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REMEDIES IN MERGER CASES

-- Germany --

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The attached document is submitted to Working Party No.3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on the 28 June 2011.

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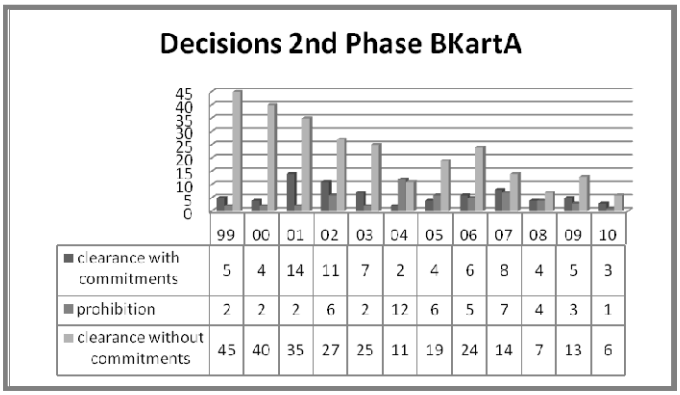
1. Introduction

1. The prohibition of a merger imposes far-reaching restrictions on companies. While in some cases this is the only way to avoid the creation or strengthening of a dominant position leading to higher prices, lower output or less innovation, in many cases appropriate remedies may be a preferable alternative. As can be seen in the chart below, remedies play an important role in the merger review practice of the Bundeskartellamt.



	99	00	01	02	03	04	05	06	07	08	09	10
clearance with commitments	5	4	14	11	7	2	4	6	8	4	5	3
prohibition	2	2	2	6	2	12	6	5	7	4	3	1
clearance without commitments	45	40	35	27	25	11	19	24	14	7	13	6

2. The design of an effective remedy capable of adequately addressing the competitive concerns in a merger case, however, is a complex matter that requires a high degree of knowledge of the industry concerned, as well as a great deal of foresight on the part of the case team and the merging parties. Efforts made during the remedy negotiation phase can help avoid difficulties in the further course of the proceedings and ensure the effectiveness of the remedy.

3. The following paper provides an overview of the experience of the Bundeskartellamt with regard to remedies in merger cases and touches on (1.) different types of remedies, (2.) the divestiture of a viable and competitive business, (3.) procedural issues, the role of (4.) third parties and the public, as well as (5.) the courts.

2. Different types of remedies

4. In principle, both structural and behavioural remedies are possible in German merger control proceedings. The important requirement is that remedies must be effective. Divestments in particular can be regarded as effective remedies if they remove the overlap created by a merger or reduce the horizontal overlap to a degree that eliminates the competition problem. Behavioural remedies are often more complex to design and to implement and their success is sometimes more uncertain.

5. German law rules out remedies that lead to a situation in which the Bundeskartellamt has to intervene or to monitor the behaviour of the merging parties on a permanent basis (Sec. 40 para. 3 Act against Restraints of Competition, "ARC"). The role of the authority is normally limited to a one-off intervention and merger control should not create a situation in which the authority has to assume the role of a sectoral regulator. This legal requirement is sometimes misunderstood by commentators as ruling out behavioural remedies altogether.[1] However, the provision only instructs to reject particular behavioural

[1] Mestmäcker/Veelken, in: Immenga, Ulrich; Mestmäcker, Ernst-Joachim; Wettbewerbsrecht, Band 2 GWB. Kommentar zum deutschen Kartellrecht, 4th ed., Munich 2007, § 40 paras 62ff.

remedies if they involve permanent intervention or monitoring by the Bundeskartellamt. Such behavioural remedies would be ineffective in the vast majority of cases and would also be refused on that ground in other jurisdictions. Accordingly, the relevant provisions under German law ensure the efficiency of the merger review process in that the Bundeskartellamt is not obliged to assess the effectiveness of remedy proposals that are typically ineffective, such as behavioural remedies that would require permanent intervention and monitoring of behaviour.

6. Examples of remedies that have been accepted by the Bundeskartellamt and that do not involve the divestment of a business include the following: divestment of slots at airports,[2] termination of exclusive distribution agreements,[3] granting the right to terminate long-term supply contracts,[4] access to infrastructure,[5] granting licenses of IP rights,[6] obligation to undertake formal tender procedures after public transportation licenses have expired, with the aim of opening up the market for competition,[7] admission of a competitor as a supplier of publicly funded healthcare services,[8] and obligation to disclose calculations.[9] All decisions are available on the Bundeskartellamt's website.

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2 Bundeskartellamt, Decision of 19 Sep. 2001, B9-147/00 – *Lufthansa/Eurowings*, pp. 2, 22ff.

3 Bundeskartellamt, Decision of 2 June 2005, B3-123/04 – *H&R WASAG/Sprengstoffwerke Gnaschwitz,* pp. 3, 13f.

4 Bundeskartellamt, Decision of 11 Oct. 2000, B8-109/00 –*Contigas/Stadtwerke Heides*, pp. 2, 8f; Bundeskartellamt, Decision of 4 Sep. 2000, B8-132/00 –*Eon/Hein Gas*, pp. 2, 18ff; Bundeskartellamt, Decision of 26 Jan. 2001, B8-208/00 – EnBW/Stadtwerke Schwäbisch Gmünd 1ff, 12; Bundeskartellamt, Decision of 3 Apr. 2001, B8-263/00 – *Neckarwerke Stuttgart/Stadtwerke Reutlingen,* pp. 2f, 12; Bundeskartellamt, Decision of 18 May 2001, B8-29/01 – *EnBW Regional, Stadt Schramberg u. a.*, pp. 2, 8f; Bundeskartellamt, Decision of 18 May 2001, B8-291/00 –*Trienekens Niederrhein, Stadt Viersen, Stadtwerke Viersen*, pp. 2, 10f; Bundeskartellamt, Decision of 29 Jul. 2002, B8-23/02 – *EnBW/ZEAG*, pp. 2f.

5 Bundeskartellamt, Decision of 11 Oct. 2000, B8-109/00 – *Contigas/Stadtwerke Heides*, pp. 2, 8f; Bundeskartellamt, Decision of 4 Sep. 2000, B8-132/00 – *Eon/Hein Gas*, pp. 2, 18ff; Bundeskartellamt, Decision of 26 Jan. 2001, B8-208/00 – EnBW/Stadtwerke Schwäbisch Gmünd 1ff, 12; Bundeskartellamt, Decision of 3 Apr. 2001, B8-263/00 – *Neckarwerke Stuttgart/Stadtwerke Reutlingen,* pp. 2f, 12; Bundeskartellamt, Decision of 18. May 2001, B8-29/01 – *EnBW Regional, Stadt Schramberg u. a.*, pp. 2, 8f; Bundeskartellamt, Decision of 18. May 2001, B8-291/00 –*Trienekens Niederrhein, Stadt Viersen, Stadtwerke Viersen*, pp. 2, 10f; Bundeskartellamt, Decision of 29. July 2002, B8-23/02 – *EnBW/ZEAG*, pp. 2f.

6 Bundeskartellamt, Decision of 3. Jul. 2002, B3-6/03, - BASF/Bayer Crop Science, pp. 2, 9ff; Bundeskartellamt, Decision of 25. May 1999, B5-16/99, - Federal Mogul/Alcan, p. 1f, 39f.

7 Bundeskartellamt, Decision of 3. Jul. 2002, B9-164/01 – *DB AG/Stadt- und Regionalbus Göttingen*, pp. 2f, 46ff; Bundeskartellamt, Decision of 2. Dec. 2003, B9-91/03 – *DB Regio/üstra*, pp.2ff, 64ff.

8 Bundeskartellamt, Decision of 10. May 2000, B3-587/06 – *Klinikum Region Hannover/Landeskrankenhaus Wunstort*, pp. 2ff, 60ff.

9 Bundeskartellamt, Decision of 11. Oct. 2000, B8-109/00 – *Contigas/Stadtwerke Heides*, pp. 2, 8f; Bundeskartellamt, Decision of 04. Sep. 2000, B8-132/00 – *Eon/Hein Gas*, pp. 2, 18ff; Bundeskartellamt, Decision of 26 Jan. 2001, B8-208/00 – EnBW/Stadtwerke Schwäbisch Gmünd 1ff, 12; Bundeskartellamt, Decision of 3 Apr. 2001, B8-263/00 – *Neckarwerke Stuttgart/Stadtwerke Reutlingen,* pp. 2f, 12; Bundeskartellamt, Decision of 18 May 2001, B8-29/01 – *EnBW Regional, Stadt Schramberg u. a.*, pp. 2, 8f; Bundeskartellamt, Decision of 18 May 2001, B8-291/00 –*Trienekens Niederrhein, Stadt Viersen, Stadtwerke Viersen*, pp. 2, 10f.

7. However, purely behavioural remedies are rare in the Bundeskartellamt's practice. One example is the commitment not to apply for an anti-dumping duty for imports from certain Asian countries.[10] The idea behind this commitment was to avoid the creation of entry barriers. However, the commitment turned out to be quite ineffective because other market players could still apply for an anti-dumping duty. Moreover, the commitment was criticized because it restricted the exercise of rights under EU legislation.

8. Assessing whether a proposed remedy will effectively redress the competitive harm identified in a merger investigation is not an easy task. In this context, past experience with remedies in the particular industry is helpful and understanding the markets concerned is essential. The Bundeskartellamt cannot require the parties to propose the best remedy possible with regard to its effects on competition. They are only required to offer an effective remedy that is sufficient to resolve the competition problems created by the merger. This requirement is significant because the competitive situation before the merger may already have been problematic. This does not mean, however, that the Bundeskartellamt has to accept remedy proposals that rely too heavily on optimistic assumptions.

9. In vertical merger cases, in particular, behavioural remedies can be successful in resolving competition issues. In recent cases that raised vertical concerns, however, the competition issues have been resolved by divestments, e.g. in Stihl/Zama[11] and in Van Drie/Alpuro.[12] Sometimes behavioural obligations are also included to complement other remedies (such as divestments). These are, in particular, provisions relating to the use of trustees, reporting obligations, and buyer approval obligations, including obligations to provide information on proposed buyers.

3. Divestiture of a viable and competitive business

10. In structural relief cases, usually the divestment of a stand-alone business is required to ensure the effectiveness of the divestment remedy. Judging whether a carve-out is possible requires a careful analysis and due consideration of the characteristics of the markets involved. Mix-and-match solutions often carry high risks and are viewed with great caution by the Bundeskartellamt. In the Mid EuropePartners/DISA case[13] the business that was to be divested had to be created from three separate parts stemming from both companies. The implementation of this remedy proved to be anything but trivial, even if the end-result was satisfactory.

11. In the CPTN case[14] the Bundeskartellamt accepted the divestment of certain groups of patents held by the target. Strictly speaking, this was not a remedy but the redesign of the transaction and a re-notification of the modified deal. In addition, it has to be taken into account that the transaction was in essence limited to acquiring certain IP rights from Novell through a joint venture.

12. If upfront buyer solutions are chosen, the merging parties themselves have a strong incentive to make sure that a divestment is feasible and likely to attract buyers.

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10 Bundeskartellamt, Decision of 2 May 2003, B3-08/03 – *Ajinomoto/Orsan*, pp. 2, 19ff.

11 Bundeskartellamt, Decision of 21 Aug. 2008, B5-84/08 – *Stihl/ZAMA Asien,* pp. 2, 36ff.

12 Bundeskartellamt, Decision of 27 Dec. 2008, B2-71/10 –*Van Drie/Alpuro,* pp. 2, 85ff.

13 Bundeskartellamt, Decision of 21 Aug. 2008, B5-77/08 –*Mid Europe Partners/DISA*, pp. 4ff, 41ff.

14 Bundeskartellamt, Press Release of 20 Apr. 2011.

3.1. Protecting the divested business

13. The effectiveness of the remedy can be seriously undermined if the business to be divested has deteriorated before it is actually sold. The merging parties may have an incentive to weaken the market position of the business to be divested because after the divestiture the business will compete with the merging parties for the same customers. This incentive may in some cases be more important than the effect that any deterioration may have on the sales price of the divested business. For example, as an effect of a protracted divestment procedure the business can lose key employees and key customers. During this time the business is often not developed further, investments as well as strategic and mid- and long-term decisions are delayed. The supply with sufficient capital may be challenged. These were serious concerns, for example, in the Mid EuropePartner/DISA case,[15] which also involved a mix-and-match solution, i.e. in this case the divested business consisted of three different units of the buyer and the target that still had to be integrated.[16] In this case it became very clear that it would have been important to obtain information early in the process, ideally during the remedy negotiations regarding any measures that might impact the viability of the business, notably with regard to ongoing restructuring or relocation efforts.

14. The risk of deterioration can be reduced in various ways, including the following: (i) the divestment is implemented quickly, (ii) measures are taken to prevent dilution of the business, e.g. measures to keep employees and provide for sufficient funds to finance the business, and (iii) either the acquirer does not take control of the business to be divested before the divestment has taken place, or (iv) a hold separate manager makes sure that the business to be divested does not deteriorate.

15. The merging parties generally have a strong interest in implementing a merger transaction speedily in order to achieve the expected synergies and efficiencies as quickly as possible. A way to ensure a speedy divestment is to give the merging parties a strong incentive for it by requiring an upfront buyer solution. The Bundeskartellamt will normally require an upfront buyer solution which is specified as a suspensive condition for the clearance. This means that the acquirer cannot directly influence or dilute the to-be-divested business that is part of the target. However, the underlying purchase agreements often stipulate that the acquirer bears the commercial risk of divestments, i.e. the purchase price will not be reduced if a part of the target has to be sold below value. As a consequence, the target may not have an interest in continuing to develop the business to be divested. Therefore, even with an upfront buyer solution, there are good reasons to involve a monitoring trustee. The trustee obtains the necessary information, for example on the efforts of the business to retain its employees and customers. Monitoring trustees are regularly foreseen in remedy packages accepted by the Bundeskartellamt. Accordingly, in cases without upfront buyer solutions it is helpful to involve a hold separate manager who will ensure that the business is run as an independent unit.

3.2. Ensuring divestment

16. A competition authority's work does not end with securing a remedy. In several complex merger cases of the Bundeskartellamt the resources required for implementing a remedy equaled the resources necessary for the process of substantive assessment. Ensuring a timely divestment to a suitable buyer is a crucial element of remedy design and implementation. The incentives of the merging parties may change quickly, once they have secured a clearance decision. During the merger investigation parties are usually very willing to cooperate and to find a solution that can open the way for clearance. During the implementation phase the situation is different and sometimes may be akin to the typical setting of an abuse of dominance proceeding. Here, the merging parties have little interest in the proper implementation

[15] Bundeskartellamt, Decision of 21 Aug. 2008, B5-77/08 – *Mid Europe Partners/DISA*, pp. 4ff, 41ff.

[16] Bundeskartellamt, Decision of 21 Aug. 2008, B5-77/08 – *Mid Europe Partners/DISA*, pp. 4ff, 41ff.

of the remedies. Not fully implementing the remedies or delaying their implementation may sometimes be more in their interest.

17. The merging parties may also present the to-be-divested business in fundamentally different ways during remedy negotiation and implementation. During remedy negotiations the merging parties will normally try to offer as little as possible to gain the clearance. The divestment offer will generally be described as a business that will play a significant role in the market. Following the clearance decision, i.e. during the divestiture period, however, the merging parties may have an incentive to delay or to water down the divestment. At this particular stage, further difficulties such as veto rights of other shareholders, third-party owners of crucial assets, i.e. real-estate or production sites, or the lack of potential buyers for the to-be-divested business may arise.

18. Sometimes, there may be doubts whether the merging parties are really interested in identifying potential buyers that are acceptable to the competition authority. Interest in the assets on sale may be low. Potential buyers will normally try to acquire the assets or business for a bargain price. They are very aware that the merging parties will have to sell at any price once the divestment period comes to an end or that there may be a second period in which a divestment trustee will take over and provide them with a second chance to buy at a low price.

19. Many of these problems can be alleviated by requiring an upfront buyer solution. This maintains the incentive of the merging parties to obtain the approval of the competition authority for the solution of all the issues and problems that arise after the clearance decision has been taken. In cases with upfront buyer solutions the merger is prohibited-, once the time limit for divestiture has expired unless the time limit has been extended. Such an extension is possible in the practice of the Bundeskartellamt, but only if there are very good reasons. In cases without upfront buyer solutions the Bundeskartellamt regularly requires the merging parties to appoint a divestiture trustee to sell the to-be-divested business, if necessary, at any price once the first divestiture period has expired.

20. Where there have been doubts as to whether a sufficient number of suitable buyers would be interested in acquiring the business to be divested and if no better solution was available, the Bundeskartellamt has accepted so-called "crown-jewel" arrangements which usually concern assets or businesses that are significantly more attractive for buyers, for example because they contain a broader scope of business activities and are therefore more suitable to a broader group of buyers, or because the business is more profitable. Such a "crown-jewel" arrangement becomes applicable once a divestment has not been possible during the first divestment period. For example in the asphalt and aggregates case Werhahn/NMW[17] the divestment of a facility in a more remote area would have solved the competition problem, but it was unclear whether it would be attractive enough for potential buyers. Therefore, the Bundeskartellamt insisted on the divestment of a facility closer to an urban area as a fall-back solution. A similar solution was included for the sale of a participation in a company. Here the uncertainty was whether the other shareholders would block the sale. In case this happened, the divestment of another facility was chosen as a crown-jewel arrangement. The alternative facility did not raise comparable issues with co-shareholders, had a higher capacity and achieved higher sales. In this case and in other cases the Bundeskartellamt has also accepted alternative divestments, i.e. the merging parties have the choice which business they prefer to divest. In these cases it seems useful, however, to decide beforehand which business will be divested in case the merging parties are not able to implement the divestiture during the first divestiture period. In the EnBW/EWE[18] case a mechanism was included to decide which divestment would

17 Bundeskartellamt, Decision of 22 Aug. 2005, B1-29/05 – *Wilhelm Wehrhahn KG/Norddeutsche Mischwerke*.

18 Bundeskartellamt, Decision of 6 July 2009, B8-96/08 – *EnBW/EWE, pp. 4f, 7ff, 46f.*

have to be implemented by the trustee. A clear solution to this issue facilitates the implementation of the remedy and avoids ex-post discussions with the merged entity.

21. In many cases the identity of the buyer of the assets or business to be divested is crucial for the success of a remedy. In addition the terms of the sale and purchase agreement may also be important; these should not hamper the incentives of the divestiture buyer to compete with the merging parties after the transaction is consumed. For example, clauses that foresee some kind of revenue sharing after the transaction has been completed (so-called earn-out clauses) can raise problems.

22. The identity of the buyer as well as the terms of the purchase agreement always have to be approved by the Bundeskartellamt before the divestment is implemented. The potential buyer has to be independent from the merging parties and must be able to show that he is able and has the economic incentive to develop the divestment business as a viable competitor of the merging parties. Therefore, the merging parties are obliged to provide the Bundeskartellamt with sufficient information on the proposed buyer and explain why he meets these requirements. The trustee can play an important role in verifying the information and rendering his own assessment. It is helpful if the trustee is already involved in an earlier stage of the process, in particular when the merging parties meet with potential buyers. In many cases the Bundeskartellamt has also interviewed the proposed buyer to get a first-hand impression of the motivation, strategic plans and business of the proposed buyer.

3.3. Ensuring compliance with other obligations

23. In the Bundeskartellamt's practice, the main substance as well as the technical details of the remedies are usually contained in the operative part of the clearance decision itself. Remedies usually contain some additional obligations for the merging parties that play an auxiliary role with regard to the divestment. This applies in particular to the obligations to retain a trustee, to submit reports to the competition authority and to obtain the prior approval of the buyer as well as the contractual terms of the sale.

24. Normally parties comply with the rules laid down in the remedies section of the clearance decision, in particular if an upfront buyer divestment is ordered. Delays or non-compliance are more frequent if the decision does not contain any conditions but only obligations. If obligations are not implemented, the Bundeskartellamt can revoke the clearance decision subject to proportionality. Compliance with obligations can also be enforced by imposing consecutive fines for non-compliance.

25. The work of trustees can facilitate and support compliance. It is part of the trustee's responsibilities to monitor and report on the implementation of the remedies, any difficulties, obstacles and possible solutions. The reports as well as the process between trustee and merging parties that leads up to the reports make the parties aware of non-compliance issues and bring these issues to the attention of the competition authority. The discussions that take place between the different players involved in the process also help to clarify the content and scope of the obligations flowing from the remedies and may convince the merging parties to take the necessary steps. Usually the remedy package requires that trustees produce reports monthly in addition to an initial report, which sets out their work plan, and a final report, which sums up the implementation of the remedies.

4. Procedural issues

26. In German competition law, remedies are only foreseen for second phase proceedings (Sec. 40 para. 2, 3) ARC). Rigid time limits for submitting remedy proposals are foreseen neither in the law nor in the Bundeskartellamt's practice. However, the proposals must be made at a stage when it is still possible to market-test them.

27. In many cases the merging parties reflect on remedies well before they notify a transaction, if they anticipate that the competition authority may identify competition problems. In practice, however, parties are often reluctant to propose remedies before the Bundeskartellamt has issued a statement of objections, or at least before it has explained to the parties informally - but in detail - its main competitive concerns. This happens usually at an advanced stage of the proceedings. At that stage, it will often be difficult to complete the investigation including the assessment of remedies within the statutory review period of four months. In most cases it will be necessary to market test the remedies.

28. The negotiation and market-testing of remedies will normally prolong the merger review process by a few months. Therefore, the merging parties and the Bundeskartellamt often agree on an extension of the review period. In the Bundeskartellamt's practice, pre-notification contacts with the parties are the exception. This means that the effective review time is usually relatively close to the statutory four month period in second phase procedures.

29. There are no particular steps that are formally required when submitting a remedy proposal. Parties should include all the information required for assessing the remedy. Parties should base their remedy proposal on the model remedy clauses published by the Bundeskartellamt on its website. If there are differences to the model clauses, the merging parties should explain why they propose a different wording and why the remedies can still be expected to be manageable and effective.

30. It is the responsibility of the merging parties to submit a remedy proposal. The role of the Bundeskartellamt is to assess its effects and effectiveness. However, the Bundeskartellamt is not limited to choosing between accepting a remedy in the exact wording of the proposal and rejecting it. It can make slight modifications to the remedy's terms and conditions, though not to its main content.

31. The implementation of the remedies is normally ensured by the case team that was already in charge of approving the design of the remedies. The case team is supported by the Merger Unit of the General Policy Division that pools know-how on remedies design and implementation across the different decision divisions dealing with merger control.

5. Role of third parties and the public

32. Third parties are an important source of information in a merger control procedure and in divestment negotiations. Depending on the case and the markets concerned, competitors, customers and suppliers can provide valuable information, in particular on the following issues: (i) Whether the proposed divestment will be able to effectively allay the competition concerns raised by the merger; (ii) whether the business that the merging parties have proposed to divest is viable, or more generally, what are the important factors when assessing viability in the particular sector or market concerned; (iii) whether the proposed buyer is suitable, or in general terms, what are the qualities that a buyer must possess in order to have the ability and the incentive to compete with the merging parties.

33. There are two important points to consider in this context. First, third parties, in particular if they are competitors, often have an agenda of their own. Some of the assessments and information provided may be framed in a way that serves their interests, e.g. in acquiring particular parts of the merging parties' business. Second, customers and suppliers may be reluctant to provide information to the competition authority that is detrimental to the merging parties given their ongoing business relationships which they might not want to jeopardize. Of course, these points are not specific to merger remedies.

34. The status of third parties in the formal proceedings can differ. First and foremost, third parties are involved in merger procedures in their capacity as the addressees of information requests. These are mainly done in writing, but sometimes it is also useful to have a face-to-face meeting or telephone

interviews. During the negotiation of remedies in the second phase, the merger procedure is usually at a very advanced stage so that there is not much time to hold meetings with third parties. Sometimes telephone interviews can be the only way to obtain information at very short notice. However, third parties can also apply for a more formal participation in the procedure if their economic interests are sufficiently affected by the merger. Once the Bundeskartellamt has granted them the status of interveners (*Beigeladene*), they have the right to be heard, the right to access the file, and they can challenge the Bundeskartellamt's decision, notably the effectiveness of remedies in court.[19] In merger cases that raise serious competition issues it is common to have a significant number of interveners.

6. Role of the Courts

35. Courts are normally not involved in the design and implementation of remedies. Remedies do not have to be approved by a court before they can enter into effect. However, parties are free to challenge the substance of remedies in court. The fact that the merged parties have proposed the remedies in order to obtain clearance does not bar them from appealing a decision involving remedies in court.[20] Accordingly, there have been a number of decisions of the Higher Regional Court of Düsseldorf and the Federal Court of Justice concerning remedies.

36. In this context, the Globus/Hela[21] case is particularly interesting. This transaction between two Do-it-yourself ("DIY") retailers was cleared subject to the divestment of several DIY stores. The divestment was not designed as an upfront buyer solution but as a dissolving condition, i.e. the clearance lapses if the stores are not sold before the end of the divestiture period. The companies consumed the merger and challenged the condition in court. They claimed the Bundeskartellamt should have restricted the remedy to a mere obligation and should have prolonged the divestment period. In addition they claimed difficulties in selling the stores. The Higher Regional Court of Düsseldorf made it clear that the parties had consumed the merger at their own risk. According to the judgment, should the merging parties not be able to affect the divestment within the relevant time frame, the remedy would lapse and the merger be deemed prohibited. The court also addressed the risk that the stores could not be sold for an economically justified price. It decided that this risk had to be borne by the merging parties. The court also rejected the petition for an extension of the divestment period. The court explained that remedies without upfront buyer solutions have the effect of tolerating the creation or strengthening of a dominant position until the divestment is implemented. Therefore, the duration of the divestment period has to be kept to a minimum. Following the judgment the merging parties were able to find acceptable buyers for the DIY stores to be divested.

7. Conclusions

37. Competition authorities are rarely in a position to make a complete and reliable assessment of a remedy proposal without obtaining substantial information and data from market participants. Accordingly, it requires a thorough market investigation to analyze a given remedy and determine its effectiveness. In addition, the implementation of a given remedy is sometimes a difficult task, not only for the competition authority but also for the merging parties, their management and legal counsel, the target, trustees, potential acquirers of the divested business and third parties. Therefore, the Bundeskartellamt will generally require the merging parties to come up with upfront buyer solutions to ensure that a timely and effective solution to the competition issue will be implemented. In this context, the Bundeskartellamt has

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19 Federal Court of Justice, Judgment of 7 Nov. 2006, KVR 37/05 „pepcom".

20 Higher Region Court Düsseldorf, Judgment of 22 Dec. 2004, VI Kart 1/04 „DB Regio/üstra".

21 Higher Regional Court of Düsseldorf, Judgment of 22 Dec. 2008, VI-Kart 12/08 (V) „Globus/Hela"; upheld by Federal Court of Justice, judgment of 21 July 2009, KVZ 8/09 – Globus/Hela.

published model texts for different types of commitments: (i) suspensive condition, i.e. the upfront buyer solution (*aufschiebende Bedingung*),[22] (ii) dissolving condition, i.e. the clearance lapses if not implemented on time (*auflösende Bedingung*),[23] as well as mere obligation (*Auflage*).[24] It has also issued a model trustee contract[25] and plans to issue guidelines on the design and implementation of remedies in the future.[26]

22 Bundeskartellamt, Model Text for Suspensive Conditions.

23 Bundeskartellamt, Model Text for Dissolving Condition.

24 Bundeskartellamt, Model Text for Obligations.

25 Bundeskartellamt, Model text for Trustee Mandate.

26 cf. Bundeskartellamt, Activity Report, available at: http://www.bundeskartellamt.de/wEnglisch/Publications/Report.php.