

# REMEDIES IMPLEMENTATION RISKS THE TRUSTEE PERSPECTIVE

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# Role of the Monitoring Trustee

**Overall objective is to ensure the timely and effective implementation of the commitments**

## **Monitoring Hold Separate Commitment**

- Monitor implementation of carve-out, hold-separate and ring-fencing obligations
- Oversee ongoing management of the Divestment Business and supervise HSM
- Avoid delays and compliance issues

## **Monitoring Divestiture Commitment**

- Monitor sales process and report on potential purchasers
- Review the suitability of the proposed purchaser
- Review the consistency of the transaction documents with the Commitments

## **General Duties**

Advise the client and foresee potential issues

Act as intermediary between the Commission and the Parties

Specific tasks and responsibilities as identified and outlined in the commitments text and the Trustee Mandate

# Three types of risk in divestiture remedies

- **Composition risks** — these are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market.
- **Purchaser risks** — these are risks that a suitable purchaser is not available or that the merging parties will dispose to a weak or otherwise inappropriate purchaser.
- **Asset risks** — these are risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture, for example through loss of customers or key members of staff.

Classification adopted in 2008 by UK Competition Commission

# Top-5 issues in scoping the divestment business

- 1.Up-/downstream links:** failure of the remedy to deal with the purchaser's continuing vertical dependence on the parties, e.g. for critical inputs, after sales services, or other critical assets.
- 2.Below critical size:** insufficient considerations of critical size issues occurred where the divested business was too small to be an effective competitor in anybody's hands (except, perhaps, in the hands of some large competitors who, though, would create new competition concerns).
- 3.Geographic limitations:** refer to the damaging effect of a geographical split in the scope of the remedy, e.g. where a business is divested only in one national market but suffers from a brand-split where a neighbouring and closely related market is not included.
- 4.Product cycle effects:** insufficient consideration of projected demand shifts away from the divested product, which may e.g. be a mature but declining business, towards the newer products retained by the merging parties, which have greater strategic importance and which have better future business prospects.
- 5.Unresolved IPR issues:** insufficient consideration of the IPRs needed to support the divested business which are not included in the divestiture package, or the subsequent transfer of which may be encumbered by third party rights.

*"...the assessment of a divested business typically required important insights to the relevant business, going much beyond the initial competition assessment."* (Alex Kopke (2005), Competition Policy Newsletter 3)

# The challenges of carve-outs

It is common for businesses not to be structured along the lines of relevant markets as identified in antitrust investigations.

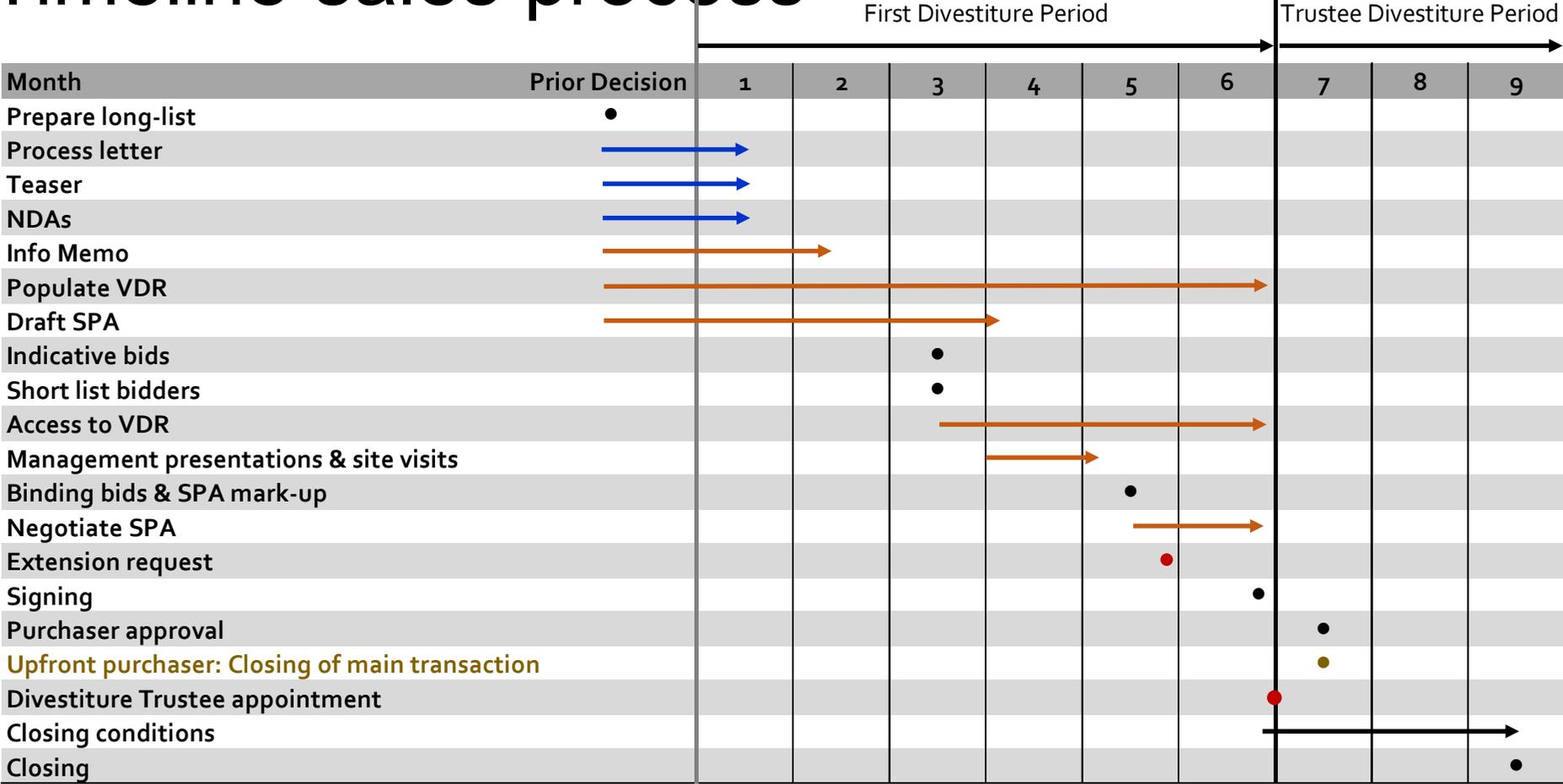
As a consequence, either of the following two carve-out scenarios may occur:

- A divestment business may need to be carved-out of a larger business (covering more than the relevant market where competition concerns exist)
- A part of the business held by the entities comprising the divestment business need to be transferred (back) to the retained business (“reverse carve-out”)

As part of its 2005 remedies study, the European Commission noted the pitfalls with carve-outs

**In our experience, carve-outs require significant resources and a detailed understanding of the divestment business.**

# Timeline sales process



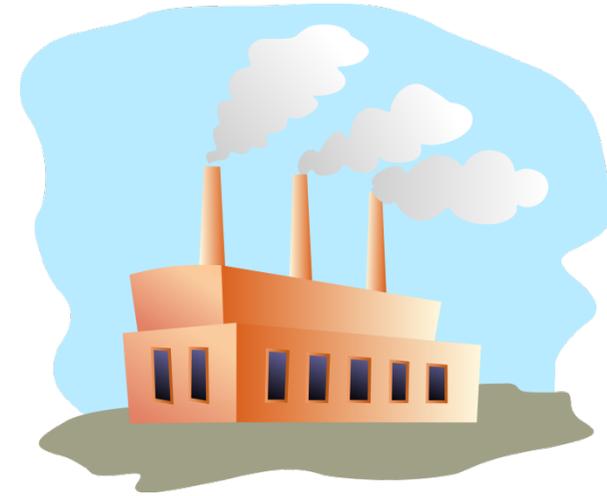
- Timeline and process driven by the Parties
- First Divestiture Period is typically 6 months, Trustee Divestiture Period typically three months

# Key challenges during the sales process

- Due diligence
- Requirements to inform Commission
- Purchaser requirements
- Upfront purchaser/Fix it first
- Review clause: extensions
- Divestiture Trustee

# Viability

- The Commitments require that the Parties should not act in a manner **that may have a significant adverse impact** on the value, management or competitiveness of the Divestment Business nor alter its nature, strategy etc.
- The Parties must make available **sufficient resources** for the development of the Divestment Business, e.g. support or transitional services, supply of inputs
- The key to ensure the continued success and maintenance of viability of the business is to appoint **a strong Hold Separate Manager (HSM)** who knows the business



Profit and Loss Account for the x months ended on DD/MM/YYYY			
	€	€	€
Sales Income (57 bowls @ €17,50)			997,50
Less cost of Goods Sold			
Opening Stock	0,00		
(plus) cost of production 60 units:			
Materials	315,00	615,00	
Labour	300,00		
(less) closing stock: 3 Units			
Materials	15,75		
Labour	15,00	30,75	
Cost of Goods Sold			584,25
<b>Gross Profit</b>			<b>413,25</b>
Expenses			
Admin Wages			150,00
Printing, Production			35,00
Telephone			25,00
Travel Costs			18,00
Total Expenses			228,00
<b>Net Profit</b>			<b>185,25</b>

# How the Trustee can help to mitigate risks?

## Risks

Composition

Purchaser

Assets

## Resolutions

Communication

Advice

Mediation

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## Do's and don'ts of the Trustee Business



## Do:

- Kick-off the sales process in a timely manner
- Vet the interested parties and ensure that the Purchaser is suitable
- Communicate with the Trustee and the Commission as openly and as early as possible
- Appoint a knowledgeable and capable HSM to ensure that the Divestment Business is in a safe pair of hands
- Plan IT separation and complex carve-outs well in advance of the Commission Decision and ensure their timely implementation

## Don'ts:

- Take any action which would compromise the viability of the Divestment Business or favour the competing retained business
- Ignore the advice of the Commission on contentious issues
- Select an unsuitable buyer
- Hinder the due diligence efforts of the interested parties

# Further reading

- **Merger Remedies Study, DG Comp, European Commission October 2005**  
[http://ec.europa.eu/competition/mergers/legislation/remedies\\_study.pdf](http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf)  
**Co-authored by Justin Menezes**
- **EC Best Practice Guidelines, 5 December 2013**
- **In Divestitures We Trust, 2014**  
[http://competitionrx.com/wp-content/uploads/2015/02/2014\\_Menezes\\_Gaved-In-divestitures-we-trust.pdf](http://competitionrx.com/wp-content/uploads/2015/02/2014_Menezes_Gaved-In-divestitures-we-trust.pdf)  
**Justin Menezes and Matthew Gaved**
- **Monitoring Compliance with Merger Remedies – the Role of the Monitoring Trustee**  
[http://competitionrx.com/wp-content/uploads/2015/02/2010\\_Brueckner\\_Hoehn-Role-of-Monitoring-Trustee\\_CLI.pdf](http://competitionrx.com/wp-content/uploads/2015/02/2010_Brueckner_Hoehn-Role-of-Monitoring-Trustee_CLI.pdf)  
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