Commission for Protection of Competition pursuant to article 28 paragraph (3), in relation to article 19 paragraph (1) point 2) of the Law on Protection of Competition (Official Gazette of the Republic of Macedonia no. 145/10, 136/11, 41/14) on its session held on 28.12.2015 adopted the fallowing

Guidelines for possible remedies in relation to notified concentrations acceptable to the Commission for Protection of Competition pursuant to The Law on Protection of Competition[1]

I. INTRODUCTION

[1] These Guidelines are harmonized Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 Official Journal C 267, 22.10.2008, p. 1-27

1. The Law for Protection of Competition (The Law) in Article 19 paragraph (2) expressly stipulates that if the Commission for Protection of Competition (hereinafter: the Commission) established that after the modifications made by participants, the concentration which is notified will not have for its consequence significant prevention, restriction or distortion (hereinafter: impede) of effective competition in the market or its essential part, especially as a result of creation or straightening of a dominant position of the participants, adopts a decision which determined that the concentration is in accordance with the provision of the Law for Protection of Competition. (Hereinafter: the Law)

2. The purpose of this Notice is to provide guidance on modifications to concentrations, in particular commitments by the undertakings concerned to modify a concentration. Such modifications are more commonly described as 'remedies' since their object is to eliminate the competition concerns[2] identified by the Commission. The principles contained herein will be applied and further developed and refined by the Commission in individual cases

3. This Notice sets out the general principles applicable to remedies acceptable to the Commission, the main types of commitments that may be accepted by the Commission in cases under the Law, the specific requirements which proposals of commitments need to fulfill in both phases of the procedure, and the main requirements for the implementation of commitments.

II. **GENERAL PRINCIPLES**

[2] Save where the contrary is indicated, in the following, the term 'competition concerns' corresponds, according to the stage of the procedure, to serious doubts or preliminary findings that the concentration is likely to significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position

4. Under the Law, the Commission assesses the compatibility of a notified concentration with the Law. The test for compatibility under Article 17 paragraph (3) and (4) of the Law is whether or not a concentration would significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. A concentration that significantly prevents, restricts or distorts effective competition as described above is incompatible with the Law and the Commission is required to prohibit it. For the creation of a joint venture, the Commission will also examine the concentration under Article 17 paragraph (5) of the Law. The principles set out in this Notice will generally also apply to remedies submitted to eliminate competition concerns identified under Article 17 paragraph (5).

5. Where a concentration raises competition concerns in that it could significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, the parties may seek to modify the concentration in order to resolve the competition concerns and thereby gain clearance of their merger. Such modifications may be fully implemented in advance of a clearance decision. However, it is more common that the parties submit commitments with a view to rendering the concentration compatible with the Law and that those commitments are implemented following clearance.

6. Under the structure of the Merger Regulation, it is the responsibility of the Commission to show that a concentration would significantly impede competition[3]. The Commission communicates its competition concerns to the parties to allow them to formulate appropriate and corresponding remedies proposals. It is then for the parties to the concentration to put forward commitments; the Commission is not in a position to impose unilaterally any conditions to an authorization decision, but only on the basis of the parties' commitments. The Commission will inform the parties about its preliminary assessment of remedies proposals. If, however, the parties do not validly propose remedies adequate to eliminate the competition concerns, the only option for the Commission will be to adopt a prohibition decision

7. The Commission has to assess whether the proposed remedies, once implemented, would eliminate the competition concerns identified. Only the parties have all the relevant information necessary for such an assessment, in particular as to the feasibility of the commitments proposed and the viability and competitiveness of the assets proposed for divestiture. It is therefore the responsibility of the parties to provide all such information available that is necessary for the Commission's assessment of the remedies proposal. To this end, the Law obliges the notifying parties to provide, with the commitments, detailed information on the content of the commitments offered, the conditions for their implementation and showing their suitability to remove any significant impediment of effective competition. For commitments consisting in the divestiture of a business, parties have to describe in detail in particular how the business to be divested is currently operated. This information will enable the Commission to assess the viability, competitiveness and marketability of the business by comparing its current operation to its proposed scope under the commitments. For commitments consisting in the divestiture of a business, parties have to describe in detail in particular how the business to be divested is currently operated. This information will enable the Commission to assess the viability, competitiveness and

[3] In phase I and before the issuance of a Statement of Objections, this corresponds to *serious doubts* as to the significant impediment to effective competition

marketability of the business by comparing its current operation to its proposed scope under the commitments.

8. Whereas the parties have to propose commitments sufficient to remove the competition concerns and submit the necessary information to assess them, it is for the Commission to establish whether or not a concentration, as modified by commitments validly submitted, must be declared incompatible with the common market because it leads, despite the commitments, to a significant impediment of effective competition. The burden of proof for a prohibition or authorization of a concentration modified by commitments is therefore subject to the same criteria as an unmodified concentration.

Basic conditions for acceptable commitments

9. Under the Law, the Commission only has power to accept commitments that are deemed capable of rendering the concentration compatible with the Law so that they will prevent a significant impediment of effective competition. The commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view. Furthermore, commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.

10. Structural commitments, in particular divestitures, proposed by the parties will meet these conditions only in so far as the Commission is able to conclude with the requisite degree of certainty that it will be possible to implement them and that it will be likely that the new commercial structures resulting from them will be sufficiently workable and lasting to ensure that the significant impediment to effective competition will not materialize.

11. The requisite degree of certainty concerning the implementation of the proposed commitments may in particular be affected by risks in relation to the transfer of a business to be divested, such as conditions attached by the parties to the divestiture, third party rights in relation to the business or the risks of finding a suitable purchaser, as well as risks in relation to the degradation of the assets until the divestiture has taken place. It is incumbent on the parties to remove such uncertainties as to the implementation of the remedy when submitting it to the Commission[4].

12. In assessing the second condition, whether the proposed commitment will likely eliminate the competition concerns identified, the Commission will consider all relevant factors relating to the proposed remedy itself, including, *inter alia*, the type, scale and scope of the remedy proposed, judged by reference to the structure and particular characteristics of the market in which the

[4] Depending on the nature of the risks, specific safeguards may aim at compensating for them. For example, the risk arising from third party rights in relation to the assets to be divested may be compensated by the proposal of an alternative divestiture. Such safeguards will be discussed in more detail below

competition concerns arise, including the position of the parties and other players on the market.

13. In order for the commitments to comply with these principles, there has to be an effective implementation and ability to monitor the commitments. Whereas divestitures, once implemented, do not require any further monitoring measures, other types of commitments require effective monitoring mechanisms in order to ensure that their effect is not reduced or even eliminated by the parties. Otherwise, such commitments would have to be considered as mere declarations of intention by the parties and would not amount to binding obligations, as, due to the lack of effective monitoring mechanisms, any breach of them could not result in the revocation of the decision according to the provisions of the Law.

14. Where, however, the parties submit remedies proposals that are so extensive and complex that it is not possible for the Commission to determine with the requisite degree of certainty, at the time of its decision, that they will be fully implemented and that they are likely to maintain effective competition in the market, an authorization decision cannot be granted. The Commission may reject such remedies in particular on the grounds that the implementation of the remedies cannot be effectively monitored and that the lack of effective monitoring diminishes, or even eliminates, the effect of the commitments proposed.

Appropriateness of different types of remedies

15. According to the case law of the Court, the basic aim of commitments is to ensure competitive market structures. Accordingly, commitments which are structural in nature, such as the commitment to sell a business unit, are, as a rule, preferable from the point of view of the Law objective, inasmuch as such commitments prevent, durably, the competition concerns which would be raised by the merger as notified, and do not, moreover, require medium or long-term monitoring measures. Nevertheless, the possibility cannot automatically be ruled out that other types of commitments may also be capable of preventing the significant impediment of effective competition.

16. The Commission stresses that the question of whether a remedy and, more specifically, which type of remedy is suitable to eliminate the competition concerns identified, has to be examined on a case-by-case basis.

17. Nevertheless, a general distinction can be made between divestitures, other structural remedies, such as granting access to key infrastructure or inputs on non-discriminatory terms, and commitments relating to the future behavior of the merged entity. Divestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps, and may also be the best means of resolving problems resulting from vertical or conglomerate concerns. Other structural commitments may be suitable to resolve all types of concerns if those remedies are equivalent to divestitures in their effects, as explained in more detail below in Article 60 *et seq.* Commitments relating to the future behavior of the merged entity may be acceptable only exceptionally in very specific circumstances. In particular, commitments in the form of undertakings not to raise prices, to reduce product ranges or to remove brands, etc., will generally not eliminate competition concerns resulting from horizontal overlaps. In any case, those types of remedies can only exceptionally be accepted if their workability is fully ensured by effective

implementation and monitoring in line with the considerations set out in Article 13-14, 65, 68 and if they do not risk leading to distorting effects on competition[5]

Procedure

18. The Commission may accept commitments in either phase of the procedure. However, given the fact that an in-depth market investigation is only carried out in phase II[6], commitments submitted to the Commission in phase I[7] must be sufficient to clearly rule out 'serious doubts' that the concentration may significantly impede effective competition within the meaning of Article 20 paragraph 1 item 3 of the Law[8]. Pursuant to Article 23 paragraph 3 of the Law, the Commission has to take a clearance decision as soon as the serious doubts referred to in Article 20 paragraph 1 item 3 of the Law are removed as a result of commitments submitted by the parties. This rule applies to commitments proposed in phase II-proceedings before the Commission issues a Statement of Objection. If the Commission reaches the preliminary view that the merger leads to a significant impediment to effective competition and issues a Statement of Objections, the commitments must be sufficient to eliminate such a significant impediment to effective competition.

19. Whilst commitments have to be offered by the parties, the Commission will ensure the enforceability of commitments by making the authorization of the merger subject to compliance with the commitments. A distinction must be made between conditions and obligations. The requirement for achievement of the structural change of the market is a condition — for example, that a business is to be divested. The implementing steps which are necessary to achieve this result are generally obligations on the parties, e.g. such as the appointment of a trustee with an irrevocable mandate to sell the business.

20. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke clearance decisions issued either under Article 20 paragraph (3) or Article 22 paragraph (6) of the Law, acting pursuant to Article 20 paragraph (2) or Article 22 paragraph (2) of the Law, respectively. In case of a breach of an obligation, the parties may also be subject to fines and periodic penalty payments as provided in Article 47 paragraph 1 item 7 of the Law. Where, however, a condition is breached, e.g. a business is not divested in the time-frame foreseen in the commitments or afterwards re-acquired, the compatibility decision is no longer applicable. In such circumstances, the Commission may, first, take interim measures appropriate to maintain

[5] For example, commitments regarding a certain pricing behavior such as price caps which contain the risk to lead to an anticompetitive alignment of prices among competitors.

[6] The phase II relates to the provisions of Article 20, paragraph 1 item 3 of the Law, it refers to situations where the Commission finds that the notified concentration falls within the provisions of the Law and may significantly impede effective competition on the market or a substantial part of it, the Commission makes a decision on initiating procedure.

[7] The phase I relates to the provisions of Article 20, paragraph 1 item 2 of the Law it refers to situations where the Commission finds that the notified concentration although falls within the provisions of the Law does not significantly impede effective competition on the market or a substantial part of it and accordingly the Commission makes a decision declaring that the concentration is compliant with the provision of the Law

[8] Commitments in phase I can only be accepted in certain types of situations; see below in paragraph 80.

conditions of effective competition pursuant to Article 22 paragraph (5) item (2). Second, it may, if the conditions of Article 22 paragraph 4 item b are met, order any appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures or, according to Article 22 paragraph (7), take a decision pursuant to Article 22 paragraph (1)-(3) of the Law. In addition, the parties may also be subject to fines as provided in Article 47 paragraph 1 item 7 of the Law.

III. **DIFFERENT TYPES OF REMEDIES**

1. Divestiture of a business to a suitable purchaser

21. Where a proposed concentration threatens to significantly impede effective competition the most effective way to maintain effective competition, apart from prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture by the merging parties.

1.1. Divestiture of a viable and competitive business

22. The divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis [9] and that is divested as a going concern. For the business to be viable, it may also be necessary to include activities which are related to markets where the Commission did not identify competition concerns if this is required to create an effective competitor in the affected markets.

23. In proposing a viable business for divestiture, it is necessary to take into account the uncertainties and risks related to the transfer of a business to a new owner. These risks may limit the competitive impact of the divested business, and, therefore, may lead to a market situation where the competition concerns at stake will not necessarily be eliminated.

Scope of the business to be divested

24. The business has to include all the assets which contribute to its current operation or which are necessary to ensure its viability and competitiveness and all personnel which is currently employed or which is necessary to ensure the business' viability and competitiveness[10].

25. Personnel and assets which are currently shared between the business to be divested and other businesses of the parties, but which contribute to the operation of the business or which are necessary to ensure its viability and competitiveness, also have to be included. Otherwise, the viability and competitiveness of the business to be divested would be endangered. Therefore, the divested business has to contain the personnel providing essential functions for the business such as, for instance, group for research and development (R&D) and information technology IT staff even where such personnel is currently employed by another business unit of the parties — at least in a sufficient proportion to meet the on-going needs of the divested business. In the same way shared assets have to be included even if those assets are owned by or allocated to another business unit.

26. In order for the Commission to be able to identify the scope of the business to be divested, the parties have to include a precise definition of the scope of the divested business in the commitments

[9] This includes, under certain conditions, businesses that have to be carved out from a party's business or individual assets; see below paragraph 34

[10] Notifying parties will have to undertake in the commitments that the business to be divested includes all those assets and personnel. Where the detailed description of the business, to be provided by the parties as set out in paragraph 26, will at a later point in time appear to be incomplete in that respect and the parties do not complement the business with the necessary additional assets or personnel, the Commission may consider revoking the conditional clearance decision.

(the “description of the businesses”). The description of the business has to be adapted to the individual case at hand and should contain all the elements that are part of the business to be divested: tangible (e.g. R & D, production, distribution, sales and marketing activities) and intangible assets (such as intellectual property rights, know-how and goodwill); licenses, permits and authorizations by governmental organizations granted to the business; contracts, leases and commitments (e.g. arrangements with suppliers and customers) for the benefit of the business to be divested; and customer, credit and other records. In the description of the business, the parties have to include the personnel to be transferred in general terms, including staff seconded and temporary employees, and to insert a list of the key personnel, i.e. the personnel essential for the viability and competitiveness of the business. The Commitments should include participant’s efforts of not making offers of the key personnel which will move along with the business venture that will sell.

27. In the description of the business, the parties also have to set out the arrangements for the supply of products and services by them to the divested business or by the divested business to them. Such on-going relationships of the divested business may be necessary to maintain the full economic viability and competitiveness of the divested business for a transitional basis. The Commission will only accept such arrangements if they do not affect the independence of the divested business from the parties.

28. In order to avoid any misunderstanding about the business to be divested, assets or personnel that are used within or employed by the business but that should not, according to the parties, be transferred with the divestiture, have to be expressly excluded by the parties in the commitments text. The Commission will only be able to accept such exclusion of assets or personnel if the parties can clearly show that this does not affect the viability and competitiveness of the business.

29. The business to be divested has to be viable as such. Therefore, the resources of a possible or even presumed future purchaser are not taken into account by the Commission at the stage of assessing the remedy. The situation is different if already during the procedure a sale and purchase agreement with a specific purchaser is concluded whose resources can be taken into account at the time of the assessment of the commitment. This situation will be dealt with in more detail below in paragraphs 55 ff.

30. Once a purchaser is identified after adoption of an authorization decision, some of the assets or personnel included in the divested business may not be needed by the proposed purchaser. In the purchaser approval process, the Commission may, upon request by the parties, approve the divestiture of the business to the proposed purchaser without one or more assets or parts of the personnel if this does not affect the viability and competitiveness of the business to be divested after the sale, taking account of the resources of the proposed purchaser.

1.2. Stand-alone business and conditions for acceptability of alternatives

31. Normally, a viable business is a business that can operate on a stand-alone-basis, which means independently of the merging parties as regards the supply of input materials or other forms of cooperation other than during a transitory period.

32. The Commission has a clear preference for an existing stand-alone business. This may take the form of a pre-existing company or group of companies, or of a business division which was not previously legally incorporated as such.

33. Where the competition concern results from a horizontal overlap, the parties may be able to choose between two businesses. In cases involving a hostile bid, a commitment to divest activities of the target company may, in such circumstances of limited information available to the notifying parties about the business to be divested, increase the risk that this business might not, after a divestiture, result in a viable competitor which could effectively compete in the market on a lasting basis. It may therefore be more appropriate for the parties to propose to divest activities of the acquiring company in such scenarios.

Carve-outs

34. Even though normally the divestiture of an existing viable stand-alone business is required, the Commission, taking into account the principle of proportionality, may also consider the divestiture of businesses which have existing strong links or are partially integrated with businesses retained by the parties and therefore need to be 'carved out' in those respects. In order to reduce the risks for the viability and competitiveness to a minimum in such circumstances, an option for the parties is to submit commitments proposing to carve out those parts of an existing business which do not necessarily have to be divested. In effect, an existing, stand-alone business is being divested in those circumstances although, by way of a 'reverse carve-out', the parties may carve-out the limited parts which they may keep.

35. In any case, the Commission will only be able to accept commitments which require the carve-out of a business if it can be certain that, at least at the time when the business is transferred to the purchaser, a viable business on a stand-alone basis will be divested and the risks for the viability and competitiveness caused by the carve-out will thereby be reduced to a minimum. The parties therefore have to ensure, as set out in detail below in paragraph 111, that the carve-out is started in the interim period, i.e. the period between the adoption of the Commission decision up to the completion of the divestiture (meaning the legal and factual transfer of the business to the purchaser). Consequently, at the end of this period, a viable business on a stand-alone basis will be divested. If this should not be possible or if the carve-out should be particularly difficult, parties may provide the requisite degree of certainty for the Commission by proposing an up-front buyer solution, as further detailed below in paragraph 54.

Divestiture of assets, in particular of brands and licenses

36. A divestiture consisting of a combination of certain assets which did not form a uniform and viable business in the past creates risks as to the viability and competitiveness of the resulting business. This is in particular the case if assets from more than one party are involved. Such an approach may be accepted by the Commission only if the viability of the business is ensured

notwithstanding the fact that the assets did not form a uniform business in the past. This may be the case if the individual assets can already be considered a viable and competitive business (1). Similarly, only in exceptional cases a divestiture package including only brands and supporting production and/or distribution assets may be sufficient to create the conditions for effective competition (2). In such circumstances, the package consisting of brands and assets must be sufficient to allow the Commission to conclude that the resulting business will be immediately viable in the hands of a suitable purchaser.

37. Divestitures of a business generally appear preferable to the granting of licenses to intellectual property (IP) rights, as the granting of a license involve more uncertainties, will not enable the licensee to compete immediately in the market, requires an on-going relationship with the parties which may allow the licensor to influence the licensee in its competitive behavior and may give rise to disputes between the licensor and the licensee over the scope and the terms and conditions of the license. The granting of a license will therefore generally not be considered appropriate where a divestiture of a business seems feasible. Where the competition concerns arise from the market position held for such a technology or such IP rights, a divestiture of the technology or the IP rights is the preferable remedy as it eliminates a lasting relationship between the merged entity and its competitors. However, the Commission may accept licensing arrangements as an alternative to divestiture where, for instance, a divestiture would impede efficient, on-going research or where a divestiture would be impossible due to the nature of the business. Such licenses will have to enable the licensee to compete effectively with the parties in a similar way as if a divestiture had taken place. They will normally be exclusive licenses and have to be without any field-of-use and any geographical restrictions on the licensee. Where there might be any uncertainty as regards the scope of the license or its terms and conditions, the parties will have to divest the underlying IP right, but may obtain a license back. If there is uncertainty that the license will actually be granted to a suitable licensee, the parties may consider proposing an up-front licensee or a fix-it-first solution according to the considerations set out below in paragraphs 55, in order to enable the Commission to conclude with the requisite degree of certainty that the remedy will be implemented.

Re-branding

38. In exceptional cases, the Commission has accepted commitments to grant an exclusive, time-limited license for a brand with the purpose of allowing the licensee to re-brand the product in the period foreseen. After the first license phase of these so-called re-branding commitments, the parties commit in a second phase to abstain from any use of the brand (blackout phase). The goal of such commitments is to allow the licensee to transfer the customers from the licensed brand to its own brand in order to create a viable competitor, without the licensed brand being permanently divested.

39. A re-branding remedy carries substantially higher risks for restoring effective competition than a divestiture, including the divestiture of a brand as there is considerable uncertainty whether the licensee will succeed in establishing itself as an active competitor in the market on the basis of the re-branded product. A re-branding remedy may be acceptable in circumstances where the brand at stake is widely used and a high proportion of its turnover is generated in markets outside those in

which competition concerns have been identified[11]. In those circumstances, a re-branding remedy has to be defined in such a way as to ensure that the granting of the license will effectively maintain competition in the market on a lasting basis and that the licensee will be an effective competitor after re- branding the products.

40. As the success of re-branding commitments is substantially linked to the viability of the licensed brand a number of preconditions have to be met for the design of such commitments. Firstly, the brand to be transferred must be well-known and one of considerable strength to guarantee both immediate viability of the licensed brand and its economic survival in the re-branding period. Secondly, part of the assets related to the production or the distribution of the products marketed under the licensed brand or the transfer of know-how may be necessary to ensure the viability of the remedy. Thirdly, the license has to be exclusive and normally comprehensive, i.e. not limited to a certain range of products within a specific market, and has to include the intellectual property rights to ensure that customers will acknowledge the familiarity of the re-branded product. The parties will not be allowed to use similar words or signs as this could undermine the effect of the re-branding exercise. Fourthly, both the license and the black-out period have to be sufficiently long, account being taken of the particularities of the case, so that the re-branding remedy is in its effects similar to a divestiture.

41. The identity of the potential licensee will be a key factor for the success of the commitment. If there is uncertainty that a number of suitable licensees are available, being able and having strong incentives to carry out the re-branding exercise, the parties may consider proposing an up-front or fix-it-first solution, in line with the considerations set out in paragraph 52 below.

1.3. Non-reacquisition clause

42. In order to maintain the structural effect of a remedy, the commitments have to foresee that the merged entity cannot subsequently acquire influence[12] over the whole or parts of the divested business. The commitments will normally have to foresee that no re-acquisition of material influence is possible for a significant period, generally of 10 years. However, the commitments can also provide for a waiver allowing the Commission to relieve the parties from this obligation if it subsequently finds that the structure of the market has changed to such an extent that the absence of influence over the divested business is no longer necessary to render the concentration compatible with the common market. Even in the absence of an explicit clause, a re-acquisition of the business would violate an implicit obligation on the parties under the commitments as this would affect the effectiveness of the remedies.

1.4. Alternative divestiture commitments: Crown Jewels

43. In certain cases, the implementation of the parties' preferred divestiture option (of a viable business solving the competition concerns) might be uncertain in view, for example, of third

[11] However, even in these conditions a divestiture of the brand may be more appropriate, especially if the resulting split in the ownership of the brand corresponds to common practice in the industry.
[12] The influence by the previous owner on the competitive behavior of the divested part of the undertaking creates a risk for hindering of the objective of the remedies.

parties' preemption rights or uncertainty as to the transferability of key contracts, intellectual property rights, or the uncertainty of finding a suitable purchaser. Nevertheless, the parties may consider that they would be able to divest this business to a suitable purchaser within a very short time period.

44. In such circumstances, the Commission cannot take the risk that, in the end, effective competition will not be maintained. Accordingly, the Commission will only accept such divestiture commitments under the following conditions: (a) absent the uncertainty, the first divestiture proposed in the commitments would consist of a viable business, and (b) the parties will have to propose a second alternative divestiture which the parties will be obliged to implement if they are not able to implement the first commitment within the given time frame for the first divestiture. Such an alternative commitment normally has to be a 'crown jewel', i.e. it should be as least as good as the first proposed divestiture in terms of creating a viable competitor once implemented, it should not involve any uncertainties as to its implementation and it should be capable of being implemented quickly in order to avoid that the overall implementation period exceeds what would normally be regarded as acceptable in the conditions of the market in question. In order to limit the risks in the interim period, it is indispensable that interim preservation and holding separate measures apply to all assets included in both divestiture alternatives. Furthermore, the commitment has to establish clear criteria and a strict timetable as to how and when the alternative divestiture obligation will become effective and the Commission will require shorter periods for its implementation.

45. If there is uncertainty as to the implementation of the divestiture due to third party rights or as to finding a suitable purchaser crown jewel commitments and up-front buyers as discussed below in paragraphs 53 address the same concerns, and the parties may therefore choose between both structures.

1.5. Transfer to a suitable purchaser

46. The intended effect of the divestiture will only be achieved if and once the business is transferred to a suitable purchaser in whose hands it will become an active competitive force in the market. The potential of a business to attract a suitable purchaser is an important element already of the Commission's assessment of the appropriateness of the proposed commitment. In order to ensure that the business is divested to a suitable purchaser, the commitments have to include criteria to define its suitability which will allow the Commission to conclude that the divestiture of the business to such a purchaser will likely remove the competition concerns identified.

(a) Suitability of a purchaser

47. The standard purchaser requirements are the following:
—the purchaser is required to be independent of and unconnected to the parties,
—the purchaser must possess the financial resources, proven relevant expertise and have the incentive and ability to maintain and develop the divested business as a viable and active competitive force in competition with the parties and other competitors, and

—the acquisition of the business by a proposed purchaser must neither be likely to create new competition problems nor give rise to a risk that the implementation of the commitments will be delayed. Therefore, the proposed purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the business to be divested.

48. The standard purchaser requirements may have to be supplemented on a case-by-case basis. An example is the requirement, where appropriate, that the purchaser should be an industrial, rather than a financial purchaser[13]. The commitments will normally contain such a clause where, due to the specific circumstances of the case, a financial buyer might not be able or might not have the incentives to develop the business as a viable and competitive force in the market even considering that it could obtain the necessary management expertise (e.g. by recruiting managers experienced in the sector at stake) and therefore the acquisition by a financial buyer would not remove the competition concerns with sufficient certainty.

(b) Identification of a suitable purchaser

49. In general, there are three ways to ensure that the business is transferred to a suitable purchaser. First, the business is transferred within a fixed time-limit after adoption of the decision to a purchaser which is approved by the Commission on the basis of the purchaser requirements. Second, in addition to the conditions set out for the first category, the commitments foresee that the parties may not complete the notified operation before having entered into a binding agreement with a purchaser for the business, approved by the Commission (so-called 'up-front-buyer'). Third, the parties identify a purchaser for the business and enter into a binding agreement already during the Commission's procedure[14] (so-called 'fix-it-first' remedy). The main difference between the two latter options is that in the case of an up-front buyer, the identity of the purchaser is not known to the Commission prior to the authorization decision.

50. The choice of the category depends on the risks involved in the case and therefore on the measures which enable the Commission to conclude with the requisite degree of certainty that the commitment will be implemented. This will depend on the nature and the scope of the business to be divested, the risks of degradation of the business in the interim period up to divestiture and any uncertainties inherent in the transfer and implementation, in particular the risks of finding a suitable purchaser.

(1) Sale of the divested business within a fixed time-limit after the decision

51. In the first category, the parties may proceed with the sale of the divested business on the basis of the purchaser requirements within a fixed time-limit after the adoption of the decision. This procedure is likely to be appropriate in the majority of case; provided that a number of purchasers can be envisaged for a viable business and that no specific issues complicate or stand in the way

[13] Certain markets may require a sufficient degree of recognition by customers for a purchaser to be able to translate the business to be divested into a competitive force on the market.

[14] The transfer of the business may be implemented after the Commission decision.

of the divestiture. Where the purchaser needs to have special qualifications, this procedure may be appropriate if there are sufficient interested potential purchasers available which fulfill the specific purchaser requirements to be included in the commitments in such cases. In these circumstances the Commission may be able to conclude that the divestiture will be implemented and that there are no reasons for the implementation of the notified concentration to be suspended after the Commission decision.

(2) Up-front buyer

52. There are cases where only the proposal of an up-front buyer will allow the Commission to conclude with the requisite degree of certainty that the business will be effectively divested to a suitable purchaser. The parties therefore have to undertake in the commitments that they are not going to complete the notified operation before having entered into a binding agreement with a purchaser for the divested business, approved by the Commission.

53. First, this concerns cases where there are considerable obstacles for a divestiture, such as third party rights, or uncertainties as to finding a suitable purchaser. In such cases, an up-front buyer will allow the Commission to conclude with the requisite degree of certainty that the commitments will be implemented, as such a commitment creates greater incentives for the parties to close the divestiture in order to be able to complete their own concentration. In these circumstances, parties may choose between proposing an up-front buyer and an alternative divestiture commitment, as set out above in paragraph 45.

54. Second, an up-front buyer may be necessary in cases which cause considerable risks of preserving the competitiveness and sale ability of the divestment business in the interim period until divestiture. This category comprises cases where the risks of a degradation of the divestment business appear to be high, in particular due to a risk of losing employees being key for the business, or where the interim risks are increased as the parties are not able to undertake the carve-out process in the interim period, but the carve-out process can only take place once a sales and purchase agreement with a purchaser is entered into. The up-front buyer provision may accelerate the transfer of the business to be divested-given the increased incentives for the parties to close the divestiture in order to be able to complete their own concentration — to such an extent that the commitments may allow the Commission to conclude with the requisite degree of certainty that those risks are limited and the divestiture will be effectively implemented.

(3) Fix-it-first remedies

55. The third category involves cases where the parties identify and enter into a legally binding agreement with a buyer outlining the essentials of the purchase during the Commission

procedure[15]. The Commission will be able to decide in the final decision whether the transfer of the divested business to the identified purchaser will remove the competition concerns. If the Commission authorizes the notified concentration, no additional Commission decision for the purchaser approval will be needed and the closing of the sale of the divested business may take place shortly afterwards.

56. The Commission welcomes fix-it-first remedies in particular in cases where the identity of the purchaser is crucial for the effectiveness of the proposed remedy. This concerns cases where, given the circumstances, only very few potential purchasers can be considered suitable, in particular as the divested business is not a viable business in itself, but its viability will only be ensured by specific assets of the purchaser, or where the purchaser needs to have specific characteristics in order for the remedy to solve the competition concerns. If the parties choose to enter into a binding agreement with a suitable purchaser during the procedure by way of a fix-it-first solution, the Commission can in those circumstances conclude with the requisite degree of certainty that the commitments will be implemented with a sale to a suitable purchaser. In these situations, an 'upfront buyer' solution containing specific requirements as to the suitability of a buyer will generally be considered equivalent and acceptable.

2. Removal of links with competitors

57. Divestiture commitments may also be used for removing links between the parties and competitors in cases where these links contribute to the competition concerns raised by the merger. The divestiture of a minority shareholding in a joint venture may be necessary in order to sever a structural link with a major competitor, or, similarly, the divestiture of a minority shareholding in a competitor.

58. Although the divestiture of such stakes is the preferable solution, the Commission may exceptionally accept the waiving of rights linked to minority stakes in a competitor where it can be excluded, given the specific circumstances of the case, that the financial gains derived from a minority shareholding in a competitor would in themselves raise competition concerns. In such circumstances, the parties have to waive all the rights linked to such a shareholding which were relevant for behavior in terms of competition, such as representations on the board, veto rights and also information rights. The Commission may only be able to accept such a severing of the link with a competitor if those rights are waived comprehensively and in a permanent way.

59. Where competition concerns result from agreements with companies supplying the same products or providing the same services, a suitable remedy may be the termination of the respective agreement, such as distribution agreements with competitors or agreements resulting in the coordination of certain commercial behavior. However, the termination of a distribution agreement alone will only remove the competition concerns if it is ensured that the product of a competitor will also be distributed in the future and exercise effective competitive pressure on the parties.

3. Other remedies

[15] Such agreements are normally conditional to the final Commission decision accepting the remedy in question.

60. Whilst being the preferred remedy, divestitures or the removal of links with competitors are not the only remedy possible to eliminate certain competition concerns. However, divestitures are the benchmark for other remedies in terms of effectiveness and efficiency. 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.

Access remedies

61. In a number of cases, the Commission has accepted remedies foreseeing the granting of access to key infrastructure, networks, key technology, including patents, know-how or other intellectual property rights, and essential inputs. Normally, the parties grant such access to third parties on a non-discriminatory and transparent basis.

62. Commitments granting access to infrastructure and networks may be submitted in order to facilitate market entry by competitors. They may be acceptable to the Commission in circumstances where it is sufficiently clear that there will be actual entry of new competitors that would eliminate any significant impediment to effective competition. Often, a sufficient reduction of entry barriers is not achieved by individual measures, but by a package comprising a combination of divestiture remedies and access commitments or a commitments package aimed at overall facilitating entry of competitors by a whole range of different measures. If those commitments actually make the entry of sufficient new competitors timely and likely, they can be considered to have a similar effect on competition in the market as a divestiture. If it cannot be concluded that the lowering of the entry barriers by the proposed commitments will likely lead to the entry of new competitors in the market, the Commission will reject such a remedies package.

63. Commitments granting non-discriminatory access to infrastructure or networks of the merging parties may also be submitted in order to ensure that competition is not significantly impeded as a result of foreclosure. In past Commission decisions, commitments have foreseen the granting of access to pipelines and to telecom or similar networks. The Commission will only accept such commitments if it can be concluded that these commitments will be effective and competitors will likely use them so that foreclosure concerns will be eliminated. In specific cases, it may be appropriate to link such a commitment with an up-front or fix-it-first provision in order to allow the Commission to conclude with the requisite degree of certainty that the commitment will be implemented.

64. Similarly, the control of key technology or IP rights may lead to concerns of foreclosure of competitors which depend on the technology or IP rights as essential input for the activities in a downstream market. This, for example, concerns cases where competition problems arise as the parties may withhold information necessary for the interoperability of different equipment. In such circumstances, commitments to grant competitors access to the necessary information may eliminate the competition concerns. Similarly, in sectors where players commonly have to cooperate by licensing patents to each other, concerns that the merged entity would no longer have the incentive to provide licenses to the same extent and under the same conditions as before may be eliminated by commitments to grant licenses on the same basis also in the future. In those cases, commitments should foresee nonexclusive licenses or the disclosure of information on a non-

exclusive basis to all third parties which depend on the IP rights or information for their activities. It has to be further ensured that the terms and conditions under which the licenses are granted do not impede the effective implementation of such a license remedy. If no clearly determined terms and conditions for the granting of licenses exist in the market at stake, the terms and conditions, including the pricing, should be clearly apparent from the commitments (e.g. by way of pricing formulas). An alternative solution may be to rely on royalty-free licenses. Furthermore, depending on the case, the granting of licenses may also transmit sensitive information to the licensor on the competitive behavior of the licensees which are active as competitors in the downstream market, e.g. by transmitting the number of licenses used in the downstream market. In such cases, in order for the remedy to be suitable, the commitments will have to exclude such confidentiality problems. Generally, as set out in the preceding paragraph, the Commission will only accept such commitments if it can be concluded that they will be effective and competitors will likely use them.

65. Access commitments are often complex in nature and necessarily include general terms for determining the terms and conditions under which access is granted. In order to render them effective, those commitments have to contain the procedural requirements necessary for monitoring them, such as the requirement of separate accounts for the infrastructure in order to allow a review of the costs involved, and suitable monitoring devices. Normally, such monitoring has to be done by the market participants themselves, e.g. by those undertakings wishing to benefit from the commitments. Measures allowing third parties themselves to enforce the commitments are in particular access to a fast dispute resolution mechanism via arbitration proceedings (together with trustees) or via arbitration proceedings involving national regulatory authorities if existing for the markets concerned. If the Commission can conclude that the mechanisms foreseen in the commitments will allow the market participants themselves to effectively enforce them in a timely manner, no permanent monitoring of the commitments by the Commission is required. In those cases, an intervention by the Commission would only be necessary in cases where the parties do not comply with the solutions found by those dispute resolution mechanisms. However, the Commission will only be able to accept such commitments where the complexity does not lead to a risk of their effectiveness from the outset and where the monitoring devices proposed ensure that those commitments will be effectively implemented and the enforcement mechanism will lead to timely results.

Change of long-term exclusive contracts

66. The change in the market structure resulting from a proposed concentration can cause existing contractual arrangements to be unfavorable to effective competition. This is in particular true for exclusive long-term supply agreements if such agreements foreclose either, up-stream, the input for competitors or, down-stream, their access to customers. Where the merged entity will have the ability and the incentives to foreclose competitors in this way, the foreclosure effects resulting from existing exclusive agreements may contribute to significantly impeding effective competition[16].

67. In such circumstances, the termination or change of existing exclusive agreements may be considered appropriate to eliminate the competition concerns. However, the available evidence must allow the Commission to clearly determine that no *de facto* exclusivity will be maintained.

[16] See Guidelines on the assessment of vertical and conglomerate concentrations

Furthermore, such change of long-term agreements will normally only be sufficient as part of a remedies package to remove the competition concerns identified.

Other non-divestiture remedies

68. As indicated above in paragraph 17, non-structural types of remedies, such as promises by the parties to abstain from certain commercial behavior (e.g. bundling products), will generally not eliminate the competition concerns resulting from horizontal overlaps. In any case, it may be difficult to achieve the required degree of effectiveness of such a remedy due to the absence of effective monitoring of its implementation, as already set out above in paragraph 13. Indeed, it may be impossible for the Commission to verify whether or not the commitment is complied with and even other market participants, such as competitors, may not be able to establish at all or with the requisite degree of certainty whether the parties meet the conditions of the commitment in practice. In addition, competitors may also not have an incentive to alert the Commission as they do not directly benefit from the commitments. Therefore, the Commission may examine other types of non-divestiture remedies, such as behavioral promises, only exceptionally in specific circumstances, such as in respect of competition concerns arising in conglomerate structures.

Time limit for non-divestiture remedies

69. The Commission may accept that non-divestiture remedies are limited in their duration. The acceptability of a time limit and the duration will depend on the individual circumstances of the case and cannot be pre-defined in a general manner in the present Notice.

4. Review Clause

70. Irrespective of the type of remedy, commitments will usually include a review clause[17]. This may allow the Commission, upon request by the parties showing good cause, to grant an extension of deadlines or, in exceptional circumstances, to waive, modify or substitute the commitments.

71. Modifying commitments by extending the deadlines is in particular relevant for divestiture commitments. Parties have to submit a request for an extension within the deadline. Where parties apply for an extension for the first divestiture period, the Commission will only accept that they have shown good cause if the parties were not able to meet the deadline for reasons outside their responsibility and if it can be expected that the parties subsequently will succeed in divesting the business within a short time-frame. Otherwise, the divestiture trustee may be better placed to undertake the divestiture and to fulfill the commitments for the parties.

72. The Commission may grant waivers or accept modifications or substitutions of the commitments only in exceptional circumstances. This will very rarely be relevant for divestiture commitments. As divestiture commitments have to be implemented within a short time-frame after the decision, it is very unlikely that changes of market circumstances will have occurred in such a short time-frame and the Commission will normally not accept any modifications under the general

[17] However, the review clause is of particular relevance for access remedies, which systematically should include such a clause; see below paragraph 73.

review clause. For specific situations the commitments normally foresee more targeted review clauses[18].

73. A waiver, modification or substitution of commitments may be more relevant for non-divestiture commitments, such as access commitments, which may be on-going for a number of years and for which not all contingencies can be predicted at the time of the adoption of the Commission decision. Exceptional circumstances justifying a waiver, modification or substitution may, first, be accepted for such commitments if parties show that market circumstances have changed significantly and on a permanent basis. For showing this, a sufficient long time-span, normally at least several years, between the Commission decision and a request by the parties is required. Second, exceptional circumstances may also be present if the parties can show that the experience gained in the application of the remedy demonstrates that the objective pursued with the remedy will be better achieved if modalities of the commitment are changed. For any waiver, modification or substitution of commitments, the Commission will also take into account the view of third parties and the impact a modification may have on the position of third parties and thereby on the overall effectiveness of the remedy. In this regard, the Commission will also consider whether modifications affect the right already acquired by third parties after implementation of the remedy.

74. If at the time of the adoption of the decision the Commission for particular reasons cannot anticipate all contingencies in relation to the implementation of such commitments, it may also be appropriate for the parties to include a clause in the commitments, allowing the Commission to trigger a limited modification to the commitments. Such modifications may be necessary if the original commitments do not achieve the envisaged results set out in those commitments, and therefore do not effectively remove the competition concerns. Procedurally, the parties may be obliged in such cases to propose a change to the commitments in order to achieve the result defined in those commitments, or the Commission may itself, after hearing the parties, modify the conditions and obligations to this end. This type of clause will typically be limited to cases where specific modalities risk jeopardizing effective implementation of the commitments.

75. The Commission may, upon request, adopt a formal decision for any waiver, modification or substitution of commitments or simply take note of satisfactory amendments of the remedy by the parties, where such amendments improve the effectiveness of the remedy and result in legally binding obligations of the parties, e.g. by contractual arrangements. A change of the commitments will normally only be effective *ex nunc*. Consequently, a modification of the commitments will not heal retroactively any breach of the commitments which has been committed before the time of the modification. The Commission may therefore, where appropriate, further pursue a breach under Articles 47 and 48 of the Law.

[18] As mentioned in paragraph 29, the Commission may approve a purchaser without some of the assets or personnel foreseen if this does not affect the competitiveness and viability of the divested business. Similarly, the non-requisition clause, as explained in paragraph 42, prohibits the re-acquisition of control over the assets divested only if the Commission has not previously found that that the market structure has changed to such an extent that the divestiture is no longer necessary.

IV. **ASPECTS OF PROCEDURE FOR SUBMISSION OF COMMITMENTS**

1. Phase I

76. Pursuant to Article 20 paragraph (2) of the Law the Commission may declare a concentration compatible with the provisions of the Law also before the initiation of proceedings, where it is confident that following modification a notified concentration no longer raises serious doubts within the meaning of Article 20 paragraph (1) item 3).

77. Parties can submit proposals for commitments to the Commission on an informal basis, even before notification. They should submit the commitments to the Commission timely, in order Commission to have enough time to analyze the same. The Commission informs the parties about its serious doubts in due time before that deadline, so the parties have sufficient time to submit proposals for commitments. Where the parties submit commitments, the deadline for the Commission's decision pursuant to Article 20 paragraph (1) of the Law is extended from 25 to 35 working days.

78. In order to form the basis of a decision pursuant to Article 20 paragraph (2), proposals for commitments must meet the following requirements:
(a) They shall fully specify the substantive and implementing commitments entered into by the parties;
(b) They shall be signed by a person duly authorized to do so;
(c) They shall be accompanied by the information about the submitted commitments (as explained above in paragraph 7); and
(d) They shall be accompanied by a non-confidential version of the commitments. The non-confidential version of the commitments must allow third parties to fully assess the workability and the effectiveness of the proposed remedies to remove the competition concerns.

79. Proposals submitted by the parties in accordance with these requirements will be assessed by the Commission. The Commission will consult third parties and it may also, if appropriate, consult the competent national regulatory authorities. In addition, in cases involving a geographic market that is wider than the Republic of Macedonia or where, for reasons related to the viability of the business, the scope of the business to be divested is wider than the territory of Republic of Macedonia, the non-confidential version of the proposed remedies may also be discussed with competition authorities within the framework of the Community's bilateral cooperation agreements with these countries.

80. Commitments in phase I can only be accepted where the competition problem is readily identifiable and can easily be remedies. The competition problem therefore needs to be so straightforward and the remedies so clear-cut that it is not necessary to enter into an in-depth investigation and that the commitments are sufficient to clearly rule out ‘serious doubts’[19] within the meaning of Article 20 paragraph (1) item 3) of the Law. Where the assessment confirms that the proposed commitments remove the grounds for serious doubts on this basis, the Commission clears the merger in phase I.

81. Due to the time-constraints in phase I, it is particularly important for the parties to submit in a timely manner to the Commission the information required in the Regulation for the criteria for properly assess of the concentrations, the content and workability of the commitments and their suitability to maintain conditions of effective competition in the common market on a permanent basis. If the parties do not comply with the obligation in the Regulation, the Commission may not be able to conclude that the proposed commitments will remove the grounds for serious doubts.

[19] Serious doubts exists when concentration for which the notification was submitted can result in a significant impede of effective competition on the market or on its essential part, particularly as a result of creation or straightening of a dominant position.

82. Where the assessment shows that the commitments offered are not sufficient to remove the competition concerns raised by the concentration, the parties will be informed accordingly. Given that phase I remedies are designed to provide a clear-cut answer to a readily identifiable competition concern, only limited modifications can be accepted to the proposed commitments. Such modifications, presented as an immediate response to the result of the consultations, may include clarifications, refinements and/or other improvements designed to ensure that the commitments are workable and effective. However, such modifications may only be accepted in circumstances where it is ensured that the Commission can carry out a proper assessment of those commitments.

83. If the Commission's final assessment of a case shows that there are no competition concerns in one or more markets, the parties will be informed accordingly and may withdraw the unnecessary commitments for such markets. If the parties do not withdraw them, the Commission will normally ignore them in the decision. In any event, such commitment proposals do not constitute a condition for clearance.

84. Where the parties are informed that the Commission intends to maintain in its final decision that the transaction raises competition concerns for a specific market, it is for the parties to propose commitments. The Commission is not in a position to impose unilaterally any conditions to an authorization decision, but only on the basis of the parties' commitments[20]. However, the Commission will review whether the commitments submitted by the parties are proportionate to the competition problem when assessing whether to attach them as conditions or obligations to its final decision. Nevertheless, it has to be stressed that, in a commitments proposal, all those elements which are required to fulfill the basic conditions for acceptable commitments as set out above in paragraphs 9*et seq*. will be considered necessary. This paragraph as well as the previous one also applies to commitments in phase II.

85. If the Commission concludes that the commitments offered by the parties do not remove the serious doubts, it will issue an Article 20 paragraph (1) item 3) decision and open proceedings.

2. Phase II

86. Pursuant to Article 22 paragraph (2) of the Law, the Commission must declare a concentration compatible with the common market, where following modification a notified concentration does no longer significantly impede effective competition within the meaning of Article 17 paragraph (4) of the Law.

87. Commitments proposed to the Commission pursuant to Article 22 paragraph (2) must be submitted to the Commission within not more than 65 working days from the day on which proceedings were initiated, pursuant to Article 20 paragraph 1 item 3 of the Law. Where the deadlines for the final decision have been extended according to Article 23 paragraph (3) of the

[20] See above paragraph 6

Law, also the deadline for remedies is automatically extended by the same number of days. Only in exceptional circumstances, the Commission may accept that commitments are submitted for the first time after the expiry of this period. The request by the parties for an extension of the deadline must be received within the period and has to set forth the exceptional circumstances which, according to the parties, justify it. In addition to the existence of exceptional circumstances, an extension is only possible where there is sufficient time to make a proper assessment of the proposal by the Commission and to allow adequate consultation with third parties.

88. The Commission is available to discuss suitable commitments well in advance of the end of the 65 working day period. The parties are encouraged to submit draft proposals dealing with both substantive and implementation aspects which are necessary to ensure that the commitments are fully workable.

89. In order to meet the requirements for a decision pursuant to Article 22 paragraph (2), commitments must meet the following requirements:

(a) They shall address all competition concerns raised by the concentration and shall fully specify the substantive and implementing commitments entered into by the parties;
(b) They shall be signed by a person duly authorized to do so;
(c) They shall by accompanied by the information of the offered commitments (as explained above in paragraph 7); and
(d) They shall be accompanied by a non-confidential version of the commitments, fulfilling the requirements set out above in paragraph 78.

90. Proposals submitted by the parties in accordance with these requirements will be assessed by the Commission. If the assessment confirms that the proposed commitments remove the serious doubts (if no Statement of Objection has been issued yet by the Commission) or the competition concerns raised in the Statement of Objections, following the consultations as set out in paragraph 79 above, the Commission will adopt a conditional clearance decision.

91. Conversely, where the assessment leads to the conclusion that the proposed commitments appear not to be sufficient to resolve the competition concerns raised by the concentration, the parties will be informed accordingly.

92. Where parties subsequently modify the proposed commitments after the deadline of 65 working days, the Commission will only accept these modified commitments where it can clearly determine — on the basis of its assessment of information already received in the course of the investigation — that such commitments, once implemented, fully and unambiguously resolve the competition concerns identified and where there is sufficient time to allow for an adequate assessment by the Commission and for proper consultation with third parties. The Commission will normally reject modified commitments which do not fulfill those conditions.

V. **REQUIREMENTS FOR IMPLEMENTATION OF COMMITMENTS**

93. Commitments are offered as a means of securing a clearance, with the implementation normally taking place after the decision. Commitments therefore require safeguards to ensure their effective and timely implementation. These implementing provisions will normally form part of the commitments entered into by the parties *vis-à-vis* the Commission.

94. In the following, detailed guidance is given on the implementation of divestiture commitments, as the most typical commitment. Afterwards, some aspects of the implementation of other types of commitments are discussed.

1. **Divestiture process**

95. The divestiture has to be completed within a fixed time period agreed between the parties and the Commission. The total time period is divided into a period for entering into a final agreement and a further period for the closing, the transfer of legal title, of the transaction. The period for entering into a binding agreement is further normally divided into a first period in which the parties can look for a suitable purchaser (the ‘first divestiture period’) and, if the parties do not succeed to divest the business, a second period in which a divestiture trustee obtains the mandate to divest the business at no minimum price (the ‘trustee divestiture period’).

96. Short divestiture periods contribute largely to the success of the divestiture, as otherwise, the business to be divested will be exposed to an extended period of uncertainty. The time periods should therefore be as short as feasible. The Commission will normally consider a period of around six months for the first divestiture period and an additional period of three months for the trustee divestiture period as appropriate. A period of further three months is normally foreseen for closing the transaction. These periods may be modified on a case-by-case basis. In particular, they may have to be shortened if there is a high risk of degradation of the business' viability in the interim period.

97. The deadline for the divestiture shall normally start on the day of the adoption of the Commission decision. An exception might be justified for a transaction via public bid where the parties commit to divest a business belonging to the target. Where in such circumstances the parties cannot prepare for the divestiture of the target's business before closing of the notified concentration, the Commission might accept that the periods for such a divestiture only start with the date of closing the notified transaction. Similarly, such a solution may be considered if the date of closing of the concentration is not under the control of the parties as it, e.g. requires state approval[21]. In return, it may be appropriate to shorten the deadlines in order to reduce the time of uncertainty for the business to be divested.

98. Whereas for up-front buyer solutions the above-described procedure applies, the procedure will be different for fix-it-first solutions. In general, a binding agreement with a purchaser will already be entered into during the procedure so that after the decision only a further period for the closing of the transaction has to be foreseen. If before the decision only a framework agreement has been concluded with the purchaser, the periods to be foreseen for entering into a full agreement and the closing afterwards will have to be decided on a case-by-case basis.

2. Approval of the purchaser and of the sale and purchase agreement

99. In order to ensure the effectiveness of the commitment, the sale to a proposed purchaser is subject to prior approval by the Commission. When the parties (or the divestiture trustee) have reached a final agreement with a purchaser, they have to submit a reasoned and documented proposal to the Commission. The parties or the divestiture trustee, as the case may be, will be required to demonstrate to the satisfaction of the Commission that the proposed purchaser meets

[21] However, also in those circumstances, other provisions in the commitments, in particular the provisions establishing the safeguards in the interim period should start running on the date of the adoption of the decision.

the purchaser requirements, and that the business is divested in a manner consistent with the Commission's decision and the commitments. Where the commitments allow that different purchasers are being proposed for different parts of the package, the Commission will assess whether each individual proposed purchaser is acceptable and that the total package solves the competition concern.

100. In assessing any proposed purchaser, the Commission will interpret the purchaser requirements in the light of the purpose of the commitments, to immediately maintain effective competition in the market where competition concerns had been found, and of the market circumstances as set out in the decision. Generally, the basis for the Commission's assessment of the purchaser requirements will be the submission of the parties, the assessment of the monitoring trustee and, in particular, discussions with the proposed purchaser and its business plan. The Commission will further analyze whether the underlying assumptions of the purchaser appear plausible according to the market circumstances.

101. The requirement that the purchaser has to have the necessary financial resources extends in particular to the way the acquisition is financed by the proposed purchaser. The Commission will normally not accept any financing of the divestiture by the seller, and, in particular, any seller financing if this were to give the seller a share in the profits of the divested business in the future.

102. In assessing whether the proposed purchaser threatens to create competition problems, the Commission will undertake a *prima facie* assessment in the light of the information available to the Commission in the purchaser approval process. Where the purchase results in a concentration that has obligation for notification, this new operation will have to be notified under the Law and cleared under normal procedures. In addition, the proposed purchaser must be expected to obtain all other necessary approvals from the relevant regulatory authorities. Where it can be foreseen, in the light of the information available to the Commission, that difficulties in obtaining merger control clearance or other approvals may unduly delay the timely implementation of the commitment, it will be considered that the proposed purchaser does not meet the purchaser requirements. Otherwise, the competition concerns identified by the Commission would not be removed in the appropriate time-frame.

103. The requirement for an approval by the Commission does usually not only extend to the identity of the purchaser, but also to the sale and purchase agreement and any other agreement entered into between the parties and the proposed purchaser, including transitory agreements. The Commission will verify whether the divestiture according to the agreements is in line with the commitments.[22]

104. The Commission will communicate its view as to the suitability of the proposed purchaser to the parties. If the Commission concludes that the proposed purchaser does not meet the purchaser requirements, it will adopt a decision that the proposed purchaser is not a purchaser under the commitments. If the Commission concludes that the sale and purchase agreement (or any ancillary

[22] As discussed above, the parties may apply to the Commission to approve the divestiture of the business to the proposed purchaser without one or more assets or parts of the personnel if this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the resources of the proposed purchaser.

agreements) does not foresee a divestiture in line with the commitments, the Commission will communicate this to the parties without necessarily rejecting the purchaser as such. If the Commission concludes that the purchaser is suitable under the commitments and that the contracts agree a divestiture in line with the commitments, the Commission will approve the divestiture to the proposed purchaser.[23] The Commission will issue the necessary approvals as expeditiously as possible.

3. Obligations of the parties in the interim period

105. Parties have to fulfill certain obligations in the interim period (as defined above in paragraph 35). The following should normally be included in the commitments in this respect: (i) safeguards for the interim preservation of the viability to the business; (ii) the necessary steps for a carve-out process, if relevant; and (iii) the necessary steps to prepare the divestiture of the business.

Interim preservation of the divested business

106. It is the parties' responsibility to reduce to the minimum any possible risk of loss of competitive potential of the business to be divested resulting from the uncertainties inherent in the transfer of a business. Up to the transfer of the business to the purchaser, the Commission will require the parties to offer commitments to maintain the independence, economic viability, marketability and competitiveness of the business. Only such commitments will allow the Commission to conclude with the requisite degree of certainty that the divestiture of the business will be implemented in the way as proposed by the parties in the commitments.

107. Generally, these commitments should be designed to keep the business separate from the business retained by the parties, and to ensure that it is managed as a distinct and saleable business in its best interest, with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by the parties.

108. The parties will be required to ensure that all assets of the business are maintained, pursuant to good business practice and in the ordinary course of business, and that no acts which might have a significant adverse impact on the business are carried out. This relates in particular to the maintenance of fixed assets, know-how or commercial information of a confidential or proprietary nature, the customer base and the technical and commercial competence of the employees. Furthermore, the parties must maintain the business in the same conditions as before the concentration, in particular provide sufficient resources, such as capital or a line of credit, on the basis and continuation of existing business plans, the same administrative and management functions, or other factors relevant for maintaining competition in the specific sector. The commitments also have to foresee that the parties should take all reasonable steps, including appropriate incentive schemes, to encourage all key personnel to remain with the business, and that the parties may not solicit or move any personnel to their remaining businesses.

[23] Depending on the circumstances of the divestiture, the parties may also have to ensure, for example through appropriate provisions in the purchase agreement, that the purchaser will maintain the divested business as a competitive force in the market and will not sell on the business within a short time-span.

109. The parties should further hold the business separate from its retained business and ensure that the key personnel of the business to be divested do not have any involvement into the retained businesses and *vice versa*. If the business to be divested is in corporate form and a strict separation of the corporate structure appears necessary, the parties' rights as shareholders, in particular the voting rights, should be exercised by the monitoring trustee which should also have the power to replace the board members appointed on behalf of the parties. In relation to information, the parties must ring-fence the business to be divested and take all necessary measures to ensure that the parties do not obtain any business secrets or other confidential information. Any documents or information confidential to the business obtained by the parties before adoption of the decision have to be returned to the business or destroyed.

110. The parties are further generally required to appoint a hold-separate manager with the necessary expertise, who will be responsible for the management of the business and the implementation of the hold-separate and ring-fencing obligations. The hold-separate manager should act under the supervision of the monitoring trustee who may issue instructions to the hold-separate manager. The commitments have to provide that the appointment should take place immediately after the adoption of the decision and even before the parties may close the notified concentration. Whereas the parties can appoint the hold-separate manager on their own, the commitments have to foresee that the monitoring trustee is able to remove the hold-separate manager if s/he does not act in line with the commitments or endangers their timely and proper implementation. A new appointment of a hold separate manager afterwards will be subject to the approval of the monitoring trustee.

Steps for a carve-out

111. As outlined above in paragraph 34, the Commission may accept in appropriate circumstances that the divestiture of a business which needs to be carved out from the remaining businesses of the parties can be considered a suitable remedy. Nevertheless, also in such circumstances only the transfer of a viable business to a purchaser which can maintain and develop this business as an active competitive force in the market will remove the Commission's competition concerns. Therefore, the parties have to commit to a result-oriented obligation to carry out, in the interim period, a carve-out of the assets that contribute to the divested business. The result has to be that a viable and competitive business, which is stand-alone and separate from the other businesses of the parties, can be transferred to a suitable purchaser at the end of the interim period. The parties will have to bear the costs and risks of such a carve-out in the interim period.

112. The carve-out will need to be carried out by the parties under the supervision of the trustee and in cooperation with the hold-separate manager. First, those assets and parts of the personnel which are shared between the business to be divested and remaining businesses of the parties have to be allocated to the business to the extent that this is not excluded in the commitments.[24]The allocation of the assets and the personnel will be monitored and has to be approved by the monitoring trustee. Second, the carve-out process may also require a replication for the business of assets held or functions performed by other parts of the parties' businesses if this is necessary to ensure the viability and competitiveness of the business to be divested. An example is the

[24] See paragraph 25 above for the question how shared assets have to be dealt with in commitments.

termination of the business' participation in a central information technology network and an installation of a separate IT system for the business. In general, the major steps of such a carve-out process and the functions to be replicated should be decided on a case-by-case basis and described in the commitments.

113. At the same time, it has to be ensured that the viability of the business to be divested is not affected by such measures. In the interim period, the parties therefore have to maintain the use of shared assets by and to continue to provide services to the business to the same extent as in the past as long as the business is not yet viable on a stand-alone basis.

Specific obligations of the parties concerning the divestiture process

114. For the divestiture process, the commitments should foresee that potential purchasers can carry out a due diligence exercise and obtain, dependent on the stage of the procedure, sufficient information concerning the divested business to allow the purchaser to fully assess the value, scope and commercial potential of the business, and have direct access to its personnel. The parties further have to submit periodic reports on potential purchasers and developments in the negotiations. The divestiture will only be implemented once the transaction is closed, that is the legal title has passed to the approved purchaser, and the assets have been actually transferred. At the end of the process, the parties will have to send a final report, confirming the closing and the transfer of the assets.

4. The monitoring and the divestiture trustee

Role of the monitoring trustee

115. As the Commission cannot, on a daily basis, be directly involved in overseeing the implementation of the commitments, the parties have to propose the appointment of a trustee to oversee the parties' compliance with the commitments, in particular with their obligations in the interim period and the divestiture process (the so-called ‘monitoring trustee’). Thereby, the parties guarantee the effectiveness of the commitments submitted by them and allow the Commission to ensure that the modification of the notified concentration, as proposed by the parties, will be carried out with the requisite degree of certainty.

116. The monitoring trustee will carry out its tasks under the supervision of the Commission and is to be considered the Commission's ‘eyes and ears’. It shall be the guardian that the business is managed and kept properly on a stand-alone basis in the interim period. The Commission may therefore give any orders and instructions to the monitoring trustee in order to ensure compliance with the commitments, and the trustee may propose to the parties any measures it considers necessary for carrying out its tasks. The parties, however, may not issue any instructions to the trustee without approval by the Commission.

117. The Commitments will generally set out the tasks of the monitoring trustee. Its duties and obligations will be specified in detail in the trustee mandate, to be concluded between the parties and the trustee, and its tasks shall be further detailed in a work-plan. The tasks of the monitoring trustee will normally start immediately after the adoption of the Commission decision and last until the legal and actual transfer of the business to the approved purchaser. Five main, non-exhaustive tasks can be distinguished which the monitoring trustee should carry out under the supervision of the Commission:

— first, the monitoring trustee will be called upon to oversee the safeguards for the business to be divested in the interim period,

— second, in carve-out cases, the monitoring trustee has to monitor the splitting of assets and the allocation of the personnel between the divested business and retained businesses by the parties as well as the replication of assets and functions in the business previously provided by the parties,

— third, the monitoring trustee shall be responsible for overseeing the parties' efforts to find a potential purchaser and to transfer the business. In general, it shall review the progress of the divestiture process and the potential purchasers included in the process. It shall verify that potential purchasers receive sufficient information relating to the business — in particular by reviewing the information memorandum (if available), the data room or the due diligence process. Once a purchaser is proposed, the monitoring trustee shall submit to the Commission a reasoned opinion as to whether the proposed purchaser fulfils the purchaser requirements in the commitments and whether the business is sold in a manner consistent with the commitments. At the end of the process, the monitoring trustee has to oversee the legal and actual transfer of the business to the purchaser and make a final report, confirming the transfer,

— fourth, the monitoring trustee shall act as a contact point for any requests by third parties, in particular potential purchasers, in relation to the commitments. The parties shall inform interested third parties of the identity and the tasks of the monitoring trustee, including any potential purchasers. In case of disagreement between the parties and third parties in relation to matters dealt with by the commitments, the monitoring trustee shall discuss those matters with both sides and report to the Commission. In order to be able to carry out its role, the monitoring trustee will keep confidential any business secrets of the parties and third parties,

— fifth, the monitoring trustee shall report on these issues to the Commission in periodic compliance reports and shall also submit additional reports upon request by the Commission.

118. The commitments will also comprehensively set out the monitoring trustee's needs for support by and cooperation with the parties; the Commission will supervise the relationship between the parties and the trustee also in this respect. In order to fulfill its tasks, the trustee shall have access to books and records of the parties and of the divested business, insofar and as long as this is relevant for the implementation of the commitments, may ask for managerial and administrative support by the parties, shall be informed of potential purchasers and all developments in the divestiture process, and shall be provided with the information submitted to potential purchasers. In addition, the parties shall indemnify the trustee and allow the trustee to appoint advisors, if appropriate for the fulfillment of its tasks under the commitments. The commitments will also enable the Commission to share the parties' information with the monitoring trustee in order to allow the monitoring trustee to fulfill its tasks. The monitoring trustee will be bound to keep this information confidential.

Role of the divestiture trustee

119. As for the monitoring trustee, the parties have to propose to appoint a divestiture trustee in order to make the commitments submitted by them effective and allow the Commission to ensure that the modification of the notified concentration, as proposed by them, will be carried out. If the parties do not succeed in finding a suitable purchaser within the first divestiture period, the divestiture trustee will be given an irrevocable and exclusive mandate to dispose of the business, under the supervision of the Commission, within a specific deadline at no minimum price to a suitable purchaser. The commitments shall allow the divestiture trustee to include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale, in particular customary representations, warranties and indemnities. The sale of the business by the divestiture trustee is in the same way subject to the prior approval of the Commission as the sale by the parties.

120. The commitments will set out that the parties shall support and inform the divestiture trustee and cooperate with the trustee in the same way as this is foreseen for the monitoring trustee. For the divestiture, the parties have to grant to the divestiture trustee comprehensive powers of attorney, covering all stages of the divestiture.

Approval of the trustee and the trustee mandate

121. Depending on the commitment, the monitoring trustee may or may not be the same person or institution as the divestiture trustee. The parties shall propose one or several potential trustees to the Commission, including the full terms of the mandate and an outline of a work-plan. It is of the essence that the monitoring trustee is in place immediately after the Commission decision. Therefore, the parties should propose a suitable trustee immediately after the Commission decision and the commitments normally have to foresee that the notified concentration can only be implemented once the monitoring trustee is appointed, after being approved by the Commission[25]. The situation is different for the divestiture trustee who should be appointed well ahead of the end of the first divestiture period[26] so that its mandate can take effect with the beginning of the trustee divestiture period.

122. Both types of trustees will be appointed by the parties on the basis of a trustee mandate, entered into by the parties and the trustee. The appointment and the mandate will be subject to the approval by the Commission which will have discretion in the selection of the trustee and will assess whether the proposed candidate is suitable for the tasks in the specific case. The trustee shall be independent of the parties, possess the necessary qualifications to carry out its mandate and shall not be, or become, exposed to a conflict of interests.

123. The Commission will assess the necessary qualifications in the light of the requirements of the specific case, including the geographic area and the sector concerned. Auditing firms and other consulting firms may be particularly well placed to fulfill the tasks of a monitoring trustee.

[25] Normally, the commitments should foresee that a monitoring trustee is proposed within eight days of the date when the decision is effective.

[26] The Commission will normally require an appointment at least one month ahead of the end of the first divestiture period.

Individuals who have worked in the specific industry may also be suitable candidates for performing such a role if they have the necessary resources available to deal with the tasks at stake. Investment banks seem to be particularly suitable for the role of a divestiture trustee. The independence of the trustee is crucial in order to enable the trustee to properly fulfill its role of monitoring the parties' compliance for the Commission and to ensure its credibility *vis-à-vis* third parties. In particular, the Commission will not accept persons or institutions as trustees which are at the same time the parties' auditors or their investment advisors in the divestiture. However, no conflicts of interests 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. It is the parties' responsibility to supply the Commission with adequate information for it to verify that the trustee fulfils the requirements. The appointment of the trustee after approval by the parties is irrevocable unless the trustee is replaced with the approval of or upon request by the Commission.

124. The trustee mandate shall define the tasks as specified in the commitments further and shall include all provisions necessary to enable the trustee to fulfill its tasks under the commitments accepted by the Commission. The parties are responsible for remuneration of the trustee under the mandate, and the remuneration structure must be such as to not impede the trustee's independence and effectiveness in fulfilling the mandate. The Commission will approve a trustee only together with a suitable mandate. In appropriate cases, it may publish the identity of the trustee and a summary of its tasks.

125. When the specific commitments with which the trustee has been entrusted have been implemented — that is to say, when legal title for the business to be divested has passed, the assets have been actually transferred to the purchaser and specific arrangements which may continue post-divestiture have been fulfilled — the mandate will provide for the trustee to request the Commission for a discharge from further responsibilities. Even after the discharge has been given, it may be necessary for the Commission to require the reappointment of the trustee on the basis of the commitments, if it appears subsequently to the Commission that the relevant commitments might not have been fully and properly implemented.

5. Obligations of the parties following implementation of the divestiture

126. The Commitments also have to foresee that for a period of 10 years after the adoption of the decision accepting the commitments the Commission may request information from the parties. This will allow the Commission to monitor the effective implementation of the remedy.

6. Implementation of other commitments

127. Many of the principles discussed above for the implementation of divestiture commitments can equally be applied to other types of commitments if those commitments need to be implemented subsequent to the Commission decision. For example, if it is foreseen that the beneficiary of a license needs to be approved by the Commission, the considerations regarding the purchaser approval can be applied. Given the wide range of non-divestiture commitments, no general and comprehensive requirements for the implementation of non-divestiture commitments can be set out.

128. However, given the long duration of non-divestiture commitments and their frequent complexity, they often require a very high monitoring effort and specific monitoring tools in order to allow the Commission to conclude that they will effectively be implemented. Therefore, the Commission will often require the involvement of a trustee to oversee the implementation of such commitments and the establishment of a fast-track arbitration procedure in order to provide for a dispute resolution mechanism and to render the commitments enforceable by the market participants themselves. In past cases, the Commission has often required both the appointment of a trustee and an arbitration clause. In those circumstances, the trustee will oversee the implementation of the commitments, but will also be able to assist in arbitral proceedings to the effect that they may be finalized in a short period of time.