

Explanatory note

Best Practice Guidelines:

The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the EU Merger Regulation

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Introduction

1. The Merger Regulation¹ provides that the Commission can declare a concentration compatible with the internal market following modifications, also referred to as commitments, offered by one or more of the merging parties (the "*Parties*"). The parties submitting the commitments are referred to as the "*Committing Parties*".
2. The Commission publishes and updates model texts designed to serve as best practice guidance for Committing Parties. These texts are currently (1) the model for divestiture commitments (the "*Standard Model for Divestiture Commitments*"); and (2) the model for the mandate of the two types of trustees referred to in the Standard Model for Divestiture Commitments, namely the monitoring and divestiture trustees (the "*Standard Trustee Mandate*", and together with the Standard Model for Divestiture Commitments, the "*Standard Models*").
3. The Standard Models are based upon the experience the Commission has gained to date from merger cases involving remedies and are drafted in line with the remedies policy set out in the Commission's Notice on Remedies² (the "*Remedies Notice*"). The Standard Models are neither intended to provide an exhaustive coverage of all issues that may become relevant in all cases, nor are they legally binding upon parties in a merger procedure. Rather, they contain the elements for all standard provisions that should be included in divestiture commitments and trustee mandates relating to divestitures. In providing a framework for divestiture commitments and trustee mandates to be submitted in concrete cases, the Standard Models leave the flexibility to adapt the texts to the specific requirements of the case in question.
4. Since the Standard Models were first published in 2003, they have been updated in 2013 and then in 2024 in order to take into account the experience gained by the Commission in merger cases involving commitments. The text of these models will further evolve, based on ongoing practice, and will continue to be updated by the Commission, taking into consideration both the developments of the Commission's remedies policy and experience gained from working with the Committing Parties and trustees in future matters.

Purpose of the Standard Models

5. The Commission recognises that timing is crucial in merger review procedures, including when remedies are necessary to remove competition concerns or serious doubts thereof. Through the

¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004 p. 1).

² Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ C 267, 22.10.2008, p. 1).

use of standardised models, the Committing Parties and the Commission can rely on standard terms and provisions for commitments and trustee mandates under tight time constraints, avoiding delays and saving resources. The use of standardised models expedites the proceedings, supports the effectiveness of the proposed divestments, and allow the Committing Parties to concentrate more on the actual substance and specific design of the commitments. The use of the standard models also ensures consistency across cases and will thereby contribute to increasing the level of transparency and legal certainty for the Committing Parties.

6. The Standard Models are designed to apply to remedy proceedings in both Phase I and Phase II, therefore to Commission decisions according to both Articles 6(2) and 8(2) of the Merger Regulation. The Standard Models deal specifically with divestiture commitments inasmuch as the Commission's Remedies Notice stipulates that divestiture commitments are normally the preferred form of merger remedies; they have also been the most common category of commitments. However, the Commission will consider the acceptability of other types of commitments in appropriate circumstances, as set out in the Remedies Notice. Individual provisions contained in the Standard Models can still be used in cases involving such other types of commitments. In particular, the Standard Trustee Mandate may remain largely relevant for the appointment of trustees when foreseen in non-divestiture commitments.
7. In cases where Committing Parties wish to depart from the wording of the Standard Models in light of the specific circumstances of the case under investigation, or the nature of the commitments, they should declare it in the Form RM³. Such departures from the wording of the Standard Models should be duly justified, limited to what is necessary and result in commitments that are capable of rendering the concentration compatible with the internal market.

Overview of the Contents of the Standard Models

8. The Standard Model for Divestiture Commitments sets out all requirements for achieving full and effective compliance with divestiture commitments offered by the Committing Parties to obtain a clearance decision. More specifically, this Model is designed (i) to describe clearly the business to be divested (the "*Divestment Business*"), the divestiture procedure and the obligations of the Committing Parties in relation to the Divestment Business for the interim period until divestiture has been completed, (ii) to set out the various responsibilities that the Committing Parties will thereby have, respectively, to the Commission, the Trustee, and the Divestment Business; and (iii) to enshrine the importance which the Commission places upon requiring an acceptable purchaser for the Divestment Business in order to ensure the viability and competitiveness of the new entity in the market where the divestiture takes place.
9. The Standard Model for Trustee Mandates sets out the role and functions of the Trustee, as provided in the Standard Model for Divestiture Commitments, in a contractual relationship between the Committing Parties responsible for the divestiture and the Trustee. As the commitments set out the basis for the responsibilities of the Trustee, the Standard Trustee Mandate has been prepared in conformity with the requirements laid down for the Trustee in the Standard Model for Divestiture Commitments.
10. Although the Standard Trustee Mandate is a bilateral contract between the Committing Parties responsible for the divestiture and the Trustee, this document forms the basis for a tripartite relationship among the Commission, the Trustee, and the Committing Parties. The relationship

³ Form relating to the information concerning commitments submitted pursuant to article 6(2) and article 8(8) of Council Regulation (EC) No 139/2004, Annex IV of Commission Implementing Regulation (EU) 2023/914 of 20 April 2023 implementing the Merger Regulation.

between the Committing Parties and the Trustee is not a traditional trusteeship. The Trustee rather benefits from a status which makes it independent from the Committing Parties and which is characterised by the role of the Trustee to monitor (Monitoring Trustee) or even to effectuate (Divestiture Trustee) the Committing Parties' compliance with the commitments. Accordingly, the Committing Parties are not entitled to give instructions to the Trustee, whereas the Commission is allowed to do so. This specific relationship is also confirmed by the fact that the Trustee Mandate requires the Commission's approval.

11. The Standard Trustee Mandate is designed (i) to facilitate the smooth and timely appointment of the Trustee and the approval of the Trustee Mandate; (ii) to clarify the relationship among the Commission, the Trustee, and the Committing Parties; and (iii) to set out the tasks of the Trustee in the process in order to enable the Trustee to expedite compliance with the commitments. Whereas the Standard Trustee Mandate defines the role of a Monitoring and a Divestiture Trustee in one text, they can be assigned to different Trustees in practice.
12. In providing guidance for the interpretation of the Standard Texts, a certain hierarchy is established. The Standard Trustee Mandate should be interpreted in the light of the Standard Model for Divestiture Commitments, as they lay the foundation for the application of the Trustee Mandate. The commitments are to be interpreted in the light of the respective Commission decision. Moreover, both Standard Texts should be interpreted in the general framework of European Union law, in particular in the light of the Merger Regulation, and by reference to the Commission's Remedies Notice setting out the Commission's remedies policy.
13. The most important provisions contained in both Standard Models are briefly set out in the sections below.

Standard Model for Divestiture Commitments

14. The Standard Model for Divestiture Commitments shall be signed by the party or parties committing to the divestiture. This will include the notifying party(ies), as well as the target should the divestiture relate to a business on the target side in the context of an acquisition of control.
15. The Standard Model for Divestiture Commitments consists of the following main elements:
16. Section A contains a definitions section. Paragraph 2 clarifies that in case of interpretation issues, the Commission will retain the interpretation that is the most favourable for an effective implementation of the commitments.
17. Section B contains the commitment to divest and the description of the Divestment Business. It includes the general obligation to divest the Divestment Business as a going concern, paragraph 3 describes the divestiture procedure, which may take two phases. The commitments provide that in the first phase (that is, the First Divestiture Period), the Committing Parties have the sole responsibility for finding a suitable purchaser for the Divestment Business. If the Committing Parties do not succeed in divesting the business during the First Divestiture Period, then a Divestiture Trustee will be appointed with an exclusive mandate to divest the Divestment Business at no minimum price (including a negative price if considered appropriate and reasonably required) in the Trustee Divestiture Period. The deadlines for each period are set in the definitions section (Section A). The experience of the Commission has shown that short divestiture periods contribute largely to the success of the divestiture as, otherwise, the Divestment Business will be exposed to an extended period of uncertainty which may in turn

negatively affect its viability and competitiveness. The Commission will normally consider a period of 6 months for the First Divestiture Period and an additional period of 3 months for the Trustee Divestiture Period as appropriate. These periods may be modified according to the particular requirements of the case in question.

18. The Committing Parties may propose an up-front buyer for the divestment. In this scenario, the Committing Parties commit not to implement the proposed concentration unless and until they have entered into a binding agreement with a purchaser for the Divestment Business and received the Commission's approval of the purchaser and terms of sale. Up-front buyer clauses are particularly suitable where there are obstacles for a divestiture (such as third party consent rights), uncertainties around finding a suitable purchaser, or risks for the competitiveness and saleability of the divestment business in the interim period until divestiture.⁴ The structure of the divestiture commitment also needs to be adapted in cases of alternative divestitures, in particular "Crown Jewels" commitments, when the Committing Parties commit to divest a very attractive business if they have not divested the originally proposed business by the end of a period fixed in the commitments.⁵
19. Section B, together with the Schedule to the Commitments, defines what is included in the Divestment Business. The clear identification of the Divestment Business is of great importance as thereby the scope of the divestiture and of the hold-separate obligations are defined. As set out in the Remedies Notice, 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 and that is divested as a going concern. Normally, a viable business is a business that can operate on a stand-alone basis, which means independently of the Committing Parties including as regards the supply of input materials or other forms of cooperation other than during a transitory period. The Divestment Business may include assets unrelated to the competition concerns or serious doubts thereof to make the package viable and competitive or more attractive to buyers. The Divestment Business must include all the assets and staff which contribute to its current operation, including in relation to products under development, or which are necessary to ensure its viability and competitiveness.⁶ Whereas this principle is set out as an undertaking of the Committing Parties in paragraph 6 of the Standard Model for Divestiture Commitments, the Committing Parties have to give a detailed factual description of the Divestment Business in the Schedule to the Standard Model for Divestiture Commitments.
20. The Divestment Business must comprise the Personnel and the Key Personnel retained by the Divestment Business as well as the personnel providing essential functions for the Divestment Business, such as the central R&D staff. The personnel (according to groups and functions performed) is to be listed in the Schedule to the Commitments. The Key Personnel is to be listed separately. The principle, indicated in paragraph 6 (d), is that all personnel should be transferred with the Divestment Business. If the Divestment Business takes the form of a company or if the transfer of undertakings legislation applies, the personnel will normally be transferred by operation of law. In other cases, the acquirer of the business can retain and select the personnel and can make offers of employment. The transfer of staff resulting from the commitments - whichever form it takes - is without prejudice to the application of relevant EU and national law on these matters.
21. Furthermore, the Standard Model for Divestiture Commitments foresees that the Divestment Business shall be entitled to benefit from products or services provided by the Parties for a

⁴ See in particular paragraphs 53 - 55 of the Remedies Notice.

⁵ See in particular paragraphs 44 - 46 of the Remedies Notice.

⁶ See in particular part III of the Remedies Notice.

transitional period, determined on a case-by-case basis, if this is necessary to maintain the full economic viability and competitiveness of the Divestment Business (paragraph 7 of the Standard Model for Divestiture Commitments, referring to the products or services detailed in the Schedule). Such services or products should be provided at costs, or at the terms and conditions in place before the merger, whichever is more advantageous to the Divestment Business.

22. Section C contains a number of related commitments, which are designed to maintain, pending divestiture, the viability, marketability and competitiveness of the Divestment Business. These provisions deal with the preservation of the divested entity's viability and independence, as well as the hold-separate and ring-fencing obligations. The Hold Separate Manager, to be appointed by the Committing Parties, is normally the manager of the Divestment Business at the time of the merger. The Hold Separate Manager is responsible for the management of the Divestment Business as a distinct entity separate from the businesses retained by the Parties, and is supervised by the Monitoring Trustee. The Hold Separate Manager should not be employed by the Committing Parties for a period of two years following the effective transfer of the legal title to the Divestment Business to a suitable purchaser.
23. In certain cases, it may also be necessary for the hold-separate obligation to apply to the corporate structure itself. In cases where the Divestment Business takes the form of a company and a strict separation of the corporate structure is necessary, the Monitoring Trustee must be given the authority to (i) exercise the Committing Parties' rights as shareholders in the Divestment Business and (ii) to replace members of the supervisory board or non-executive directors on the board of directors who have been appointed on behalf of the Committing Parties (cf. paragraph 12 of the Standard Model for Divestiture Commitments and paragraph 7 (d) of the Standard Trustee Mandate).
24. Ring-fencing of competitively sensitive information of the Divestment Business is particularly important. The Committing Parties are obliged to implement all necessary measures to ensure that they do not obtain such information of the Divestment Business and, in particular, to sever its participation in a central information technology network. The Committing Parties should also ensure that their (retained) employees who have had access to such information sign legally binding non-disclosure agreements preventing them from using or disclosing the information.
25. Related commitments also include a transitional obligations clause which specifies that the Committing Parties need to respect contractual obligations vis-à-vis the purchaser until the end of the specific term.
26. The related commitments further contain a non-solicitation clause for Key Personnel of the Divestment Business. According to the experience of the Commission, the non-solicitation period, dependent on the circumstances of the case, should normally be two years. Where exceptionally, Key Personnel needs to be replaced, the procedure prescribed in the commitments must be followed. In addition, the Commission may request the inclusion of a non-compete clause in the commitments protecting the customers of the Divestment Business for a start-up period. This may be required to enable the Divestment Business to be active as a viable competitor in the market. The period for such customer protection clause will depend on the market in question.
27. The divestiture commitment includes the commitment not to re-acquire direct or indirect influence over the Divestment Business (paragraph 16). This re-acquisition prohibition is limited to ten years after the date of the decision and serves to maintain the structural effects of the commitments. The Commission may grant a total or partial waiver if the structure of the market

has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary to render the concentration compatible with the internal market.

28. During the First Divestiture Period, the divestiture process lies in the hands of the Committing Parties. The Commission recommends an open, fair and transparent divestiture process that increases the likelihood of finding a suitable purchaser in a timely manner. The exact method used to select a suitable purchaser is however ultimately the Committing Parties' responsibility, as long as they meet the objective and timing of the divestiture and respect the commitments. Importantly, as part of the due diligence obligations, the Committing Parties shall provide to potential purchasers sufficient information as regards the Divestment Business including a confidential version of the commitments text or a meaningful non-confidential version thereof and allow them access to its personnel (paragraph 17 of the Standard Model for Divestiture Commitments).
29. The Committing Parties shall further submit regular reports on potential purchasers and developments in the divestiture process to the Commission and the Monitoring Trustee (paragraph 18 of the Standard Model for Divestiture Commitments). This reporting mechanism gives the Monitoring Trustee the basis on which to assess the progress of the divestiture process as well as potential purchasers (for the Trustee's report, see paragraph 32(vi) of the Standard Model for Divestiture Commitments) and keeps the Commission informed.
30. Section D sets out the requirements to be met by the purchaser of the Divestment Business. The aim of this section is to ensure that the Divestment Business will be sold to a suitable purchaser who is independent of and unconnected to the Committing Parties (and shall normally not be the seller of the target business in the Concentration), and who possesses the financial resources (that is e.g. limited debt, sufficient equity and profitability and a turnover significantly larger than the Divestment Business), proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in the marketplace. Depending on the circumstances of the case, specific industrial expertise may be required to support the purchaser's proven expertise and incentive to maintain and develop the Divestment Business, thereby excluding financial investors. The acquisition of the Divestment Business by the purchaser must neither be likely to create, in light of the information available to the Commission, prima facie competition concerns nor give rise to a risk that the implementation of the commitments will be delayed.
31. Section D also details the purchaser approval process. After finalising the agreement(s) for the sale of the Divestment Business, the Committing Parties shall submit a fully documented and reasoned proposal to the Commission. The Commission will verify that (i) the purchaser fulfils the requirements set out in the commitments, and (ii) the Divestment Business is being sold in a manner consistent with the Commission's decision and the commitments. The Commission may approve the sale of the Divestment Business without parts of the assets or personnel of the Divestment Business if this does not affect the viability and competitiveness of the Divestment Business, in particular if the selected purchaser provides for such assets or personnel itself.
32. Changes to the final binding sale and purchase agreements (and ancillary agreements) entered into between the purchaser and the Committing Parties after the purchaser approval process need to be approved by the Commission following consultation of the Monitoring Trustee.
33. Section E deals with both the Monitoring and Divestiture Trustees. It identifies the terms for their appointment, as well as the content of their mandates, and conditions for their replacement during the divestiture periods if necessary. Within one week after the adoption of the decision, the

Committing Parties must propose at least three Monitoring Trustee candidates and two Divestiture Trustee candidates (whose identities can overlap with the former) as per paragraph 27 of the Standard Model for Divestiture Commitments.

34. Section E also sets out the duties and obligations of both types of trustees. The Monitoring Trustee's responsibilities (mainly set out in paragraph 32 of the Standard Model for Divestiture Commitments) aim at ensuring the full respect of the commitments. The Monitoring Trustee's duties thus relate to (i) the monitoring of the divestiture process, (ii) the monitoring of the competitiveness and viability of the Divestment Business, (iii) the monitoring of the implementation of the transaction documents including transitional supply agreements with the Committing Parties, (iv) the management of the Divestment Business during the hold-separate period, and (v) the reporting to the Commission regarding any issues encountered. In that framework, a key responsibility of the Monitoring Trustee is assessing the independence, capabilities and incentives of the proposed purchaser and the viability of the Divestment Business after the sale to the purchaser, to assist the Commission to decide on the suitability of the proposed purchaser. The Monitoring Trustee is also a primary point of contact for interested third parties, including potential purchasers, in the context of the implementation of the commitments.
35. In the Trustee Divestiture Period, the Divestiture Trustee will have an exclusive mandate to sell the Divestment Business and is empowered to include in transaction agreements (including ancillary agreements) all terms and conditions it considers appropriate for an expedient sale. The Trustee has to protect the legitimate financial interests of the Committing Parties, subject to the Committing Parties' unconditional obligation to divest at no minimum price (including at a negative price if considered appropriate and reasonably required) in the Trustee Divestiture Period. The Divestiture Trustee must report regularly on the progress of the divestiture process.
36. Section E (paragraphs 36 - 43) also defines the duties and obligations of the Committing Parties. Beside the provision of information, the Committing Parties must also provide the Monitoring Trustee with all managerial and administrative support necessary. Committing Parties should also grant to the Divestiture Trustee comprehensive powers of attorney covering all steps of the sale of the Divestment Business. An indemnification clause is included in order to reinforce the independence of the trustees. The trustees may further, at the expense of the Committing Parties, retain advisors with specialised skills, in particular for corporate finance or legal advice.
37. Section E further foresees that trustees may only be removed in exceptional circumstances and with the approval of the Commission before the complete implementation of the commitments.
38. Section F provides that in case of conflict in terms of the interpretation of the commitments, namely where contractual arrangements between the Committing Parties and third parties, including the purchaser, differ from the commitments, the wording of the commitments shall prevail unless less favourable to the Divestment Business. The same section specifies that deviations from the commitments in contractual arrangements are only valid if they have been expressly approved by the Commission.
39. Section G details the Dispute Resolution Procedure applicable to disputes arising from the implementation of the commitments. This section includes provisions linked to the selection of the panel of experts in charge of the procedure, as well as the basis on which they shall act and the role of both the Monitoring Trustee and the Commission in that process. This procedure is however without prejudice to any other rights that may be available to the Committing Parties and the purchaser in respect of any breach of the transaction documents, nor to any Commission decision related to the compliance of the Committing Parties with the commitments.

40. Section H contains a review clause, which allows the Commission to extend the periods specified in the commitments and to waive or modify conditions or obligations contained in the commitments. The Committing Parties must show good cause in order to be able to benefit from the exercise of the review clause. Requests for the extension of time periods shall, normally, be submitted no later than one month before the expiry of the time period in question. The Committing Parties are entitled to request an extension within the last month of any period only in exceptional circumstances.

Standard Model for Trustee Mandates

41. The Standard Model for Trustee Mandates sets out the duties and responsibilities of both Monitoring and Divestiture Trustee in a single text. If more than one trustee shall serve in these roles, only the provisions relevant for the Monitoring or Divestiture Trustee, respectively, have to be included in the individual mandate.
42. The Standard Trustee Mandate consists of the following main elements:
43. Section A contains some definitions and references the definitions included in the Standard Model for Divestiture Commitments.
44. Sections B to G contain provisions regarding the appointment of the Trustee (Section B), its general duties (Section C), the specific duties and obligations of the Monitoring (Section D) and Divestiture (Section E) Trustees, reporting obligations identifying certain important subjects that should be discussed in each report (Section F), and duties and obligations of the Committing Parties vis-à-vis the Trustee (Section G). These arrangements are based on the provisions established in the Standard Model for Divestiture Commitments in relation to the Trustee and described above.
45. Sections H to J cover additional trustee-related provisions, including provisions regarding the remuneration of the Trustee (which cannot be capped or based on large volume discounts), procedures concerning the termination of the mandate, and certain additional provisions, such as determination of applicable national law.
46. The independence of the trustee and the absence of conflicts of interests vis-a-vis the relevant parties are of great importance for the Commission in deciding on the approval of the Trustee and the respective mandate. The provisions in the Standard Trustee Mandate (paragraphs 26 to 29) ensuring the independence of the Trustee from the Committing Parties and the absence of conflicts of interest foresee the following procedure: (1) The Trustee must disclose current relationships with the Committing Parties and the seller and their respective affiliated undertakings (paragraph 26); (2) During the term of the mandate, the Trustee undertakes not to create a conflict of interest by having or accepting employment or appointment as a Member of the Board of the Committing Parties, their affiliated undertakings, or an identified potential purchaser or by having or accepting any assignments or other business relationships with, or financial interests in any of these undertakings that might lead to a Conflict of Interest or by having or accepting appointments, assignments or other business relationships that may be regarded as impairing the Trustee's objectivity and independence in discharging its duties. (3) If the Trustee becomes aware of a conflict of interest during the mandate, the Trustee must notify the Commission and resolve the problem immediately and, if the conflict of interest cannot subsequently be resolved, the Commission may require the termination of the trustee mandate.

(4) For a period of one year⁷ following termination of the mandate, the members of the Trustee Team shall not provide services to the Committing Parties or their affiliated undertakings without the Commission's prior approval and must establish measures to ensure the independence and integrity of the Trustee.

47. In addition to the rules laid down in the Standard Trustee Mandate, it is up to the Committing Parties and the Trustee to include provisions dealing with other potential conflicts of interests, such as conflicts of interests of the Trustee with potential purchasers.

⁷ This period can in particular circumstances, e.g. in cases of behavioural commitments extending over several years or sale of the Divestiture Business occurring in the Trustee Divestiture Period, be extended to three years.