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HOW TO SUCCESSFULLY NAVIGATE THE EC PURCHASER APPROVAL PROCESS

When a company intends to purchase a divestment business arising from commitments attached to a European Commission (EC) conditional merger clearance decision, it is not always aware that it will need to go through an extensive purchaser approval process, which is a complex, intense and fast-paced process throughout.

This short briefing gives an overview of some of the challenges remedy buyers might need to overcome and provides guidance based on experience in recent cases to ensure a smooth purchaser approval.

Purchaser approval process timeline and milestones

Under the EC's Remedy Notice, the EC will normally consider a period of six months from the moment of its conditional clearance decision as appropriate for the seller to find a suitable purchaser to avoid that the divestment business would be exposed to an extended period of uncertainty. In order to respect this strict timing, seller (or its investment bankers) in case of a bidding process will in practice already start sending out teasers or an Information Memorandum to interested purchasers a few weeks before the expected EC decision. In case of several bidding rounds, seller might also ask interested remedy buyers to already perform an auto-evaluation of compliance with the purchaser criteria to be admitted to the second round.

When the parties come near to a final agreement, seller and trustee will start sending their first preliminary requests for information (in most cases the first in a long row) to the remedy buyer. This will enable the seller to start preparing its reasoned purchaser proposal and the trustee his reasoned opinion, which need to be submitted to the EC within respectively one week and two weeks after signature of the final agreement. The aim of these two submissions is to demonstrate to the satisfaction of the EC that the proposed purchaser meets the purchaser requirements and that the business will be divested in a manner consistent with the EC's decision and the commitments.

Shortly after conclusion of the agreement, the remedy buyer should also be ready for an introductory meeting with the EC. For that purpose, the remedy buyer should prepare a substantiated presentation of the company and its future business plan to develop the divestment business as a viable competitive business going forward.

Whilst, under the Remedy Notice, the EC is not bound by a specific deadline other than to issue its decision to approve the identity of the purchaser, the SPA and any other related agreements "as expeditiously as possible", in practice the EC will issue its purchaser approval decision within one to three months after signature of the final agreement.

Impact of purchaser approval process on SPA negotiations

The absence of a hard deadline imposed on the EC to issue its purchaser approval decision can give rise to a certain degree of timing uncertainty for the remedy buyer, which impacts on closing timelines and potential long-stop dates in the SPA, in particular when the acquisition of the divestment business will need to be notified to one or more competition authorities after having obtained purchaser approval (although in practice the EC might accept pre-notification discussions on draft merger filings in parallel with the purchaser approval process).

Purchaser approval needs to be part of the condition precedent in the SPA next to other regulatory approvals such as merger control clearance. Seller and remedy buyer should also negotiate which party will bear the risk if the remedy buyer does not get approved eventually, and how any termination fee for not obtaining purchaser approval or not meeting the long stop date should be structured. In this context, a solid risk assessment of the suitable purchaser criteria and preliminary merger control analysis should be made in due time.

Intense trustee investigation process

For the preparation of his reasoned opinion to be submitted to the EC, the trustee will test the suitable purchaser criteria (i.e. (i) whether the purchaser is independent and unconnected to the seller; (ii) whether the purchaser has the financial resources, proven relevant expertise and incentives and ability to maintain and develop the divested business as a viable and active competitive force; and (iii) the absence of any prima facie concerns) and any other additional specific requirements as defined in the commitments. The trustee will often send several requests for information to the remedy buyer (towards the end of the process also containing questions from the EC), in particular to test commercial and structural independence, previous acquisitions experience, industry expertise, strategic rationale, incentives and future business plan with divestment business, financials and post-merger integration planning. Speed is of the essence to respond to these requests for information.

Practical tips

We set out below some practical tips that each remedy buyer should keep on its radar both before and during the purchaser approval process:

Dedicated response team. Remedy buyers should be prepared for an **intensive investigation process** by the trustee with strict deadlines. Significant input from the remedy buyer will be required to prepare the trustee's reasoned opinion and the seller's reasoned purchaser proposal submission. **Consistency in the data and information** submitted throughout the process to the different stakeholders is absolutely key. Therefore, we recommend to set up from the start of the process a dedicated internal response team having expertise in finance and accounting, business strategy and economics.

Close cooperation with seller. Making available the non-confidential version of the commitments in the VDR in a more advanced stage of the purchaser search, or publication of the non-confidential version of the EC's conditional clearance decision and commitments might take time and therefore leave interested remedy buyers to a certain extent "in the dark" on any specific purchaser approval requirements imposed in the commitments. But remedy buyers might already have received the draft commitments earlier as part of the market testing and it should be ensured that the relevant business divisions are alerted to report EC invitations to comment on draft commitments to Legal.

Attention to document creation. Seller has the obligation to send received offers immediately to the trustee/EC, and the trustee will request to provide remedy buyer's relevant board presentations. Therefore, the remedy buyer should **be careful with use of language** in these documents. Questioning the scope of the remedy package might (i) put off seller during the bidding process as seller will want rapid deal certainty within six months and/or (ii) worry the trustee/EC on remedy buyer's suitability or its willingness to acquire the entire remedy package which was designed in such a way to become a future viable competitive force. In any event the remedy buyer should be aware that in practice there is very little room to deviate from the text of the commitments as approved by the EC.



Contact

Vincent's practice focuses on Belgian and EU competition law. He is a seasoned multifaceted antitrust lawyer with significant expertise in successfully managing local and global complex multijurisdictional merger filings/ cartel investigations and the development and implementation of tailored competition compliance programs.

Vincent has been practicing competition law in Brussels for more than 15 years. He started his career in 2004 as a trainee at the European Commission and the Belgian Competition Authority. He subsequently worked at two international law firms and also acquired significant in-house experience as antitrust counsel at two major global multinationals.

In May 2019, Vincent was selected as a future leader of international competition practice in the Who's Who Legal Competition law survey conducted in conjunction with Global Competition Review and which lists the foremost practitioners in the competition community aged under 45. The 2019 Legal 500 rankings for Belgian Competition Law described Vincent as a lawyer who *"really goes the extra mile for his clients"*.



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