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The practice of concluding competition cases with the submission of commitments – legally binding undertakings – has increasingly pervaded all realms of EC competition law, and is now front-and-centre in most prominent cases. In mergers, the 1989 merger regulation already provided for this kind of outcome, and so does the new merger regulation adopted in 2004. The number of merger cases ending with commitments has steadily increased over time, starting from a handful in the early 1990s to a yearly average of close to 20.¹ In the antitrust field, the legal foundations of such negotiated outcomes were laid in Regulation 1/2003. The first Article 9 commitments decisions were adopted in 2005, and quickly became a staple of antitrust cases.² Finally, in recent months, the commitment mechanism has been systematically applied in the state aid world as a result of the Commission's approved restructuring plans of bailed-out banks.

The acceptance of commitments by the Commission in clearance decisions raises the issue of compliance and ultimately of the monitoring mechanism. Indeed, the Commission has to ensure that commitments, which are at the core of conditional clearance decisions, are strictly implemented. Without a sound monitoring mechanism, the very implementation of the commitments is at stake. While several solutions can in principle be considered, practical difficulties associated with some of them led the Commission to externalise the commitment monitoring as well as the corresponding financial burden.

With the externalisation of the monitoring process, a new character, the trustee, was introduced into the world of competition law. Roughly speaking, the trustee makes sure that companies comply with commitments. While the appointment of a trustee has become standard in merger-conditional clearance decisions, in antitrust commitments decisions and in recent state aid decisions, the Commission only unsuccessfully attempted to use this figure in antitrust prohibition decisions – where no commitments are submitted by companies.

This article reviews how the externalisation of the commitment monitoring in competition cases has fundamentally shaped the trustee appointment process, and is the result of a compromise between the various constraints faced by the Commission.

The externalisation of the monitoring process

In an ideal world, a competition authority would hire capable, flexible and independent professionals for the monitoring of commitments, if possible for free, in order to avoid tender procedures. Unfortunately, as much as they are committed to the promotion of general interest and consumer welfare, such professionals normally request compensation for their services. This means that a satisfactory arrangement is in the end a compromise between technical and economic constraints.

In theory, at least three different ways of monitoring commitments can be envisaged.

The first one would be for the Commission (and any competition authority) to carry out this task internally. While this solution seems simple, it entails major drawbacks. First, it would put a substantial strain on Commission resources, virtually forcing the Commission to create a dedicated department, as monitoring is a time-consuming task. Second, Commission officials dealing with competition cases do not necessarily possess the necessary skills, which include, as explained below, day-to-day business management, financial analysis, information system expertise, etc. Third, experience shows that the implementation of commitments requires a strong field presence, something that the Commission simply cannot perform over an extended period.

Another option would be for the Commission to outsource this monitoring process through a selection procedure, thereby bearing the costs. This solution has been somewhat more seriously considered in the debate over the appointment of trustees, when during the 2005 merger remedy study, several

trustees expressed the view that they would prefer such a scheme to avoid the confusion of having a trustee remunerated by companies while working for the Commission. Yet, this also has considerable drawbacks, making a move towards such a scheme unlikely at the moment. Indeed, with each competition case being different and requiring specific skills, this scheme would imply the organisation of tenders for each case, a potentially very cumbersome and time-consuming process that is at odds with the need for a timely appointment and the flexibility required for this kind of missions. The overall cost of such a solution – including the cost of organising a tender, in addition to the trustee remuneration – makes such a move even more unlikely.³

What is therefore left is the current scheme, whereby the trustee is selected and remunerated by companies subject to approval by the Commission. This is a palatable solution for the Commission, as it can rely, at no cost, on suitable professionals. But this solution is not without downsides, as it creates a commercial relationship between companies and the trustee, making the issue of independence and conflict of interest even more acute.

The externalisation arrangement suffered a setback when the Court of First Instance criticised the Commission in the Microsoft judgment for unilaterally imposing a monitoring process that had no legal basis in the prohibition decision and, in the absence of any agreement from the company, amounted to a delegation of investigative power from the Commission to a third party, according to the Court. In addition, the Court held that there is no legal basis for the Commission to force companies to bear costs of trustee remuneration, as such amounts cannot be regarded as fines or penalty payments, which are the only financial burdens provided for in the antitrust regulation.

But such reasoning does not apply to antitrust proceedings resulting in commitments, that is, cases where the Commission and the parties settle their differences by parties offering undertakings. In these cases, the key element is that the companies voluntarily commit to appoint a trustee and to provide all necessary information to ensure the effective monitoring process, while bearing all the associated costs. Subsequently, the committing company and the trustee sign a contract, where the role of the trustee is clearly spelled out.⁴

Yet, the question of the monitoring mechanism of antitrust remedies imposed pursuant to Article 7 decisions remains open. In principle, as suggested by the Court in the Microsoft judgment, the Commission could use its power to request information from the incriminated company and hire an expert

to assist the Commission with the evaluation and analysis of the collected information. It goes without saying that such system would be by nature inefficient and extremely cumbersome. The MasterCard case, whose upshot was a prohibition decision, was in this respect interesting as the appointment of a trustee was part of a post-decision ‘deal’ between MasterCard and the Commission.⁵ Therefore, even in this case the parties voluntarily committed to appoint a trustee overseeing the implementation of the commitments, which were also voluntarily submitted. But it is not clear at this stage to what extent this scheme or any other monitoring scheme could be applied in the context of any future Article 7 decisions that could ultimately give rise to commitments.

The constraints of the trustee appointment

Given the increased popularity of the settlement of competition proceedings with commitments, the final fate of cases – and ultimately, the success of competition enforcement – are essentially placed in the hands of trustees who are responsible for ensuring that commitments are implemented as set out in the decision. It is therefore easy to understand why the Commission is particularly keen to approve trustees having all attributes to cope with this task, and who will live up to the challenge according to the Commission’s expectations.

From the Commission’s perspective, the starting point of the trustee vetting is the checking of skills and competence. For a divestment

commitment, which often involves carve-out measures, the set of required skills typically encompasses expertise in business management, accounting and finance, as well as knowledge of information management and the industry at stake.⁶ Given the broad array of required qualifications, audit and consulting companies – sometimes assisted by industry experts – have often been appointed for the monitoring of this kind of remedy. As concerns behavioural remedies, a similar set of skills is needed, while the understanding of industry dynamics can become even more prevalent. In order to verify the trustee’s competence to deal with each specific case, the Commission usually reviews the trustee references and the initial trustee’s working plan to gauge the robustness of each proposal.⁷

Besides these prerequisite core skills, trustees should ideally have a basic understanding of competition law, as they often face situations not foreseen in the commitments, and therefore have to follow not only the letter, but also the spirit of the commitments. Indeed, good intuition may often prevent trouble, as the text of the commitments is often confined to a rough picture, whose implementation may prove tricky in practice. It goes without saying that a translation of a

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document of a couple of pages into major structural changes – with consequences on all market actors including employees, customers and competitors – requires the understanding of the rationale underlying the text. Therefore, the trustees have to constantly make sure the orientations taken during the implementation process are in keeping with the objective sought by the Commission in its decision.

Another criterion of the approval process, the assessment by the Commission of the trustee independence, takes on a crucial dimension given that companies, not the Commission, remunerate trustees. The paradox is that while the trustee is remunerated by the companies, it directly reports to the Commission and it is supposed to act as if it were ‘the ears and eyes’ of the Commission. This means that, despite any past, future, or even ongoing relationships with the companies, the Commission insists on a trustee that guarantees an independent implementation process and makes it clear to the companies that commitments are to be taken seriously. Should it come to it, the Commission must feel comfortable that the trustee would not shy away from playing hardball with companies trying to get around the commitments. Furthermore, the very credibility of the monitoring process and of the commitments vis-à-vis third parties would be jeopardised if the independence of the trustee was doubted.

Thus, independence is key. While it may seem an objective concept, this issue is one of the most difficult ones in the appointment process and, besides the blatant lack of competence, is a common reason for the Commission’s hesitation to approve proposed trustees.⁸ Whereas there are some obvious situations that would automatically exclude a candidate (such as the existence of substantial capitalistic links with the parties), it seems there is no such thing as a bright-line test that would easily allow concluding on the independence of proposed candidates or lack of it. Indeed, given the set of skills required for this type of mission, finding trustees that do not have any links with the companies subject to the commitments can prove extremely tricky. It becomes close to impossible when the case requires the use of an industry expert, as these experts are likely to work either for the parties or their competitors, or at least potentially be involved with the industry players. In fact, the remedy notice acknowledges that “no conflict of interest will arise by relations of the trustee with the parties if those relations will not impair the Trustee’s objectivity and independence in discharging its tasks.”⁹ Thus, very often, the Commission has to assess whether these links create an economic dependence to an extent that could lead the trustee to be more complacent and less inquisitive.¹⁰

Such assessment is not an easy task, as it requires the balancing of various criteria. In ideal cases, the parties propose several potential trustees meeting the qualification requirements and the Commission can approve those, whose independence is not dubious. In other cases, especially as concerns industry experts, the Commission will have to find a compromise between a candidate’s qualification and independence.

While standard remedy text provides that the Commission could choose the trustee itself if all potential candidates proposed by the parties are rejected, this provision seems not to be used in practice: in the end, in case of difficulties, the parties and the Commission normally engage in a constructive discussion to find the optimal solution.¹¹

The Commission analysis of the suitability and independence of the trustee includes the review of the draft contract (“trustee mandate”) between the parties and the trustee, which aims at enabling the trustee to work in full independence by allowing the trustee to obtain all necessary resources to perform its tasks, as well as appropriate remuneration.¹² Although the Commission is not a party to the “trustee mandate,” the parties cannot violate the contract without being in breach of the commitments.¹³ The link of the mandate with the commitments ensures that the parties cannot exert undue influence on the trustee without this affecting their compliance with the commitments. Conversely, the standard mandate comprises several provisions that prevent trustees or members of trustee teams from providing additional services to the same company during the term of the mandate and for a period of one year after its end.

Another guarantee of independence comes perhaps from the fact that companies providing trustee services are becoming increasingly specialised,¹⁴ and thus overall economically dependent on this activity. In this context, they have an incentive to prove their professional integrity and independence with their actions to avoid problems in potential future reappointments. Indeed, trustees have frequent and repeated contacts with the Commission, so reputational effects are therefore in play. Although this is not the case for the moment, one could imagine that similar to lawyers and accountants, trustees would become their own profession, with their own code of ethics.

While there is little doubt that the Commission is right to hold trustees to high standards of independence, it is interesting to note that this normally becomes a somewhat muted issue after the trustee appointment. Indeed, experience shows that both companies and the Commission have generally aligned

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incentives to implement the remedies as efficiently as possible. Companies usually do not balk at implementing commitments, let alone attempt to get around them. In this respect, trustees also proved useful over the years in reminding companies of the legally binding nature of the commitments once the clearance decision is secured.¹⁵ In addition, the parties have no incentive to try to take advantage of a toothless trustee, as this may seriously backfire if the Commission bypasses the trustee and ultimately takes the matter in its own hands.

This means that, despite the fact that companies surely could have lived without the constraint created by the commitments and the existence of the trustee overseeing their implementation, they are generally keen to have a trustee help them through the implementation process while taking into account their business constraints. In that sense, the Commission and companies ultimately have a common interest in having an efficient trustee that guarantees a seamless implementation of the commitments.

Conclusion

The implementation of commitments has become a capstone of many competition cases. Its supervision is therefore a critical element of the Commission competition law enforcement.

For practical reasons, the Commission relies on third parties, trustees, for the daily exercise of this supervision. Yet, this mechanism can only work and command credibility if the Commission carefully examines the independence of proposed trustees, all the more as their compensation comes from the companies subject to commitments.

Further clarification on this key aspect of the trustee appointment might be provided very soon by the General Court.¹⁶ ■

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Footnotes

- 1 Determining the causes of such a long-term upward trend goes beyond the scope of this article. It is obviously correlated with the number of deals notified to the Commission, as well as a high enforcement rate. More profound reasons, such as keenness from companies to bring an end to investigations in first phases, might also be at play. Economic booms and busts naturally affect this trend, with the number of cases with commitments waning in 2009 after surging above 20 in 2007.
- 2 Informal commitments were submitted under the previous antitrust regulation. See for example Case 36246 Marathon/Ruhrigas/GDF et alia
- 3 By way of example, the expert retained by the Commission for assistance in the Microsoft case (and potentially other IT cases) could cost up to nine million euros over three years. While this case is unusual in its size and scope, it illustrates the type of costs that would be faced by the Commission if this option was retained.
- 4 Nevertheless, the Commission amended the Implementing Merger regulation in 2008 to clarify the legal basis on which trustees are used.
- 5 See press release of the Commission MEMO/09/143.
- 6 See Merger Remedy study, p. 91
- 7 This material is submitted by the parties and often also used by them to make their own selection of trustees.
- 8 Independence from the parties is addressed in the merger remedy notice without distinction between the notifying parties and other involved parties, as defined in Article 11 of the merger implementing regulation. In practice, independence from the seller (that is, the owner of the target of the transaction initially notified to the Commission) does not seem to play a role (at least in typical divestment cases) and trustees being part of the company auditing the seller's accounts have been appointed in the past.
- 9 While trustees are not required to be independent from competitors, such links can create broader issues of conflict of interest.
- 10 Remedy notice, para. 125. However, the notice also states that "(...) the Commission will not accept persons or institutions as trustees which are at the same time the parties' auditors or their investment advisers in the divestiture."
- 11 While rejections of trustees are normally done on an informal basis, formal rejection would require a Commission decision. On the other hand, the Commission approves trustees by sending a simple letter of approval to the parties.
- 12 The Commission published a standard text of the Trustee mandate on which the parties can and do base their contracts with the trustees.
- 13 Note however that there is no contract between the Commission and the trustee, while the trustee mandate comprises obligations of the trustee toward the Commission. In practice, if a trustee does not fulfill its mission in a satisfactory way, the Commission can ask for its removal pursuant to the relevant commitment clauses.
- 14 The independence issue has favoured the emergence of middle-size actors with teams fully devoted to trustee services. By contrast, larger audit companies played a more prominent role in earlier times.
- 15 The mindset vis-à-vis commitments might also depend on a number of factors such as a size of the company (a smaller company might have less regard for compliance), the type of proceedings, etc.
- 16 See T-452/04.