

**Please note:        The English version is a courtesy translation only.  
                         Only the German version is binding.**

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**Model Text:**

**Clearance of a Merger Project subject to Remedies**

(here: Conditions subsequent)

**Variables (individually applicable):**

[Z]: Name of the undertaking to be divested or description of the shares of the company, line of business, business operation, assets etc, to be divested, and affiliated undertakings

[A]: party A to the merger (purchaser)

[B]: party B to the merger (target undertaking)

[C]: party C to the merger (seller)

**Clearance subject to remedies**

The merger project notified on [date] [...] shall be cleared in accordance with Section 40 (2) and (3) ARC subject to the following remedies:

**A. Duty to divest**

**1. Divestiture**

Clearance is granted under the condition subsequent that [A/B/C] does *not* divest [Z] to an independent purchaser within the scope of A.2., within the period specified under A.3., and according to the following conditions (in particular A.5., B.1. and B.2.) or procure the divestiture of [Z] by the companies affiliated with [A/B/C].

The divestiture is deemed to be effected if [A/B/C] provides evidence to the Decision Division that the divestiture of [Z] has been legally completed not only in terms of the law of obligations, but also in terms of the law of property, and in compliance with the following conditions. If the said divestiture has not materialized by expiry of the periods specified under A.3, can no longer be implemented or is effectively challenged, the clearance effect of the decision lapses. The concentration is then deemed prohibited.

## **2. Object of Divestiture**

[Z] is [description of the legal and functional structure, areas of activity and business, business premises, organisational structure, etc.] and consists essentially of:

**2.1.** the following tangible assets: [List of the main tangible assets such as factory premises and buildings, works, operational plants, stores, installations, machinery and technical equipment, vehicle fleets, data-processing installations, all kinds of raw materials and supplies, finished products and inventory, etc.].

**2.2.** the following intangible assets: [List of intangible assets such as industrial property rights (copyrights and restricted utilization rights), patents, licences, trade marks, design patents and utility models), specific know-how, special data-processing programmes, customer and debtor lists and other lists, business records and documents which are necessary to continue business operations, etc.].

**2.3.** the following contractual and other legal relationships: [List of legal relationships, such as contracts with suppliers, contracts with customers, consultancy and agency agreements, rental and lease agreements, credit and debt agreements, company agreements, insurance contracts, rights to third party property, concessions and operating licences, etc.].

**2.4.** the following personnel: [List of names with description of functions and periods of employment as well as details of those personnel performing key functions, including the employment or service contracts].

## **3. Divestiture Periods**

### **3.1. First Divestiture Period**

The obligation to divest as specified under A.1. is to be fulfilled by [A/B/C] within [...] months of service of this decision.

### **3.2. Extended Divestiture Period**

Should [A/B/C] fail to comply with the obligation to divest within the First Divestiture Period, the divestment of [Z] is to be completed within a period of a further [...] months of expiry of the First Divestiture Period by the appointment of a Divestiture Trustee in accordance with E.

## **4. Reporting Obligations of [A/B/C]**

[A/B/C] shall regularly [every month] submit to the Bundeskartellamt written reports about the time, content and outcome of their contacts with one or more potential purchasers for the

divestment assets and holdings as specified under Section A.2, giving the name of the contact partner with contact address.

[A/B/C] shall regularly report to the Bundeskartellamt about the progress in the negotiations.

## **5. The purchaser / s**

**5.1.** [A/B/C] can divest [Z] to a single purchaser or, if a single purchaser wishes to acquire a part and not the whole of [Z], to several purchasers.

**5.2.** The purchaser / s must be one or several companies in which neither [A] nor [B], including affiliates within the meaning of Section 36 (2) ARC, have personnel or equity holdings (in whatever proportion) and on which they cannot exert any substantial competitive influence within the meaning of Section 37 (1) 4 ARC. The purchaser may in no other way be affiliated with [A/B], for example, by contractual agreements enabling trading for the account of [A/B].

**5.3.** The purchaser / s should be a company/companies which can be expected to preserve the permanent existence of [Z] as a competitor in the market for [product and geographic definition of the relevant market / s].

**5.4.** The acquisition by the purchaser / s of the holdings or assets for divestment must not be expected *prima facie* to create or strengthen a dominant position.

**5.5.** [A/B/C] shall inform the Decision Division in good time about the potential purchaser / s which they have selected. The signing of the purchase contract / s with this / these purchaser / s requires the prior written approval of the Decision Division. Approval can only be refused on the grounds specified under A.5.2. to A.5.4. Any duty to notify the acquisition to the competent competition authority/ies shall remain unaffected.

## **B. Duties of [A/B/C] before divestiture**

The condition subsequent also becomes effective if the following obligations are violated. In this case the concentration is deemed prohibited.

### **1. Maintenance of the entrepreneurial independence of [Z]**

**1.1.** [A/B/C] shall ensure that [Z] remains an independent entrepreneurial entity until its divestiture is completed and has adequate capital to continue to be managed independently. [Z] is to be provided with the personnel and assets necessary for this purpose [list where necessary].

[So far as is necessary to maintain the entrepreneurial independence of [Z]: [A/B/C] shall provide [Z] with the following products / services (list) until its divestiture, at the usual market conditions / at conditions equivalent to those at present afforded to [Z]. / Until divestiture is completed [A/B/C] shall neither directly nor indirectly solicit personnel (list where necessary) necessary to preserve the entrepreneurial independence of [Z].

**1.2.** [A/B/C] shall hold [Z] economically separate from its other areas of business until fulfilment of the obligation specified under A.1. Personnel interlocks, in particular with regard to the manager/s and key personnel, are to be broken up promptly upon service of the decision. B.1.1. Sentence 2 remains unaffected.

**1.3.** [A/B/C] shall ensure that it obtains no business secrets, know-how, company information or any other confidential information relating to [Z] [until the divestiture of [Z]] unless the information is necessary for fulfilling its statutory reporting obligations.

**1.4.** In particular, [A/B/C] shall sever all IT installations and systems currently used jointly by itself and [Z]. [A/B/C] shall guarantee that [Z], at the latest [...] weeks of service of this decision, is able to independently carry out all the IT services necessary for its business operations at least on the present scale.

**1.5.** The dissolution of the existing interlocks shall be confirmed in writing to the Decision Division at the latest within [...] weeks after service of the decision.

## **2. Assurance of Marketability and Competitiveness of [Z]**

[A/B/C] shall ensure that the economic viability, marketability and competitiveness of [Z] are at least maintained. [A/B/C] shall minimize as far as possible any risk of loss of [Z]'s competitive potential. In particular, [A/B/C] shall undertake not to carry out any act that might have an adverse impact on the value, management or competitiveness of [Z] or that might compromise the nature and scope of activity, the industrial or commercial strategy or the investment policy of [Z].

### **[Version of B.1. and B.2 in the event of a “carve out”]:**

#### **B.1. Creation of [Z] as an independent entity with marketability and competitiveness (condition precedent)**

**1.1.** [A/B/C] shall ensure that [Z] constitutes an independent entity until its divestiture is completed and has sufficient capital resources to be managed as an independent undertaking. [Z] is to be provided with the personnel and assets necessary for this purpose [list where necessary]. [A/B/C] shall guarantee that at the latest [...] weeks upon service of this decision

[Z] is able to independently carry out all the IT services necessary for its operations and without connection to the IT installations and systems of [A/B/C]. [A/B/C] shall see to it that [Z] at any time obtains the necessary official permits to enable it to operate its own business.

*[In so far as is necessary to establish [Z] as an independent entity: [A/B/C] shall provide [Z] with the following products / services (list) until its divestiture at the usual market conditions / at [...] conditions. / [A/B/C] shall neither directly nor indirectly solicit the above-mentioned personnel [list where necessary] until its divestiture.]* The Decision Division shall be informed in writing of the fulfilment of the above-mentioned obligations within [...] of service of the decision.

**1.2.** [A/B/C] shall hold [Z] economically separate from its other areas of business until fulfilment of the obligation specified under A.1. Personnel interlocks, with particular regard to the manager / s and / or key personnel, are to be promptly broken up upon service of the decision. B.1.1. Sentence 2 remains unaffected.

**1.3.** [A/B/C] shall ensure that it obtains no business secrets, know-how, company information or other confidential information relating to [Z] [until the divestiture of [Z]] unless the information is necessary for fulfilling its statutory reporting obligations.

## **B.2. Assurance of Marketability and Competitiveness of [Z]**

[A/B/C] shall ensure that the economic viability, marketability and competitiveness of [Z] are assured. [A/B/C] shall minimize as far as possible any risk of loss of [Z]'s competitive potential. In particular, [A/B/C] shall not carry out any act which might have an adverse impact on the management, value or competitiveness of [Z] or which might compromise the nature and scope of activity, the industrial or commercial strategy or the investment policy of [Z].

## C. Duties of [A/B/C] after divestiture (obligations)<sup>1</sup>

The following duties are necessary obligations for clearance, in order to safeguard the structural competitive effects of the divestiture.

### 1. Obligation to supply

*[So far as this is necessary to maintain the competitive business activity of [Z]:]* [A/B/C] shall be obliged to provide the purchaser with the following products / services via [A/B/C] or affiliated undertakings for a transitional period of up to [...] months after completion of the divestiture at the usual market conditions / at conditions equivalent to those currently afforded to [Z].

[List of the products / services, the supply of which to [Z] by [A/B/C] is necessary for a transitional period in order to safeguard the viability and competitiveness of [Z].

### 2. Prohibition of Repurchase

In order to maintain the structural effect of the divestment obligation, [A/B/C], including affiliate undertakings, shall not acquire any direct or indirect influence over the divested holdings and assets for a period of [5] years after completion of the divestiture.

### 3. Non-solicitation Clause

[A/B/C] is further obliged to neither directly nor indirectly solicit staff [key personnel] from [Z] within a period of [5] years after completion of the divestiture of the assets and / or company holdings mentioned under A.2., unless the purchaser / s has/have confirmed in writing that it is / they are not interested in employing them any further.

### 4. Relinquishment of Exercise of Rights from Non-Competition Clauses

Following completion of the divestiture of the assets and / or company holdings described under A.2. [A/B/C] shall relinquish its exercise of rights from non-competition clauses, which may have been agreed with personnel of the divestment assets and / or company holdings.

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<sup>1</sup> According to the significance of the duties listed under C. in the specific case, these should where necessary be formulated as a condition subsequent. The following sentence should then read: "Clearance is subject to the condition subsequent of violation of the duties under C. [...]. In the event of violation of the duties specified under C [...] the clearance effect of the decision shall lapse. The concentration shall then be deemed prohibited." If necessary, certain duties can be formulated as conditions, others as obligations, which should be made clear.

#### **D. Hold Separate Trustee**

1. Without delay [after service of this decision / up to ...] [A/B/C] shall appoint an independent and competent Hold Separate Trustee, whose function is to ensure on behalf of [A/B/C] that the duties specified under sections A. and B. are fulfilled. The Hold Separate Trustee must be independent of [A/B/C], free of actual or potential conflicts of interest and possess the necessary qualification to carry out this mandate. [A/B/C] bears the costs of the Hold Separate Trustee.

2. The appointment of the Trustee and the Trustee Mandate require the prior written approval of the Decision Division. [Within one week / up to ...] of service of this decision [A/B/C] shall submit to the Decision Division [a proposal / a list of a minimum of three proposals] for the office of Hold Separate Trustee, accompanied by the proposed Trustee Mandate. Should the Decision Division reject the proposed candidate and / or the Trustee Mandate, [A/B/C] shall, within a further week of receipt of the Decision Division's rejection, submit a minimum of two further proposals and / or an amended version of the Trustee Mandate modified in accordance with the suggestions made by the Decision Division. Should these proposals not find any approval either, [A/B/C] shall appoint a trustee nominated by the Decision Division and / or use a Trustee Mandate drafted by the Decision Division.

3. On assuming his/her mandate, the Hold Separate Trustee, as the representative of [A/B/C], shall promptly propose in his/her first report to the Decision Division a detailed work plan describing which measures he/she intends to take to ensure that the tasks imposed on [A/B/C] ensuing from the remedies imposed, are fulfilled.

The Hold Separate Trustee

- as the representative of [A/B/C] shall submit to the Decision Division every [...] weeks a written report on the stage of implementation of and compliance with the duties mentioned under B and on the progress of the divestiture process;
- shall supervise and assist the on-going management of the Divestment Business with a view to ensuring the economic viability, marketability and competitiveness of [Z] and, in consultation with the management, shall determine the necessary measures to be undertaken;
- shall support and monitor the course of the divestiture process;

- can appoint a member of personnel of [Z] as Hold Separate Manager. The task of the latter is, above all, to inform the rest of the personnel of [Z] in detail about the divestiture process and the ensuing duties for the personnel of [Z] (in particular the duty not to pass on any confidential information about [Z] to [A/B/C]) and about other changes.
- as the representative of [A/B/C] shall on expiry of his/her mandate or on completion of the divestiture promptly submit to the Decision Division a conclusive report on the state of compliance with and implementation of the duties resulting from the remedies.

4. [A/B/C] shall provide the Hold Separate Trustee and the Hold Separate Manager with all such expedient cooperation, assistance and information as they may reasonably require to perform their tasks. [A/B/C] shall grant the Hold Separate Trustee access to all books, records, documents, personnel, facilities, sites and technical information belonging to [A/B/C] and [Z], which are necessary for him/her to carry out his / her mandate.

5. If [Z] is a legally independent company:

[A/B/C] shall transfer to the Hold Separate Trustee the independent exercise of all shareholder rights in [Z] allocated to it and its affiliated companies, including all controlling rights, the right to issue instructions and voting rights, with exception of the right to dividend payments and the right to alienate.

6. The Decision Division can issue instructions to the Hold Separate Trustee as the representative of [A/B/C] in order to ensure compliance with the remedies. Should the Hold Separate Trustee fail to comply with these instructions or else repeatedly violate the duties conferred upon him/her as the representative of [A/B/C], the Decision Division can oblige [A/B/C] to replace him/her with another Hold Separate Trustee. The regulations applying to the appointment of a Hold Separate Trustee under D.2. shall apply *mutatis mutandis* to his/her replacement.

7. The Bundeskartellamt shall not be liable for any damage arising from the performance of the Hold Separate Trustee or any of his/her personnel.



## **E Appointment of a Divestiture Trustee**

In the event that [A/B/C] does not fulfil its duty to divest ensuing from the remedies imposed within the first divestiture period as specified under A.3.1., [A/B/C] shall appoint a Divestiture Trustee immediately on expiry of this period to prepare and carry out [Z's] divestiture. The person acting as Hold Separate Trustee can also be appointed as the Divestiture Trustee.

The regulations under D apply *mutatis mutandis* to the Divestiture Trustee.

The Divestiture Trustee is empowered to carry out the divestiture of [Z] for the account of [A/B/C] within the divestiture period as specified under Section A.3.2. (second divestiture period) to a purchaser as specified under Section A.5. without instruction, in the best possible way and at no minimum price.