158</sup> See e.g. BKartA, decision of 10.1.2007, B9-94/06 – *Praktiker/Max Bahr*, para. 181 et seq. (commitment for a “divestment and, alternatively, closing” of DIY stores rejected since commitment was inconsistent; in any case, remedy to close or reduce capacities not suitable because the merger would result in a reduction of alternative sources of supply and customers would switch to the parties' other DIY stores. Ultimately, merger cleared subject to modified commitments).

### **Bundeskartellamt and OLG Düsseldorf *Tönnies/Tummel*<sup>159</sup> – temporary disuse of slaughtering capacities**

Tönnies, the leading operator of sow slaughterhouses in Germany, intended to buy a competitor, the slaughterhouse Tummel.<sup>160</sup> To compensate for the expected lessening of competition in the market for the purchase of cull sows and the distribution of sow meat, Tönnies offered to suspend its sow slaughtering activities at Tummel's plant for about two years. In an additional proposal, Tönnies suggested to offer slaughtering capacities to third parties, i.e. providing them with slaughtering services on the basis of three to five year contracts.<sup>161</sup>

The Bundeskartellamt rejected these proposals and prohibited the merger. The proposed remedies would have required a permanent monitoring of the market conduct of Tönnies and would not have solved the competition problems raised by the merger. The disuse of capacities at the acquired plant would not have been sufficient to effectively compensate for the loss of competitive pressure that Tummel was exercising on Tönnies.<sup>162</sup> This assessment was confirmed by the Higher Regional Court Düsseldorf (OLG Düsseldorf).<sup>163</sup>

## **5. „Chinese wall“ obligations not suitable to remedy competitive harm**

- 86 A commitment sometimes proposed by the parties to a merger is to implement a so called “Chinese wall” within the merged entity. The idea is to shield sensitive information provided by competitors to one of the merging parties from business units, which will be part of the company after the merger, if they are active on the same level of the value chain as the competitors. This plays a role, inter alia, in vertical mergers, when a company buys its supplier and, as a result of the merger, gains access to competitively **sensitive information** on the supplier’s other customers, who are also the company’s own competitors. As a consequence, competition may be impaired because the unilateral access to information reduces uncertainty with regard to certain aspects of the competitors’ behaviour, from which the merging parties will benefit at the expense of their competitors.
- 87 According to the Bundeskartellamt’s practice, the obligation to implement firewalls to protect information is not an acceptable remedy. Such measures do not effectively address the impact on market conditions brought about by the change of market structure resulting from the merger. They are also not effective because they would require a level and intensity of **monitoring** that cannot be achieved in practice. In addition, firewall obligations can

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<sup>159</sup> BKartA, decision of 16.11.2011, B2-36/11 – *Tönnies/Tummel*; confirmed by OLG Düsseldorf (Higher Regional Court), decision of 1.7.2015, VI-Kart 8/11 (V), para. 196 (juris). The example in the English version has been simplified and shortened as compared to the original version in German.

<sup>160</sup> BKartA, decision of 16.11.2011, B2-36/11 – *Tönnies/Tummel*, para. 11 et seq.

<sup>161</sup> Ibid. para. 291 et seq., 296 et seq.

<sup>162</sup> Ibid. para. 291 et seq., 296 et seq.

<sup>163</sup> OLG Düsseldorf (Higher Regional Court), decision of 1.7.2015, VI-Kart 8/11 – *Tönnies/Tummel*, para. 196 (juris).

only regulate conduct for a limited period of time and do not have a sustainable effect that would compensate for the permanent impact of the merger on market conditions. Once the remedy and the firewall obligation expire, any positive impact on the market would also cease. Also, firewall commitments are not admissible because they would require a **continued control** of market conduct and would thus be in conflict with Section 40(3) sentence 2 GWB. Contacts and exchanges of information within one and the same corporate group are widespread and common on a daily basis in almost every industry. Thus, it would be extremely difficult to identify, stop and prevent non-compliance with the firewall obligations. Neither the merging parties nor the Bundeskartellamt or an external third party would therefore be in a position to ensure an effective implementation of firewall remedies. Furthermore, monitoring of firewall measures would require the competition authority to intervene excessively in the companies' internal processes and would therefore be disproportionate.

**Bundeskartellamt merger between *wholesalers of newspapers and magazines in Hamburg*<sup>164</sup> – firewalls and access to competitors' sales figures**

The two press wholesalers active in Hamburg, Presse Vertrieb Nord (Bauer) and Buch und Presse-Großvertrieb Hamburg (Axel Springer) intended to transfer the physical logistics function of their activities in the press wholesale sector to an existing joint venture, with both partners holding equal shares in the company. In particular, it was planned that the joint venture would receive the copies of newspapers and magazines delivered by the publishers and intended for retail sale. The joint venture would assort the products according to the orders of each retailer, package and deliver them. The joint venture would also collect the copies of newspapers and magazines that were not sold and take care of the recycling. The commercial and administrative functions were to remain with the parent companies.

As a result of the merger, the provision of logistics services is no longer subject to competition between the two suppliers on the press wholesale market in the Hamburg area. These horizontal aspects of the case were not the only reason why the Bundeskartellamt prohibited the merger project. The merger also raised vertical issues. The joint venture enabled Axel Springer to gain access to comprehensive data relating to the deliveries made to each supplied retailer in the Hamburg area, as well as the respective figures concerning returned unsold products. This information can be used to identify the actual sales figures and includes detailed sales figures for titles published by Axel Springer's competitors, e.g. the Hamburger Morgenpost daily newspaper. Thus, it would have been possible, for example, for Axel Springer to target promotional activities for its tabloid Bild Zeitung on retail outlets where the competing newspaper Hamburger Morgenpost achieves high sales figures. The merger would therefore have especially strengthened Axel Springer's dominant position with its daily newspaper Bildzeitung in the market for over-the-counter newspapers (mainly tabloids).

The commitments offered by the parties included, inter alia, a non-disclosure obligation with regard to the sales data of the two wholesalers that are the joint venture's parent companies. The joint venture would be barred from transmitting the data of one wholesaler to the other. The parties

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<sup>164</sup> BKartA, decision of 27.10.2005, B6-86/05 – *PVN/Buch und Presse/MSV*; annulled on formal grounds by OLG Düsseldorf (Higher Regional Court), decision of 28.6.2006, VI-Kart 18/05 (V) (transaction did not fulfil the definition of a concentration according to the GWB).

planned to include this non-disclosure obligation in a shareholders' resolution to be adopted by the joint venture. The commitment also stipulates that the parent companies should not have access to the joint venture's information technology and communication systems. In addition, the merging parties undertook to make their management and personnel aware of how important it is to maintain the confidentiality of the sales data and that penalties would be imposed in the case of non-compliance.<sup>165</sup> The Bundeskartellamt rejected the commitment because the proposed measures would not have a permanent effect on market conditions and would require the authority to continuously monitor the merging parties' compliance with the non-disclosure obligations.<sup>166</sup>

#### IV. Ancillary measures

88 In order to safeguard the effectiveness of remedies it can be necessary to impose ancillary measures that merging parties have to comply with **before, during or after the implementation** of the main remedy.<sup>167</sup> In the case of divestiture remedies, for example, additional duties to ensure the competitiveness (1.) and independent management (2.) of the divestment business during the divestiture period have to be included in the wording of the remedies. Also, the following further obligations may be required: separation of central facilities, such as IT (3.), transfer of voting rights or refraining from exercising voting rights (4.), prohibition from reacquiring the divestment business (5.), non-compete obligations (6.), non-solicitation of employees (7.), supply and purchase obligations benefiting the divestment business (8.), and other obligations (9.).

##### 1. Maintaining the competitiveness of the divestment business

89 There is a risk that the competitive potential of the divestment business will be reduced or lost in the interim period until the divestiture is implemented.<sup>168</sup> Ultimately, the main issue is to preserve the divestment business's **competitiveness**, which is closely linked to its **economic viability, value** and **marketability** in the sense of saleability. These factors have to be safeguarded as well. In the following, the term competitiveness refers to all of these four

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<sup>165</sup> BKartA, decision of 27.10.05, B6-86/05 – *PVN/Buch und Presse/MSV*, p. 9 et seq.

<sup>166</sup> *Ibid.* p. 24 et seq.

<sup>167</sup> The BKartA regularly requires the use of monitoring trustees to supervise the compliance with and implementation of the remedies (see C.V.1, para. 127-148). If, in exceptional cases, divestment remedies are accepted without an up-front buyer solution, i.e. if clearance is only subject to conditions subsequent, it is also required that the merging parties mandate a divestiture trustee (see C.V.2, para. 149 et seq.). Moreover, it can be necessary to appoint a hold separate manager (see C.V.3, para. 151-155).

<sup>168</sup> See e.g. BKartA, decision of 12.3.2013, B3-132/12 – *Asklepios/Rhön*, para. 378 (After the merger had been cleared with remedies, the purchaser did not have an incentive to maintain the marketability and the competitiveness of the hospital and the medical care center to be sold. Therefore, measures to protect the divestment business were required as part of the remedy provisions).

criteria, since competitiveness is the most important one in the context of the implementation of remedies.

- 90 The divestiture process, the transfer of the divestment business and its integration into the buyer's group of companies are associated with uncertainties and **risks** in many cases. For example, companies often risk losing some particularly qualified staff members during the M&A process. Customer relationships can also be damaged during this period. In addition, it cannot be excluded that the merging parties have an economic incentive to specifically weaken the competitive potential of the divestment business, which is their future competitor, or to transfer resources to their own company.
- 91 It is therefore necessary, depending on the case scenario and the type of remedy at hand, to oblige one or both of the merging parties to preserve the competitiveness of the divestment business during the transition period.<sup>169</sup> In particular in the following **scenarios**, there is a special need to protect the divestment business:
- The divestment business **belongs to the purchaser's corporate group**, e.g. as a business unit or a subsidiary. In principle, the purchaser has the authority to operate the divestment business and to take all relevant decisions until the divestiture is effective. This applies irrespective of whether the remedy is structured as an up-front buyer solution (condition precedent) or a condition subsequent.
  - If the divestment business is **part of the seller's corporate group**, i.e. part of the target company, similar concerns arise in exceptional cases in which a condition subsequent has been accepted due to the particular circumstances of the individual case in question. In this scenario, the merger transaction can be closed as soon as the clearance decision has been issued. The purchaser then acquires the target including the divestment business. The purchaser's access to the divestment business only ends once the divestment business has been sold to a third party.
  - If the divestment business is part of the target company and is to be sold in the context of an up-front buyer solution, the **seller's own self-interest** in preserving the value of the divestment business can be sufficient in most cases, depending on the contractual arrangements. Measures to safeguard competitiveness can be necessary in cases where contractual arrangements exist to the effect that the purchaser as-

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<sup>169</sup> See BKartA, Model Text: Clearance of a Merger Project subject to Remedies (Conditions precedent/up-front buyer), 2005, no. B.2 (p. 4) ([http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions\\_precedent.pdf?\\_\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions_precedent.pdf?__blob=publicationFile&v=4)).

sumes the divestment business's economic risks. This also applies if the divestment business remains a part of the seller's corporate group for a longer period than the usual three to six months, or if the Bundeskartellamt has reasonable doubts as to whether the seller will maintain the competitiveness of the divestment business.

- 92 The divestment business<sup>170</sup> must be equipped with adequate **capital resources** and **assets** necessary to enable it to maintain its previous level of business operations.<sup>171</sup> Depending on the circumstances of each individual case, it may be necessary to identify and substantiate these resources already in the text of the remedy decision. In principle, the divestment business's resources at the time of the notification are used as a benchmark.<sup>172</sup>
- 93 In the case of **carve-outs** (see B.I.c, para. 47-50), it is necessary to take measures to separate the assets to be divested from the company's remaining operations as soon as possible, i.e. well in advance of the actual divestiture.<sup>173</sup> The divestment business has to be operational and must not be dependent on the merging parties after the divestment. To this end, it can be necessary to take additional measures (see B.IV.3., para. 96 et seq., B.IV.8., para. 103-105) and to transfer the divestment business into an independent, new company.<sup>174</sup>

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<sup>170</sup> This requirement is applicable if the divestment consists of a stand-alone business or a substantial part of a business (e.g. a business unit). It is not applicable if, in exceptional cases, granting of a licence is sufficient as a remedy.

<sup>171</sup> See e.g. BKartA, decision of 13.8.2015, B9-48/15 – *WM/Trost*, operative part of the decision no. B.1.1 (p. 5); BKartA, decision of 25.4.2014, B6-98/13 – *Funke/Springer*, operative part of the decision no. B.1 (p. 7); BKartA, decision of 3.2.2012, B3-120/11 – *OEP/Linpac*, operative part of the decision B.1.1-B.1.5 (p. 7 et seq.); BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 19; BKartA, decision of 18.7.2008, B5-84/08 – *Stihl/ZAMA*, operative part of the decision no. 2.1 (p. 5).

<sup>172</sup> See e.g. BKartA, decision of 12.3.2013, B3-132/12 – *Asklepios/Rhön*, operative part of the decision B.1.1 (p. 6); BKartA, decision of 3.2.2012, B3-120/11 – *OEP/Linpac*, operative part of the decision B.1, B.2 (p. 7 et seq.).

<sup>173</sup> See BKartA, Model Text: Clearance of a Merger Project subject to Remedies (here: Conditions precedent/up-front buyer), 2005, no. B.1, B.2 (version of the the text applicable in the event of a carve out) (p. 4 et seq.) (available at: [http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions\\_precedent.pdf;jsessionid=67DF0035FC934C7FDDA84912CABFA59F.1\\_cid371?\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions_precedent.pdf;jsessionid=67DF0035FC934C7FDDA84912CABFA59F.1_cid371?_blob=publicationFile&v=4)).

<sup>174</sup> See e.g. BKartA, decision of 24.1.2005, B4-227/04 – *Smith Group/MedVest*, operative part of the decision 1.1 (p. 2) (condition for merger clearance: divestment of the purchaser's worldwide business for invasive blood pressure measurement; as a first step, the business's tangible and intangible assets have to be transferred to a separate company).

## 2. Independent management of the divestment business

- 94 Measures to ensure the independent management of the divestment business are regularly required in the case scenarios mentioned above (see B.IV.1., para. 91).<sup>175</sup> This also applies if the parties' influence on the management would cause particularly adverse effects.
- 95 The executive director and other staff of the divestment business entrusted with strategic or other important operational duties ("management and staff") must not carry out **any functions** in the business units remaining with the purchaser's group of companies or with the target company that is acquired by the purchaser in the initial merger transaction.<sup>176</sup> Moreover, the management and staff must not be subject to any duties to **report** to the said companies.<sup>177</sup> The purchaser may not exercise any rights under company law to obtain information from the divestment business during the relevant transition period, e.g. pursuant to Art. 51a GmbH-Gesetz (German Limited Liability Companies Act). The purchaser is only permitted to obtain the aggregated financial information necessary for the preparation of financial accounts. The same applies to information that is necessary to comply with other comparable statutory reporting obligations.<sup>178</sup> This information has to be transmitted via the monitoring trustee (see C.V.1., para. 129). Insofar as this is necessary, the management of the business has to be transferred to an independent hold-separate manager (see C.V.3., para. 153). Insofar as the parties intend to work with so-called "clean teams" that would have further access to information, it is necessary to discuss them in advance with

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<sup>175</sup> For the case of a carve-out see BKartA, Model Text: Clearance of a Merger Project subject to Remedies (Conditions precedent/up-front buyer), 2005, B.1.2 (version of the the text applicable in the event of a carve out) (p. 5) ([http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions\\_precedent.pdf;jsessionid=67DF0035FC934C7FDDA84912CABFA59F.1\\_cid371?\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions_precedent.pdf;jsessionid=67DF0035FC934C7FDDA84912CABFA59F.1_cid371?_blob=publicationFile&v=4)).

<sup>176</sup> See e.g. BKartA, decision of 7.6.2004, B4-7/04 – *Henry Schein/Demedis, EDH*, operative part of the decision no. 4.1 (p. 4).

<sup>177</sup> See e.g. BKartA, decision of 12.3.2013, B3-132/12 – *Asklepios/Rhön*, operative part of the decision no. B.1.2 (p. 6 et seq.), (Asklepios had to safeguard that no sensitive information, i.e. with any relevance for competition, was disclosed by the employees of the divestment business to Asklepios); BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 21. For the case of a carve-out see BKartA, Model Text: Clearance of a Merger Project subject to Remedies (Conditions precedent/up-front buyer), 2005, B.1.3 (p. 3 et seq.) ([http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions\\_precedent.pdf;jsessionid=67DF0035FC934C7FDDA84912CABFA59F.1\\_cid371?\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions_precedent.pdf;jsessionid=67DF0035FC934C7FDDA84912CABFA59F.1_cid371?_blob=publicationFile&v=4)).

<sup>178</sup> See e.g. BKartA, decision of 13.8.2015, B9-48/15 – *WM/Trost*, operative part of the decision no. B.1.3 (p. 6); Bundeskartellamt, decision of 3.2.2012, B3-120/11 – *OEP/Linpac*, operative part of the decision no. B.1.3 (p. 8) (in both cases "statutory reporting duties").

the Bundeskartellamt, in particular with regard to the envisaged tasks and powers of the clean teams and the design of the safety mechanism protecting competitively sensitive information. It has to be excluded that the work of the clean team would amount to a violation of the standstill obligation.

### 3. Separation of central facilities, such as IT

- 96 If the divestment business is part of the purchasing party's group, it is often necessary to separate the divestment business from central facilities within this group. The separation concerns, inter alia, **staff** and **organisational issues** as well as **IT and communications**.<sup>179</sup> At the same time, the divestment business must continue to be fully operational (see B.I.1.c, para. 47-50, B.I.1.f, para. 54). If the divestment business belongs to the target company, i.e. the corporate group of the seller, these measures are also necessary, at least in every case in which a remedy has been accepted that does not amount to an up-front buyer solution due to the exceptional circumstances of the individual case. In the second scenario, the separation has to be implemented once the target company has been transferred to the purchaser, i.e. once the first merger transaction has been closed.
- 97 A separation of central IT facilities is generally necessary in the case scenarios mentioned above.<sup>180</sup> IT infrastructure and data processing must be separated so as to ensure that the purchaser (of the initial merger transaction) will no longer have, or cannot gain, access to the divestment business's **business secrets** and other information relevant to competition, such as current pricing and cost information. In addition, all staff and other resources necessary for maintaining its competitiveness have to be transferred to the divestment business, e.g. licences for specialist software and staff familiar with this.

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<sup>179</sup> See BKartA, Model Text: Clearance of a Merger Project subject to Remedies (Conditions precedent/up-front buyer), 2005, B.1.4 (p. 4) ([http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions\\_precedent.pdf;jsessionid=67DF0035FC934C7FDDA84912CABFA59F.1\\_cid371?\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions_precedent.pdf;jsessionid=67DF0035FC934C7FDDA84912CABFA59F.1_cid371?_blob=publicationFile&v=4)).

<sup>180</sup> See BKartA, decision of 12.3.2013, B3-132/12 – *Asklepios/Rhön*, operative part of the decision no. B.1.3 (p. 7); BKartA, decision of 23.2.2005, B10-122/04 – *Remondis/RWE Umwelt*, operative part of the decision no. B.3.2 (p. 9); BKartA, decision of 17.8.2004, B7-65/04 – *GE/InVision*, operative part of the decision no. B.1.2 (p. 3); BKartA, decision of 7.6.2004, B4-7/04 – *Henry Schein/Demedis, EDH*, operative part of the decision no. 4.3 (p. 4 et seq.).

### **Bundeskartellamt Nordzucker/Danisco – mission-critical software in the area of manufacturing<sup>181</sup>**

Nordzucker's acquisition of its competitor Danisco was cleared subject to an up-front buyer divestment of the production plant located in Anklam. The remedies also included the condition (formulated as a condition subsequent) that all IT facilities and systems had to be separated after the sale of the divestment business. The IT separation applied to all IT infrastructure that was used jointly by the target company and the divestment business. The IT separation had to be implemented within a period of one year. The remedies also required that all data required for the smooth operation of the production facility had to be transferred to the divestment business prior to the separation. Moreover, prior to the divestiture, the target company had to guarantee that the divestment business would be able to independently carry out all the IT services necessary for its business operations, at least on the present scale. In accordance with the provisions of the remedies, a monitoring trustee was appointed to supervise the separation of the IT systems.

With regard to the standard software used, the IT separation was carried out without any problems. What proved to be problematic was the fact that for many years the target company had developed further software components in the area of production management. These further developments had not been documented. Due to these substantial changes, the supplier of the original software, an external software company, was unable to adapt the software to the new circumstances of the divestment business. According to the target company, its IT experts who would have been able to adapt the software, had left the company in the meantime. Ultimately, another software company was contracted which was able to customise standard production software in order to adapt it to the needs of the divestment business. On this basis, the existing software could be replaced. The purchaser thus no longer depended on the merging parties for the operation and maintenance of the mission-critical production software. Since the obligation to separate the IT had been implemented, the condition subsequent was not fulfilled and the clearance of the merger remained in effect.

#### **4. Exercising voting rights**

- 98 If the divestment business is constituted as a company, i.e. a legally separate entity, it is usually necessary to safeguard the divested company's independence from the merging parties in the case scenarios referred to above (see B.IV.1., para. 91). An important measure in this context is to oblige the merging parties to authorise the **monitoring trustee** to exercise their voting rights in the company in full independence.<sup>182</sup> If, within the divestiture period, decisions have to be taken by the shareholders' meeting or other corporate bodies (e.g. advisory boards), the voting rights will be exercised by the monitoring trustee.<sup>183</sup> In exercising the voting rights, the monitoring trustee has to primarily align his actions to the

<sup>181</sup> BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 20, 377.

<sup>182</sup> See BKartA, Model Text: Clearance of a Merger Project subject to Remedies (Conditions precedent/up-front buyer), 2005, D.5 (p. 8) ([http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions\\_precedent.pdf;jsessionid=67DF0035FC934C7FDDA84912CABFA59F.1\\_cid371?\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions_precedent.pdf;jsessionid=67DF0035FC934C7FDDA84912CABFA59F.1_cid371?_blob=publicationFile&v=4)).

<sup>183</sup> See e.g. BKartA, decision of 25.9.2008, B1-190/08 – *Strabag/Kirchner*, para. 15; BKartA, decision of 8.6.2006, B4-29/06 – *Telecash/GZS*, para. 21; BKartA, decision of 8.3.2006, B10-90/05 – *AKK GmbH/AKK Verein*, operative part of the decision no. C.1 (p. 4), para. 60; BKartA, decision of 17.8.2004, B7-65/04 – *GE/InVision*, operative part of the decision no. E.2.1 (p. 6).

goal of maintaining and developing the divestment business's competitiveness. In very exceptional cases it may also be acceptable to transfer the voting rights to other shareholders of the divestment business during the relevant transitional period.<sup>184</sup>

## 5. Non-acquisition clause

99 In the context of divestiture remedies, non-acquisition clauses must be included in the text of the remedies. The clauses block a reacquisition of the divestment business by the merging parties. The idea is to prevent them from re-establishing post merger the situation that the remedy was designed to prevent or eliminate in the first place.<sup>185</sup> In the Bundeskartellamt's case practice reacquisitions have so far usually been banned for a period of **five years**.<sup>186</sup>

## 6. Non-compete obligations

100 In some cases divestiture remedies must be combined with a non-compete obligation placed on the merging parties for a limited period of time in order to ensure that the mar-

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<sup>184</sup> See BKartA, decision of 26.11.2001, B10-131/01 – *Trienekens/Remex*, operative part of the decision no. 3a, para. 130 et seq. (parties were obliged to suspend their voting rights for certain companies and to transfer the voting rights to co-shareholders in case this would be necessary to ensure the company remains fully operative).

<sup>185</sup> See BKartA, Model Text: Clearance of a Merger Project subject to Remedies (Conditions precedent), 2005, C.2 (p. 6) ([http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions\\_precedent.pdf;jsessionid=67DF0035FC934C7FDDA84912CABFA59F.1\\_cid371?\\_blob=publicationonFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions_precedent.pdf;jsessionid=67DF0035FC934C7FDDA84912CABFA59F.1_cid371?_blob=publicationonFile&v=4)); e.g. BKartA, decision of 30.6.2008, B2-333/07 – *Edeka/Tengelmann*, p. 138.

<sup>186</sup> See e.g. (all with a duration of five years) BKartA, decision of 13.8.2015, B9-48/15 – *WM/Trost*, operative part of the decision no. C.2 (p. 7); BKartA, decision of 3.2.2012, B3-120/11 – *OEP/Linpac*, operative part of the decision no. C.2 (p. 9); BKartA, decision of 27.12.2010, B2-71/10 – *Van Drie/Alpuro*, operative part of the decision no. 2a as well as para. 279 et seq.; BKartA, decision of 30.4.2010, B8-109/09 – *RWE/EV Plauen, SW Lingen, SW Radevormwald*, operative part of the decision no. II.2 (p. 3); BKartA, decision of 8.5.2009, B8-32/09 – *Shell Deutschland/Lorenz Mohr*, operative part of the decision no. II. (p. 2), para. 79 et seq. (in addition to prohibition on reacquisition of the affected petrol station also ban on lease agreement or brand partnership agreement concerning the petrol station); BKartA, decision of 9.3.2009, B1-243/08 – *Werhahn/Norddeutsche Mischwerke*, para. 18; BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 32; BKartA, decision of 25.9.2008, B1-190/08 – *Strabag/Kirchner*, para. 22 et seq.; BKartA, decision of 5.12.2007, B9-125/07 – *Globus/Distributa*, operative part of the decision no. 2.3 (p. 5); BKartA, decision of 8.2.2007, B5-1003/06 – *Atlas Copco/ABAC*, para. 39; BKartA, decision of 29.9.2006, B1-169/05 – *FIMAG/Züblin*, para. 20; BKartA, decision of 19.9.2006, B1-186/06 – *Strabag/Deutag*, para. 20; BKartA, decision of 22.8.2005, B1-29/05 – *Werhahn/Norddeutsche Mischwerke*, para. 19. In exceptional cases, reacquisition can be banned for a longer or shorter period of time, see for example BKartA, decision of 16.1.2007, B6-510/06 – *Weltbild/Hugendubel*, operative part of the decision no. 5.A (p. 4), p. 50 (4 years); BKartA, decision of 10.01.2007, B9-94/06 – *Praktiker/Max Bahr*, operative part of the decision no. 2.3 (10 years).

ket position will actually be transferred to the buyer.<sup>187</sup> In general, a period of more than **two years** (more than three years in cases of transfer of know-how) is not required and would exceed what is legally permitted by antitrust law.<sup>188</sup>

101 For example, in merger cases between food retailers and beverage retailers, it was necessary to include in the divestment remedy a non-compete clause that barred the purchaser (i.e. the seller of the divestment business) from opening new sales outlets in close proximity to the divested locations for a limited period of time.<sup>189</sup> Otherwise, the seller might be able to quickly recover its previous market position by opening new outlets nearby and thus render ineffective the remedies imposed. In the context of a merger between two service providers for cash handling services, a non-compete clause referred to certain customers with whom service contracts were concluded which had to be transferred as a part of the divestment business to the third-party purchaser.<sup>190</sup>

## 7. Non-solicitation obligations

102 It can be necessary to provide for a non-solicitation obligation with regard to **key personnel** to safeguard the divestment business's competitiveness.<sup>191</sup> This applies in particular if the economic success of the divestment business is closely linked to the skills, expertise, reputation or customer relations of key employees. If merging parties enticed key employees away from the divestment business in such a case, an essential part of the divestment busi-

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<sup>187</sup> See e.g. BKartA, decision of 25.2.1999, B9-164/98 – *Habet/Lekkerland*, operative part of the decision no. 1c, p. 25 (6 months).

<sup>188</sup> European Commission, Commission Notice on restrictions directly related and necessary to concentrations, OJ 2005/C56/03, para. 20: "Non-competition clauses are justified for periods of up to three years, when the transfer of the undertaking includes the transfer of customer loyalty in the form of both goodwill and know-how. When only goodwill is included, they are justified for periods of up to two years".

<sup>189</sup> See BKartA, decision of 28.10.2010, B2-52/10 – *Edeka/Trinkgut*, operative part of the decision no. I.2. (two years); BKartA, decision of 30.6.2008, B2-333/07 – *Edeka/Tengelmann*, operative part of the decision no. 2a as well as p. 138.

<sup>190</sup> See BKartA, decision of 18.7.2013, B4-18/13 – *Prosegur/Brinks*, operative part of the decision no. 2a as well as para. 325 et seq. (two years).

<sup>191</sup> See BKartA, Model Text: Clearance of a Merger Project subject to Remedies (Conditions precedent/up-front buyer), 2005, C.3 (p. 6) ([http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions\\_precedent.pdf;jsessionid=67DF0035FC934C7FDDA84912CABFA59F.1\\_cid371?\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions_precedent.pdf;jsessionid=67DF0035FC934C7FDDA84912CABFA59F.1_cid371?_blob=publicationFile&v=4)); For the BKartA's case practice see for example BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 31 (five years); BKartA, decision of 8.2.2007, B5-1003/06 – *Atlas Copco/ABAC*, para. 40 (two years); BKartA, decision of 15.3.2005, B4-227/04 – *Smith Group/MedVest*, operative part of the decision no. I.4.4 (two years); BKartA, decision of 23.2.2005, B10-122/04 – *Remondis/RWE Umwelt*, operative part of the decision no. B.5.3 (two years).

ness's competitive potential could be transferred back to the merging parties, and the third-party buyer would be deprived of it. In some situations, and depending on the structure of the transaction, it may also become necessary for the merging parties to waive their rights arising from non-compete obligations laid down in employment contracts with their key employees.<sup>192</sup>

## 8. Supply and purchase obligations

103 In some cases the divestment business **is dependent on** access to input services or specific raw materials that cannot be procured at short notice from a third party. Difficulties can arise in particular for market entrants. In these cases it is necessary to safeguard the interests of the purchaser by imposing a temporary obligation on the merging parties to supply the divestment business.<sup>193</sup> The supply obligation must cover the required transition period until the purchaser can be expected to switch to a supply source independent of the merging parties. Otherwise, the divestment business's continued operation, and thus its market position, would be jeopardised. In addition, it is also important that the supply obligation will only be temporary. Otherwise, the divestment business's competitiveness would be weakened due to its dependence on the merging parties, which would last longer than required for the transition. Therefore, in general, an obligation to supply is only acceptable

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<sup>192</sup> See BKartA, Model Text: Clearance of a Merger Project subject to Remedies (Conditions precedent/up-front buyer), 2005, C.4 (p. 6) ([http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions\\_precedent.pdf;jsessionid=67DF0035FC934C7FDDA84912CABFA59F.1\\_cid371?\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions_precedent.pdf;jsessionid=67DF0035FC934C7FDDA84912CABFA59F.1_cid371?_blob=publicationFile&v=4)); for the BKartA's case practice see for example BKartA, decision of 18.7.2008, B5-84/08 – *STIHL/ZAMA*, operative part of the decision no. I.3.5.

<sup>193</sup> See BKartA, Model Text: Clearance of a Merger Project subject to Remedies (Conditions precedent/up-front buyer), 2005, C.1 (p. 6) ([http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions\\_precedent.pdf;jsessionid=67DF0035FC934C7FDDA84912CABFA59F.1\\_cid371?\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions_precedent.pdf;jsessionid=67DF0035FC934C7FDDA84912CABFA59F.1_cid371?_blob=publicationFile&v=4)).

for a **maximum of one year**.<sup>194</sup> A longer term is only admissible in exceptional cases.<sup>195</sup> Under antitrust rules, the maximum admissible term amounts to five years, as accepted by the European Commission in its Notice on ancillary restraints.<sup>196</sup> However, this is not a useful benchmark when assessing a divestment remedy. In the vast majority of cases, five years significantly exceed what is acceptable in the context of remedies. In this context, the requirements are higher as compared to supply and purchase obligations which are ancillary to an unproblematic merger. It is not sufficient for a remedy to comply with antitrust standards because an effective remedy has to ensure that the divestiture eliminates the competition issues raised by the merger.

104 A similar situation can arise if the competitiveness of the divestment business is dependent on **third party suppliers**.<sup>197</sup> Depending on the structure of the divestment transaction, suppliers may not be obliged to consent to the transfer to the divestment buyer of existing contracts concluded with a merging party. Even if the divestment business is a legally separate company and has concluded the contracts with the third supplier, it is possible that the supplier will not have to continue the contractual relationship due to change-of-control clauses in the supply contract which provide the supplier with a right to terminate this contract. All the particular circumstances need to be taken into account when assessing whether a divestiture commitment is suitable in each individual case.

105 In exceptional cases, it can also be necessary to impose a temporary **purchase obligation** on the respective parties to the merger in respect of the products and services provided by

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<sup>194</sup> See e.g. BKartA, decision of 25.4.2014, B6-98/13 – *Funke/Springer*, operative part of the decision no. C1 as well as para. 355 (for a transitional period of up to one year, Funke is to supply the purchaser with programme previews for the divested TV programme magazines; access to Funke’s structured programme data is necessary because purchaser needed a certain period of time to establish its own unit capable of creating the programme previews); BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 29 (supply with certain varieties of sugar not produced in Anklam for a period of up to one year); BKartA, decision of 8.2.2007, B5-1003/06 – *Atlas Copco/ABAC*, operative part of the decision no. I.2(2) b) (access to the purchase contracts of the divestment business in the area of production and packaging of oil-injected screw compressors at previously applicable terms for two years); BKartA, decision of 15.3.2005, B4-227/04 – *Smith Group/MedVest*, operative part of the decision no. I.1.2 (divestment business was to be carved out and transferred to a separate entity prior to the divestment. Supply with components necessary for the production of sets for invasive blood pressure monitors until divestment business is able to conclude supply contracts at market rates).

<sup>195</sup> See BKartA, decision of 18.7.2008, B5-84/08 – *Stihl/Zama*, operative part of the decision no. I.3.1 and para. 71 (five years).

<sup>196</sup> European Commission, Commission Notice on restrictions directly related and necessary to concentrations, OJ 2005/C56/03, para. 33.

<sup>197</sup> See European Commission, COMP/M.6286 – *Südzucker/EDFM*, para. 734 et seq., 772 et seq. (Ideally three supply contracts for raw cane sugar were to be transferred to the purchaser of the Italian sugar refinery, which was to be divested; the parties were to guarantee the supply by other means in case of non-delivery).

the divestment business,<sup>198</sup> provided that the divestment business initially depends on the merging parties as customers.

## 9. Other obligations

106 Further obligations may be imposed on the merging parties if they are essential to effectively transfer the divestment business's competitive position to the purchaser. For example, the obligation to **provide training** to the buyer's staff can be necessary if specific know-how must be transferred to the buyer.<sup>199</sup> Another option to ensure the required transfer of know-how may be the **secondment** of suitable staff to the buyer for a transitional period.

## C. Procedural issues

107 In the following, the most important procedural issues that can arise in the context of the proposal and implementation of commitments will be discussed. It must be stressed at the outset that the parties have to **cooperate** with the Bundeskartellamt **fully and at an early stage** in order to achieve a successful commitment solution. This is in the interest of the Bundeskartellamt as well as in the parties' own interests. The parties are subject to particular obligations to cooperate since proposing commitments is an aspect of their right to decide on the design of the merger and thus falls within their sphere of responsibility (see A.II., para. 9).

108 Firstly, this section deals with the timing (I.) and the requirements placed on the text and content of commitment proposals (II.). In the Bundeskartellamt's process of evaluating proposed commitments, the information and assessment provided by third parties, in particular market participants, can play an important role. The Bundeskartellamt regularly asks them to provide their comments in the context of market tests (III.). Once suitable com-

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<sup>198</sup> See BKartA, decision of 17.2.2009, B2-46/08 – *Nordzucker/Danisco*, para. 30, 367 (acquisition of Danisco's sugar business by Nordzucker was cleared subject to the up-front buyer divestment of the German production plant in Anklam; additionally, Nordzucker was obliged to purchase the bioethanol produced as a by-product in Anklam for a transition period of around six years, since this was an important requirement for the sugar plant's profitability; no competition problems with regard to bioethanol).

<sup>199</sup> See e.g. BKartA, decision of 27.9.2001, B4-69/01 – *Dentsply/Degussa*, operative part of the decision no. I.1 (p. 2) (divestment of a production line for veneering ceramic; in this context Dentsply was obliged to offer a two-week technical training to the purchaser regarding the manufacturing of the veneering ceramic products); see also BKartA, decision of 3.2.2012, B3-120/11 – *OEP/Linpac*, operative part of the decision no. A.2.4 (p. 4).

mitments are accepted and included in a decision in the form of remedies (IV.), the implementation phase will start. As a rule, a monitoring trustee becomes involved at this stage. In some cases, a divestiture trustee and/or a hold-separate manager may also have to be appointed during the course of the implementation phase (V.). The implementation of the remedies must be fully completed within the time limit laid down in the decision (VI.).

#### I. **Timing of commitment proposals and time limits for the examination of mergers**

- 109 Commitments can generally be submitted at **any stage** of the procedure, including the first phase of merger control. However, the negotiations between the Bundeskartellamt and the merging parties on the scope and content of commitments can generally only be concluded once the Bundeskartellamt's investigations on the likely competitive effects of the concentration have been completed. This stage of the Bundeskartellamt's investigations is usually marked by the authority's statement of objections. In some cases it may also be possible to finalise the negotiations after the preliminary competition concerns have been orally communicated to the merging parties. In Germany, a merger can only be cleared subject to remedies after an in-depth investigation has been conducted. Clearance with commitments in the first phase is not provided for under German competition law.
- 110 Commitment proposals must be submitted at the latest **in due time** before the end of the time limit in second phase proceedings so as to provide the Bundeskartellamt with a sufficient time span to assess the proposed commitments and carry out a market test. In some cases the assessment of proposed commitments may also require additional investigations. With the first submission of a commitment proposal the time limit for the Bundeskartellamt's decision in the second phase is extended by one **month** (Section 40(2) sentence 7 GWB). However, in practice, the **statutory extension** of the time limit is often not sufficient to examine whether the competition concerns will be eliminated by the commitments proposed. If, in the course of the examination, modified or new commitment proposals are submitted, the statutory extension of the time limit will not be triggered again.
- 111 In principle, a **further extension** of the time limit is possible with the notifying parties' consent (Section 40(2) sentence 4 no.1 GWB). If the parties do not agree to an extension of the time limit, which would be necessary to assess the commitment proposal, the Bundeskartellamt is obliged to prohibit the merger insofar as the results of the investigation that are available at that stage of the procedure, and possible further investigation within

the remaining period of time, are not sufficient to evaluate the effectiveness of the commitments. In the context of the negotiation of commitments, an extension of the time limit for the second-phase investigation is only a reasonable option if it is part of a good-faith effort to move forward the negotiations, and provided that a clearance decision subject to conditions and obligations still appears to be possible. The Bundeskartellamt is, however, not obliged to make full use of each extension of the time limit granted by the parties. If merging parties have already submitted a number of unsuitable commitment proposals, the Bundeskartellamt is not obliged to extend its examination in order to assess further proposals. This is in particular the case if the target company's potential to compete could be impaired by an extension of the merger control proceedings. In such a case, the Bundeskartellamt rejects the proposed further commitments and takes a decision on the basis of its investigations and the commitments proposed earlier.

- 112 If concentrations are examined in several jurisdictions, an extension of the time limits on the basis of consent expressed by the merging parties can enable the competition authorities involved to examine the concentration in parallel procedures and to cooperate closely in the interest of achieving consistent results in their proceedings (**international cooperation**). This is important, for example, if remedies are required in several jurisdictions. It is clear that inconsistent remedies should be avoided whenever possible.<sup>200</sup> Likewise, effective cooperation can be facilitated if the parties provide each of the relevant competition authorities with so-called waivers of confidentiality in which they express their consent to an exchange of documents and confidential information provided by them between the competition authorities involved.<sup>201</sup>
- 113 When merging parties draft and negotiate the sale and purchase agreement and prepare **the time line for a transaction** it would seem to be advisable to allow for a sufficient period of time before the closing of the transaction in order to be able to initiate, conduct and complete the required merger control proceedings (in Germany and other states with a

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<sup>200</sup> See International Competition Network (ICN), Merger Working Group, Practical Guide to International Enforcement Cooperation in Mergers, 2015, para. 37 et seq., in particular para. 39.; ICN, Recommended Practices for Merger Notification and Review Procedures, 2002-2006, p. 31 (<http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx>); as well as EU Merger Working Group, Best Practices on Cooperation between EU National Competition Authorities in Merger Review, 2011, para. 2.3 ([http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sonstiges/ECN%20Best%20Practices%20on%20cooperation.pdf?\\_\\_blob=publicationFile&v=6](http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sonstiges/ECN%20Best%20Practices%20on%20cooperation.pdf?__blob=publicationFile&v=6)). See also OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings V.1., VI 3.(i) and VI.4.(v) (<http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf>).

<sup>201</sup> See ICN, Waivers of Confidentiality in Merger Investigations, 2005 (the ICN model waiver is contained in annex A) (<http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>).

merger control regime in place). In appropriate cases, it would be prudent to also include in the planning process the additional time required for the assessment of – one or possibly several – commitment proposals. In such cases, which possibly raise competition concerns, the merging parties should also consider engaging in pre-notification contacts. The additional time required should also be part of the transaction time line. In the context of the contractual arrangements, the precautions mentioned above apply in particular to provisions that provide for a last-delay date (“drop dead date”), i.e. provisions under which a contract will become invalid if closing cannot take place before a specified date. The same applies to **contractual penalty clauses** which will be triggered if one of the merging parties withdraws from the merger project, or if the merger is not cleared by the competition authorities until the specified date. These contractual arrangements can pose a significant obstacle to negotiating remedies with competition authorities if the time limits agreed between the parties turn out to be too tight.

## II. Text and content of commitment proposals, supporting documents

114 To facilitate the drafting of commitment proposals, the Bundeskartellamt has formulated **model texts** for divestment remedies which are available on the Bundeskartellamt’s website ([www.bundeskartellamt.de](http://www.bundeskartellamt.de)). Links to these model texts are also included in the electronic version of this document:

- [model text for divestment in the form of an up-front buyer solution \(condition precedent\)](#),
- [model text for divestment in the form of a condition subsequent](#), and
- [model text for divestment in the form of an obligation](#).

115 The model texts provided by the Bundeskartellamt include useful guidance on how to formulate effective commitments. The model texts should be used for all commitment proposals, if at all possible. If the text of proposed commitments deviates from the model texts, the differences should be identified and the merging parties should explain why these **deviations** are required in the case at hand.

116 The merging parties are required to submit to the Bundeskartellamt all the **information** that is necessary to allow for an assessment of the commitment proposal and for a market test in the particular case. The information has to be submitted together with the commitment proposal.

117 Each commitment proposal submitted by the merging parties must include a **non-confidential version** in order to enable the Bundeskartellamt to carry out a market test with third parties as soon as possible. This requirement also applies to modified proposals. In cases where a non-confidential version is not submitted immediately or at least in a timely manner, it may not be possible to market test the commitments within the short legal deadlines of a merger control proceeding. This is despite the one-month extension of the deadline that applies when commitments are proposed for the first time in a proceeding (Section 40(2) sentence 7 GWB). In such a case, it may not be possible to remove any remaining doubts as to the effectiveness of the proposed commitments in time before the deadline expires. The same applies in cases where the merging parties submit a non-confidential version of the proposed commitments on time, but where information is deleted as confidential (according to the merging parties' assessment) to such a degree that a market test would not be meaningful. Similar difficulties may arise if the parties mark a commitment proposal as **non-binding** and submit their binding proposal very late in the proceedings.

118 The commitments proposed by the parties must be suitable to eliminate the significant impediment to effective competition caused by the merger project (A.III., para. 11). Therefore, the requirements to be met by commitments result from the **competitive harm** the concentration would be likely to cause. In some previous cases in which the Bundeskartellamt already gained experience in the implementation of remedies in the same sector, it has proved useful for the authority to explain to the merging parties the requirements a commitment proposal has to meet in the particular case. In most cases, this is most useful after the merging parties have submitted a first commitment proposal and if the focus of the authority's comments is placed on the key issues. The aim here is to structure the process. Merging parties should be aware however, that it is their own responsibility to propose suitable commitments and that this also applies to cases in which the Bundeskartellamt provides guidance to assist the remedy negotiations.

### **III. Further investigation and market test**

119 The **information** gathered in the proceeding regarding the relevant markets represents an important basis for the assessment of whether the proposed commitments are suitable to eliminate the competition problem identified by the Bundeskartellamt. Further investigations can be necessary to assess whether the commitments are suitable, necessary and proportionate.

120 **Market tests** of the proposals play a particularly important role in this context. Important customers and competitors as well as third parties admitted to the proceedings (as an intervening party) are usually asked to provide their views on different aspects relating to the suitability of the commitments proposed and their likely impact on the affected markets. In most cases, they receive a non-confidential version of the commitment proposal together with the questions. The market test also provides third parties admitted to the proceedings as intervenors an opportunity to exercise their right to be heard.

121 In general, the Bundeskartellamt does not conduct any market tests if the commitments proposed are **clearly unsuitable** to eliminate the competition concerns identified during the investigation. Market tests are usually conducted in all cases where it appears to be at least possible that the commitments proposed are suitable.

122 Market tests include **questions** designed to help clarify whether the commitment proposals are suitable to eliminate the competition concerns identified by the Bundeskartellamt. Depending on the circumstances in each individual case the market test can include questions, in particular on the following issues:

- whether the remedy package would **eliminate** the **competition concerns** identified in the investigation,
- which potential **risks** and problems may arise during the implementation of the remedies,
- whether there are potential **obstacles** to the effectiveness of the remedies,
- in the context of divestment remedies, in particular the following issues may be relevant:
  - o what are the necessary requirements for the **divestment business** in order to ensure that its market position is effectively transferred to the purchaser, and whether these conditions are actually fulfilled in the case of the divestment business offered;
  - o what are the conditions that would have to be fulfilled by a **purchaser** in order to operate the divestment business as an effective competitor;
  - o whether there are **potential buyers** that would be interested in acquiring the divestment business and able to enter into the seller's competitive position on the relevant markets on the basis of the envisaged remedy package, or which conditions would have to be fulfilled in order to induce them to do so.

- 123 A market test can be conducted by using (informal) requests for information or by issuing **formal decisions** requesting the disclosure of information. In the context of market tests, the Bundeskartellamt can usually only grant short **deadlines** for replies to requests for information or formal decisions due to the short statutory time limits for the examination of a merger project. Normally a deadline of at least one week applies in the context of market tests when the Bundeskartellamt contacts companies in writing. Sometimes it can be necessary for the authority to receive written replies or replies by telephone within an even shorter deadline, for example if commitment proposals have been modified several times or if several market tests are required.
- 124 Responses provided by **customers** or **competitors** of the merging parties often include important information which can assist the investigation and prove extremely valuable for the Bundeskartellamt's assessment. In evaluating the replies to the market test the Bundeskartellamt takes into account the possible impact that the respondents' respective economic interests may have on their replies, as well as the substance and quality of the replies. The assessment provided by market participants is not binding on the Bundeskartellamt's investigation.
- 125 In some cases **site visits** of production plants or logistics centres can also be helpful for the investigations. This applies equally to the premises of merging parties and other market players. Usually, the facilities are explained on-site. **Meetings** of the Bundeskartellamt **with potential buyers** of the divestment business may also be valuable in appropriate cases before a remedy decision is adopted.

#### **IV. Remedy decision declaring commitments binding**

- 126 On the basis of its investigation and the information submitted by the merging parties, the Bundeskartellamt takes a decision on whether the proposed commitments are suitable and sufficient to eliminate the competition issues. If this is the case they are included in the clearance decision as remedies "in order to ensure that the undertakings concerned comply with the commitments they entered into with the Bundeskartellamt to prevent the concentration from being prohibited" (Section 40(3) sentence 1 GWB). A clearance subject to remedies is only possible in **second phase proceedings**. Commitments can be proposed during or even before the first phase proceedings (see C.I., para. 109), but ultimately the Bundeskartellamt can only take a formal decision on whether to accept them at the end of the in-depth investigation (second phase proceedings). A contract between the Bun-

deskartellamt and the merging parties under public law is not a possible alternative to a remedy decision.<sup>202</sup>

127 If the Bundeskartellamt reaches the conclusion that the proposed commitment package is not sufficient to remove the impediment to competition that would be created by the merger, the proposal is **rejected**. In this case, the Bundeskartellamt explains briefly to the merging parties why the commitments offered are not sufficient. Usually this will be done in writing. In general, the parties have the opportunity to submit an improved commitment package, provided that the remaining stages of the proceedings still leave sufficient time for a new proposal and its assessment by the Bundeskartellamt (see C.I., para. 110, 113).

## V. The role of trustees and hold-separate managers

128 It is the merging parties that are responsible for implementing remedies. Monitoring trustees (1.) and divestiture trustees (2.) can also play an **important role**. In addition, where appropriate, it may be necessary to appoint a hold separate manager (3.).

### 1. Monitoring trustees

129 A monitoring trustee is appointed **in most cases** in which a merger is cleared subject to remedies. In the following, his role and function in the context of the implementation process are explained (a). The qualifications, credentials and resources that are required of the monitoring trustee (b) and the procedure of how a monitoring trustee is selected and appointed (c) are set out. This is followed by a description of what monitoring trustees must be authorised to do and what their responsibilities are (d).

#### a) Role and function

130 It is the task of the monitoring trustee to **supervise** the implementation of the remedies and to **ensure** their effective implementation. In this context, he also provides **assistance** to the Bundeskartellamt and the merging parties. It is important that he acts **independently** of the merging parties. The monitoring trustee must make sure that the merging parties implement the remedies completely, effectively and without delay. For this purpose the moni-

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<sup>202</sup> The BKartA's previous practice to conclude contracts (governed by public law) with the merging parties to agree on commitments was replaced by a specific provision dealing with commitments (Section 40 (3) sentence 1 GWB). The provision was introduced by the 6<sup>th</sup> amendment to the Act against Restraints on Competition (1998) and entered into force on the 1<sup>st</sup> of January 1999.

toring trustee shall identify potential obstacles. He also sees to it that the parties plan, prepare, initiate and execute all necessary intermediate steps. The monitoring trustee also monitors the merging parties' compliance with the obligations not to affect the divestment business's economic viability, value, marketability (in the sense of its saleability) and competitiveness. In this context, the trustee can play an especially important role.

- 131 In the case of **imminent problems** with regard to the implementation of the remedies, it shall be the trustee's task to identify the extent and causes of these problems, indicate possible solutions and report to the Bundeskartellamt as soon as possible. The monitoring trustee should play an active role, but is not authorized to act (or decide) in the name and on behalf of the Bundeskartellamt.
- 132 The trustee shall inform the Bundeskartellamt at regular intervals from the beginning to the end of his activities on the status of implementation, measures planned and compliance with the remedies. On assuming his mandate, the trustee shall promptly propose a detailed work plan in his first report to the Bundeskartellamt. The **work plan** should describe which measures he intends to take to ensure that the obligations imposed on the parties are fulfilled. The work plan should also indicate the planned timing of these measures.<sup>203</sup> The trustee shall explain his work plan in a meeting with the Bundeskartellamt shortly after he commenced his work.
- 133 The trustee shall provide the Bundeskartellamt with **written reports**, usually at intervals of four weeks. Immediately after the termination of his mandate the trustee shall submit a final report. The Bundeskartellamt does not object to the trustee submitting the work plan or written reports simultaneously to the Bundeskartellamt and to the merging parties. Insofar as the trustee submits his reports to the merging parties, it is his responsibility to ensure that any possible business secrets of one party are not disclosed to the other party.
- 134 It is the task of the trustee to assist in and monitor the **divestiture process**. The trustee shall cooperate closely in particular with the seller's and the divestment business's management.
- He shall take care to prevent that the merging parties take any measures that could jeopardise the **viability** of the divestment business or reduce its **value**.

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<sup>203</sup> If the BKartA agrees, the trustee can refer in his first report to the document setting out his concept regarding the implementation of the remedies. This document has already been submitted to the BKartA previously, in the context of the trustee's appointment (see C.V.1.b, para. 136).

- The trustee shall ensure that potential purchasers receive all documentation and information necessary for a robust evaluation of the divestment business and its potential to compete (“**due diligence**”).
- The trustee shall also carry out an assessment of the companies interested in acquiring the divestment business. For this purpose the trustee must form his own opinion of the **potential purchasers** and gather information on their suitability, also from third party sources. In many cases it may be useful for the trustee to meet with potential purchasers or to participate in meetings between the merging parties and potential purchasers.

#### **b) Required qualifications, credentials, and resources**

135 The monitoring trustee must possess the necessary expertise and human resources. The trustee must be independent of the merging parties and free of conflicts of interest.<sup>204</sup>

136 In principle, the question of which **qualifications** and **experience** the trustee needs to be able to fulfil his role effectively depends on the situation in the particular merger case. In the context of divestiture remedies, know-how regarding the structuring and implementation of M&A transactions is always required. In some cases, sectoral knowledge can also be necessary. The Bundeskartellamt must be provided with conclusive information on the trustee candidates that the merging parties propose to appoint in order to be able to assess their qualification and experience. Particularly helpful in this context is information on trustees’ previous involvement in M&A as well as regulatory work, for example in cases in which they already worked as trustees within the framework of German or European merger control proceedings.

137 Furthermore, information must be submitted on the **human resources** available to the trustee and the particular staff members that would be specifically assigned to the project. The documentation should also provide details on those staff members’ relevant previous experience.

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<sup>204</sup> See BKartA, model text of a trustee mandate, 2005, no. H (“conflicts of interest”, p. 6) ([http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template%20-%20Trustee%20Mandate.pdf?\\_\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template%20-%20Trustee%20Mandate.pdf?__blob=publicationFile&v=4)); BKartA, Model Text: Clearance of a Merger Project subject to Remedies (Conditions precedent), 2005, no. D.1 (“monitoring trustee”, p. 6) ([http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions\\_precedent.pdf?\\_\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions_precedent.pdf?__blob=publicationFile&v=4)).

138 Before the trustee is appointed, he should also submit to the Bundeskartellamt an **informative and conclusive concept** covering all important issues regarding his involvement in the implementation of the remedies, which should be addressed in more detail in his work plan. The document should set out which measures the trustee plans to take in order to safeguard the merging parties' compliance with the remedy decision. If time permits, it may be useful to arrange for a meeting of the trustee with the Bundeskartellamt to personally explain the concept.

139 The trustee shall not have an actual or potential **conflict of interest** either at the date of his appointment as trustee or during the period of his trustee mandate. A conflict of interest can arise in particular in cases where there are reasonable doubts as to the trustee's independence. This will generally be the case if the trustee – or a staff member assigned to this project – is linked to a company that belongs to one of the merging parties' corporate groups, either by being a shareholder or by a financial link. In many cases, this also applies if the trustee provides services to the merging parties in a separate matter, such as accounting services, legal advice, investment banking etc., and provided that the economic weight of these services is not insignificant for the trustee, or when the parties to the concentration offer the trustee the prospect of employment after the end of his mandate.

140 For example, conflicts of interest frequently arise if an **accounting firm** which acts as a trustee conducts an audit of one of the following companies:

- a party to the merger;
- the holding company of a corporate group to which one of the merging party belongs;
- a group company that is of considerable importance for the business activities of the group or the merging party;
- a group company, provided that this mandate is of considerable importance for the accounting firm, or
- a major shareholder of the parties (usually with voting rights reaching or exceeding 25 percent).

If cases are cleared subject to an up-front buyer solution under which a merger cannot be implemented until the conditions are fulfilled, these requirements will also apply with regard to the seller.

- 141 As a rule, conflicts of interest also arise if a trustee provides **legal advice** to one of the merging parties. It will also be problematic if a trustee acts as **adviser** to this party in other areas of expertise, e.g. as a forensic IT specialist within the context of a cartel investigation.
- 142 In their proposal of potential trustees, merging parties must disclose any previous or current business relations between the trustee and the merging parties, a respective group company or a respective major shareholder. **Disclosure** is also mandatory with regard to other situations that could give rise to a conflict of interest. The disclosure obligations also apply to circumstances that occur during the trustee's ongoing mandate. The Bundeskartellamt must be informed by the trustee as soon as indications for a conflict of interest become apparent.
- 143 If conflicts of interest emerge during the monitoring trustee's mandate, the Bundeskartellamt will generally request the parties to terminate the trustee's mandate and appoint a **new trustee**.

### c) Appointment

- 144 The monitoring trustee is **proposed** by the merging parties. At the latest within one week of service of the decision, they shall submit to the Bundeskartellamt a list of three suitable potential trustees.<sup>205</sup> It is possible and sometimes useful to do so even before the decision is adopted in the merger control proceedings.
- 145 The appointment of the trustee is subject to **prior approval** by the Bundeskartellamt. The Bundeskartellamt will normally take a decision on the suitability of the candidates within one week. If the candidates proposed are not accepted, the merging parties have usually one more week to submit a new list. Once the Bundeskartellamt has approved the candidate, the trustee is to be appointed promptly. If the Bundeskartellamt rejects the parties' second proposal as well, the Bundeskartellamt will appoint a candidate that it considers to be suitable, normally within one additional week.<sup>206</sup>
- 146 All further details regarding the rights and obligations of the trustee and the merging parties shall be stipulated in a **trustee mandate**. The conclusion of the trustee mandate requires the approval of the Bundeskartellamt. A draft mandate shall generally be submit-

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<sup>205</sup> See BKartA, Model Text: Clearance of a Merger Project subject to Remedies (Conditions precedent), 2005, no. D.2 ("monitoring trustee", p. 7) ([http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions\\_precedent.pdf?\\_\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions_precedent.pdf?__blob=publicationFile&v=4)).

<sup>206</sup> Ibid.

ted by the merging parties to the Bundeskartellamt within one week after service of the decision.<sup>207</sup> The Bundeskartellamt's model text should be used if at all possible (available on [www.bundeskartellamt.de](http://www.bundeskartellamt.de)). Insofar as the parties deviate from the model text, the difference must be marked and explained.

#### **d) Authorisations, responsibilities and remuneration**

- 147 The trustee is bound by the Bundeskartellamt's **instructions**; however, this does not apply to the trustee's relationship with the parties. In practice, merging parties may sometimes have a wrong impression of the trustee's role because they have to bear the costs of his remuneration, conclude the trustee mandate with him and, subject to the Bundeskartellamt's approval, can generally select the trustee. The trustee generally coordinates the steps he takes with the Bundeskartellamt. Within this framework, he acts independently.
- 148 The trustee shall be **independent** in the fulfilment of his tasks. Merging parties can neither require the trustee to provide them with preferential access to his work products, i.e. before documents are submitted to the Bundeskartellamt, nor to disclose all written communication between him and the Bundeskartellamt.<sup>208</sup> The parties must not interfere with the trustee's assessments and evaluations before they are submitted to the Bundeskartellamt.
- 149 The parties shall provide the monitoring trustee with all appropriate **cooperation and assistance** he may reasonably require in the performance of his tasks.<sup>209</sup>
- 150 The **remuneration** of the trustee, his expenses, and the costs of additional personnel to be assigned to the project by the trustee as required for the performance of his tasks shall be borne by the merging parties. The Bundeskartellamt is not liable for any action of the trustee.

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<sup>207</sup> Ibid.

<sup>208</sup> The BKartA does not object to the trustee submitting his reports to the Bundeskartellamt and the merging parties at the same time (see C.V.1.a, para. 131).

<sup>209</sup> See BKartA, Model Text: Clearance of a Merger Project subject to Remedies (Conditions precedent/up-front buyer), 2005, no. D.4 ("monitoring trustee", p. 8) ([http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions\\_precedent.pdf?\\_\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template-Conditions_precedent.pdf?__blob=publicationFile&v=4)); BKartA, model text of a trustee mandate, 2005, no. D.1.-D.9 (p. 4 et seq.) ([http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template%20-%20Trustee%20Mandate.pdf?\\_\\_blob=publicationFile&v=4](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Template%20-%20Trustee%20Mandate.pdf?__blob=publicationFile&v=4)).

## 2. Divestiture trustees

- 151 If, in exceptional cases, the Bundeskartellamt accepts a divestiture remedy in the form of a condition subsequent (and not in the form of an up-front buyer solution, i.e. condition precedent), a divestiture trustee shall be appointed in addition to the monitoring trustee. The person or company acting as monitoring trustee can also be appointed as divestiture trustee. In some cases that involve up-front buyer solutions, it may also be necessary to provide for a divestiture trustee. A divestiture trustee needs to become involved where the parties have not been able to implement the divestment remedy within the first divestiture period (see C.VI., para. 159). It will then be the task of the divestiture trustee to carry out the sale of the divestment business within the second divestiture period (see C.VI., para. 158). The trustee has to effect the sale at the **best possible rate** without being bound to a **minimum price** or any other **instructions** of the merging parties. The purchaser must meet the requirements stipulated in the remedy decision.
- 152 The requirements specified for the monitoring trustee with regard to his **qualifications, credentials** and **resources**, the process of **appointment**, the content of the **trustee mandate**, and his **remuneration** (see C.V.1., para. 129-150) also apply to the divestiture trustee.

## 3. Hold separate managers

- 153 In some cases it can be necessary to appoint a hold separate manager in addition to a monitoring trustee (and a divestiture trustee). His function is to ensure the independence of the divestment business from other business units of the merging parties until the completion of the divestiture. During the same period, he also has to preserve the divestment business's economic viability, value, marketability (in the sense of its saleability) and **competitiveness** (see B.IV.1., para. 89-93).<sup>210</sup> The functions and objectives of hold separate managers and monitoring trustees partially overlap. The monitoring trustee is authorised to

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<sup>210</sup> See BKartA, decision of 12.3.2013, B3-132/12 – *Asklepios/Rhön*, para. 376 et seq. (acquisition of a minority shareholding in Rhön-Klinikum AG by Asklepios Kliniken was cleared subject to an up-front buyer divestment. Asklepios had to sell its hospital and medical care center in Goslar to an independent provider of hospital care. Additionally, appointment of a hold separate manager who was to safeguard that the divestment business was managed independently from Asklepios and according to the divestment business's economic interests. In particular, the economic viability, marketability and competitiveness of the divestment were to be secured. Asklepios decided not to implement the divestment remedy after the merger decision had come into force. The condition precedent (up-front buyer divestment) was therefore not fulfilled and the concentration was deemed to be prohibited. A hold separate manager was not appointed). See also BKartA, decision of 8.6.2006, B4-29/06 – *Telecash/GZS*, para. 19 (appointment of a hold separate manager who was responsible for maintaining the economic viability, value, competitiveness as well as the independent management of the divestment business).

give instructions to the hold separate manager and supervises his activities. The hold separate manager manages the day-to-day business of the divestment business, and he is present at its headquarters or relevant sites.

- 154 The hold separate manager's tasks may vary from case to case. He shall either have the responsibility to manage the business himself or his task shall be limited to supervising the **day-to-day management** of the divestment business. An additional task of the hold separate manager is to inform the divestment business's staff on the divestiture process and its implications for the staff's rights and obligations, in particular with a view to possible changes in the details of their employment. Depending on the circumstances of the individual case, it may also be possible to appoint the same person as monitoring trustee and hold separate manager.
- 155 The **qualifications** required for hold separate managers include, first and foremost, proven management skills, usually in the relevant business sector. Information on the relevant background of candidates has to be submitted to the Bundeskartellamt together with the proposal for a hold separate manager.
- 156 The hold separate manager shall be appointed without delay after the merger control decision has been served on the merging parties. They are obliged to comply with all **instructions** by the hold separate manager that are required for the implementation of the remedies. The hold separate manager shall act on the instructions of the divestiture trustee and the Bundeskartellamt; he is, however, not subject to instructions by the parties.
- 157 For further details, please refer to the explanations on monitoring trustees, especially with regard to the **appointment, remuneration** and other requirements with regard to their **qualification and independence** (see B.V.2., para. 144-146, 150, 129-143), which apply accordingly. In appropriate cases, the hold separate manager is appointed by the monitoring trustee upon the Bundeskartellamt's approval.

## **VI. Time limit for the implementation of remedies**

- 158 The time limit for the implementation of remedies is specified on a **case-by-case basis**. In this process the intermediate steps can be taken into account that companies must take (depending on the nature of the remedy) when they implement what is required by the remedy. Therefore, the length of the time limit for the implementation of remedies can vary from case to case.

- 159 In the case of a **divestment remedy** the parties must generally provide evidence that the divestiture has been **completed**. This requirement is to prevent possible delays that might occur in the period between the signing of the agreement and the closing of the transaction. In these cases it is necessary that the shares or assets to be transferred have been effectively transferred. It can, however, be sufficient for companies to take all necessary steps to initiate the transfer of ownership<sup>211</sup> at a time where only the entry into the commercial register remains to be submitted, provided that an application for the entry has been lodged with the register. In appropriate cases, it may be sufficient for the fulfilment of the remedy to provide evidence that all contracts necessary for the divestment have been concluded in a legally binding way.<sup>212</sup> In cases where this appears to be a suitable approach this will normally be explicitly mentioned in the text of the remedy decision. Any merger control proceedings that may be required with regard to the acquisition of the divestment business by the buyer have to be concluded within the time limit for the implementation of the divestment. Insofar as the remedies include other commitments in the form of a condition precedent, the parties have to prove that they have been implemented as well before they are allowed to complete the transaction.
- 160 In the case of divestiture commitments in the form of **up-front buyer** solutions (i.e. with conditions precedent), a period of **six months** after service of the clearance decision will generally be sufficient to identify a suitable purchaser, conclude binding agreements and complete the divestiture transaction. A shorter period will, however, be considered in cases where there is an increased risk that the value and viability of the divestment business could decrease at a more than average rate in the course of the divestiture period.
- 161 Whenever the fulfilment of the divestiture commitment is made dependent upon the provision of evidence for the legally binding conclusion of all contracts necessary for the divestiture, the remedies shall also fix a second time line for the closing of the transaction. Within this time line, the conclusion has to be proven to the Bundeskartellamt; otherwise clearance of the transaction will lapse (condition subsequent).<sup>213</sup>

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<sup>211</sup> This includes consents and approvals by third parties, for example by third party shareholders.

<sup>212</sup> BKartA, decision of 28.10.2010, B2-52/10 – *Edeka/Trinkgut*, operative part of the decision, no. I. 1. e); BKartA, decision of 18.07.2013, B4-18/13 - *Prosegur/Brink's*, operative part of the decision no. I. 1 dd); BKartA, decision of 22.11.2013, B6-98/13 - *Funke/Springer*, operative part of the decision no I. A. 1.

<sup>213</sup> See e.g.. BKartA, decision of 22.11.2013, B6-98/13 – *Funke/Springer*, operative part I. A. 3 (*one month*).

- 162 Divestiture commitments in the form of **obligations** and **conditions subsequent** (i.e. condition without up-front buyer solution) will only be accepted in exceptional cases (see A.III.3., para. 30 et seq). If accepted, these types of remedies allow for the merger to be completed before completion of the divestiture. An impediment to competition is thus tolerated during the transitional period. Therefore, the assessment of whether a divestment in the form of an obligation or condition precedent would be suitable and effective in practice must be particularly strict. As a consequence, the divestiture period should be as short as possible.<sup>214</sup> It should not exceed six months. As a rule, a two-step procedure is applied in cases where obligations or conditions precedent are used. Within the first divestiture period (in general three months) it is up to the parties to find a suitable purchaser, conclude a sale and purchase agreement, and close the transaction. If they are not successful, a divestiture trustee is to be appointed in most cases. It will be his task to identify a suitable purchaser and conclude the transaction. The second divestiture period is generally three months. The divestiture trustee is granted the authority to sell the divestment business to a suitable buyer at the best possible rate and without being bound to instructions or a minimum price.
- 163 Within the divestiture period, merging parties must obtain the Bundeskartellamt's **approval** regarding the purchaser as well as the sale and purchase agreement. This applies to all divestment remedies, regardless of their design. The Bundeskartellamt must therefore be provided in due time before the expiry of the divestiture period with the name of the purchaser, the sale and purchase agreement and all necessary information. The Bundeskartellamt requires a sufficient period of time to examine whether the proposed purchaser as well as the sale and purchase agreement are suitable. In general, at least two weeks are required.
- 164 If **market access remedies** solely require the granting of specific rights (e.g. special rights of termination for customers in the case of long term agreements), they can often be implemented at short notice. Thus, the time period for the implementation can be significantly shorter than in the case of divestiture commitments. For other market access measures, the timeframe for their implementation will be determined on a case-by-case basis taking account of the particular measure concerned and the circumstances involved.

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<sup>214</sup> See OLG Düsseldorf (Higher Regional Court), decision of 22.12.2008, VI-Kart 12/08 (V) – *Globus/Distributa*, para. 19 (juris).

165 An extension of the time limits provided by the remedies is generally not possible, as this would result in a change of the operative part of the decision. If, however, it becomes apparent in exceptional cases that it might not be possible to meet the deadline, the remedies can provide for the possibility of extending the deadline.<sup>215</sup> In such a case, an exceptional extension of the deadline is possible.

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<sup>215</sup> See BKartA, decision of 22.11.2013, B6-98/13 – *Funke/Springer*, operative part of the decision, I.A.3.

## Annex - definitions

### Carve-Out

The term carve-out describes the separation of a business unit from a corporate group in cases where the business unit does not constitute an existing business that operates on a stand-alone-basis. For example a branch, a sales outlet, a branch office or a production site may be considered to be an acceptable divestment business within the context of a proposed commitment (see B.I.1.c, para. 47). A reverse carve-out describes the opposite situation. In preparation of the divestiture, a business unit which is not part of the divestment package and which will remain with the respective party to the concentration is separated from the divestment business.

### Commitments

The purpose of commitments is to eliminate the competition problems identified during the Bundeskartellamt's investigations into the merger project. Commitments are proposed by the merging parties and modify the initial merger project. The parties undertake in writing to implement the proposed measures. In suitable cases, the Bundeskartellamt may provide guidance on which commitments may be suitable and necessary in a particular case.

### Conditions subsequent and up-front buyer solutions

If clearance with commitments is subject to a condition, clearance of the concentration is linked to the fulfilment of the condition.<sup>216</sup> There are two possible alternatives: up-front buyer solutions (conditions precedent) and conditions subsequent. Priority is given to up-front buyer solutions (see A.III.3., para. 30). In the case of **up-front buyer remedies** the remedy must be implemented before the clearance decision becomes effective and the concentration can be completed. In the case of **conditions subsequent** the merger can be completed directly after the clearance decision has been served on the merging parties. If, afterwards, the commitment is not implemented within the stipulated time frame, the condition shall be fulfilled and clearance shall lapse. As a consequence, the standstill obligation which bars the implementation of the merger will again become applicable and the concentration will have to be dissolved (in accordance with Section 41(3) sentence 1 GWB).<sup>217</sup>

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<sup>216</sup> See inter alia Kopp/Ramsauer, *Verwaltungsverfahrensgesetz*, 17. Edition 2016, Section 36 para. 57.

<sup>217</sup> See OLG Düsseldorf (Higher Regional Court), decision of 30.9.2009, VI-Kart 1/08 (V) – *Globus/Distributa*, para. 102 (juris).

### **Crown jewels**

If divestiture commitments raise particular uncertainties about whether they can be implemented, it is possible in some cases to address these issues by a two-step divestment procedure (see B.I.1.g, para. 55). In such a case, the first divestment business will be replaced (or complemented) by an alternative (or additional) divestment business, the so-called crown jewels, if it turns out that it will not be possible to implement the first divestiture within a given period of time. A divestment business will be accepted as a fallback solution, i.e. as crown jewels, if it is absolutely clear that it will not be difficult to find a suitable buyer for it. As a rule, crown jewels must be a more attractive business than the first divestment business, from the perspective of both the potential buyer and the seller. Sometimes crown jewels also include assets which make the divestment business more interesting, but which are not essential in order to solve the competition issues raised by the merger. It will only be necessary to move to the second step of the procedure, i.e. to divest the crown jewels, if the merging parties do not succeed in selling the first divestment business within the required time frame.

### **Divestiture trustee**

A divestiture trustee shall be appointed in cases where the merging parties have not fulfilled a divestment obligation resulting from the remedies within a first divestiture period (see C.V.2., para. 151). Within the second divestiture period it is the task of the divestiture trustee to carry out the sale of the divestment business at the best possible rate to a suitable purchaser without being bound to instructions or a minimum price.

### **Divestment business**

The term divestment business is used in the present document as a collective term for the assets and contractual relations that constitute the divestment business and have to be divested within the context of a divestment remedy, irrespective of whether the divestment business forms a separate legal entity or a separate organizational unit. However, merging parties are normally required to divest an existing stand-alone business (see B.I.1.a, para. 40).

### **Fix-it-first remedies**

Fix-it-first remedies are commitments that are implemented even before the merger control procedure is completed. It is possible to take the implementation of fix-it-first remedies into account when the Bundeskartellamt adopts a decision in the merger case. If fix-it-first remedies are implemented completely at that stage of the procedure, a merger can be cleared without including remedies in the operative part of the decision. Fix-it-first remedies can be

helpful in situations in which the implementation of a commitment has an inherent element of uncertainty, especially if it is not clear whether suitable purchasers would be interested in acquiring the divestment business (see A.III.3., para. 35).

### **Hold separate manager**

The tasks of a hold separate manager focus on divestiture commitments. He shall ensure that the divestment business operates as a stand-alone business independent from other business units of the parties, that it remains economically viable, is able to compete in the market and that its marketability and value in the context of a sale to third parties are not impaired. These obligations apply until the divestiture is completed (see C.V.3., para. 153). Under the supervision of the divestiture trustee the hold separate manager is either responsible for managing the business himself or at least for supervising the business's management. Furthermore, he informs the staff of the divestment business on the divestiture process, the staff's tasks resulting from the process and other relevant changes. The hold separate manager is subject to instructions by the divestiture trustee and the Bundeskartellamt.

### **Mix-and-match**

A mix-and-match divestiture commitment involves a divestment package consisting of a mixture of business segments and assets from both the purchaser and the target company (see B.I.1.d, para. 51).

### **Monitoring trustee**

It is the task of the monitoring trustee to supervise the implementation of the remedies and ensure the merging parties' compliance with the remedies (see C.V.1., para. 129). The monitoring trustee is to make sure that the parties implement the remedies completely, effectively and without delay. The monitoring trustee sees to it that the parties plan all intermediate steps that are necessary for the implementation of the remedies. The monitoring trustee is bound by the Bundeskartellamt's instructions and reports regularly to the authority.

### **Obligations**

Obligations are imposed on companies within the framework of a decision taken in a second-phase merger procedure. They stipulate that the addressee of the decision must carry out, tolerate or refrain from a specific action. In contrast to conditions, clearance becomes effec-

tive once the Bundeskartellamt's merger decision is served on the merging parties, irrespective of whether the obligation is complied with.<sup>218</sup>

### **Remedies**

Commitments are accepted by the Bundeskartellamt and included in the operative part of its clearance decisions which conclude its merger control proceedings, provided that they solve the competition issues raised by a merger. They are referred to as remedies. Remedies can generally take the form of conditions or obligations. Remedies must not be aimed at subjecting the merging parties' conduct to continued control (see A.III.2., para. 26-29).

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<sup>218</sup> See OLG Düsseldorf (Higher Regional Court), decision of 30.9.2009, VI-Kart 1/08 (V) – *Globus/Distributa*, para. 102 (juris) as well as Section 36 (2) no. 4 *Verwaltungsverfahrensgesetz* (Administrative Procedures Act) und inter alia Kopp/Ramsauer, *Verwaltungsverfahrensgesetz*, 17. edition 2016, Section 36 para. 57.