



Challenges in implementing remedies – a Monitoring Trustee perspective

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14th ANNUAL CONFERENCE OF THE GCLC, Brussels

1 February 2019

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

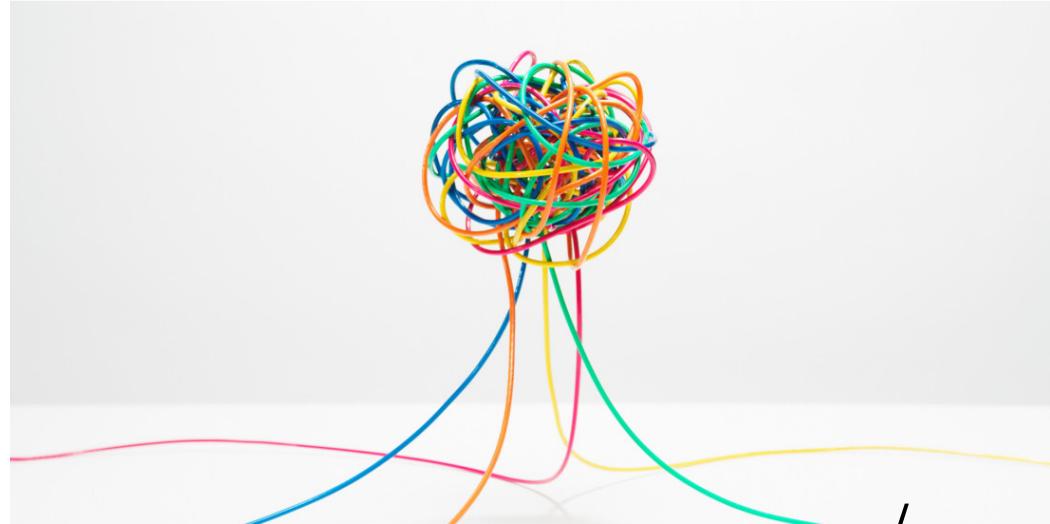
Specific tasks and responsibilities as identified and outlined in the commitments text and the Trustee Mandate

Three major challenges



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complexity



<https://lankydanblog.com/2017/04/23/learning-big-o-notation-with-on-complexity/>

urgency



<https://enterpriseproject.com/article/2014/8/20-ways-create-sense-urgency>

suitability

incentive



Dimensions of complexity:

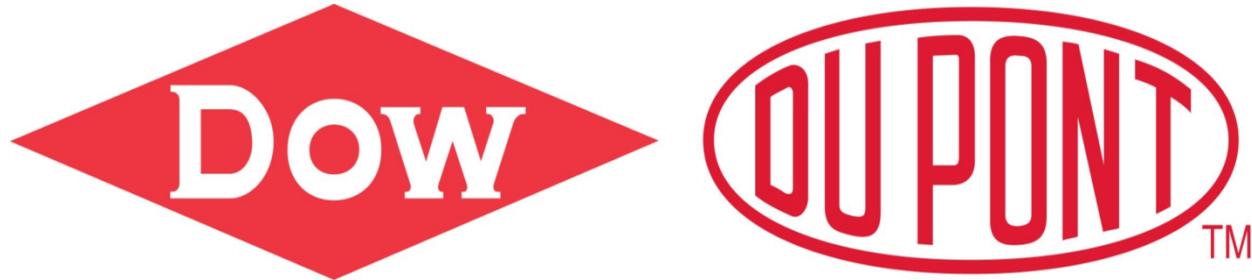


- Technical
- Legal
- Institutional
- Financial
- Economic

The biggest merger in 2017: \$130 bn



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European Commission - Press release

Mergers: Commission clears merger between Dow and DuPont, subject to conditions

Brussels, 27 March 2017



The parties will divest a significant part of DuPont's existing pesticide business, including its R&D organisation, in particular;

1. **Globally, DuPont's herbicides** for cereals, oilseed rape, sunflower, rice and pasture and **insecticides** for chewing insect and sucking insect control for fruits and vegetables etc.
2. **An exclusive license to DuPont's product for rice cultivation** in the European Economic Area to address the more limited concerns relating to **fungicides**.
3. **DuPont's global R&D organisation**, with the exception of a few limited assets that support the part of DuPont's pesticide business, which is not being divested.

Complex innovation mergers



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Innovation Mergers in 2015 -2017

Pharmaceutical and medical devices

1. BD/Bard,
2. J&J/ Actelion,
3. Boehringer Ingelheim/Sanofi Animal Health Business
4. Novartis/GSK Oncology Business,
5. Pfizer/Hospira,
6. Medtronic/Covidien

Industrial or vehicle components

7. General Electric/Alstom
8. Halliburton/Baker Hughes
9. Knorr-Bremse/Haldex

Agrochemicals

10. Dow/DuPont

Source: Esteva Mosso, 2018

Other mergers in innovation industries 2015-2018

Agrochemicals

1. Bayer/Monsanto (2018)

ITC industries

2. Discovery/Scripps (2018)
3. Qualcomm/NXP (2018)
4. Microsoft/LinkedIn (2016)
5. Brocade/Broadcom (2017)
6. Equens/Worldline (2016)

High Tech engineering

7. RR/ITC (2017)

Media & Telecom

8. Vivendi/Italia Telecom (2017)
9. Discovery/Scripps (2018)

Source: Hoehn, 2018

Major 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



Behavioural remedies: Who is holding the world record?

CANAL+



59 commitments
(30 August 2006)

Comcast[®]



43 (79) commitments
(9 January 2011)

Press room

Press Releases

Press releases 2011

21 September 2011: Broadcasting - pay television

The *Autorité de la concurrence* finds that Canal Plus Group did not comply with several commitments subscribed – including key ones – when it took over TPS.

The *Autorité* withdraws the decision authorizing the merger, thus requiring from the parties to renotify the transaction within one month. Moreover, Canal Plus Group is fined 30 million euros.

> *Version française* ■ ■

The *Autorité de la concurrence* has just issued a decision in which it establishes that **Canal Plus Group** did not fulfill several commitments – including key ones – that were attached to the decision¹ authorizing in 2006 the acquisition of **TPS** and **CanalSatellite** by **Vivendi Universal** and Canal Plus Group.

The *Autorité de la concurrence* therefore withdraws the decision authorizing the merger. Unless they restore the previous situation (before the merger), Vivendi and Canal Plus Group will have to renotify the transaction to the *Autorité* within one month.

The *Autorité* noted the seriousness of the breaches established – that are the result of some negligence and, generally speaking, of a repeated lack of diligence and ill will from Canal Plus – as well as the harm to competition that may be generated by these breaches to the commitments. Therefore, the *Autorité* imposed Canal Plus Group a financial penalty amounting 30 million euros.



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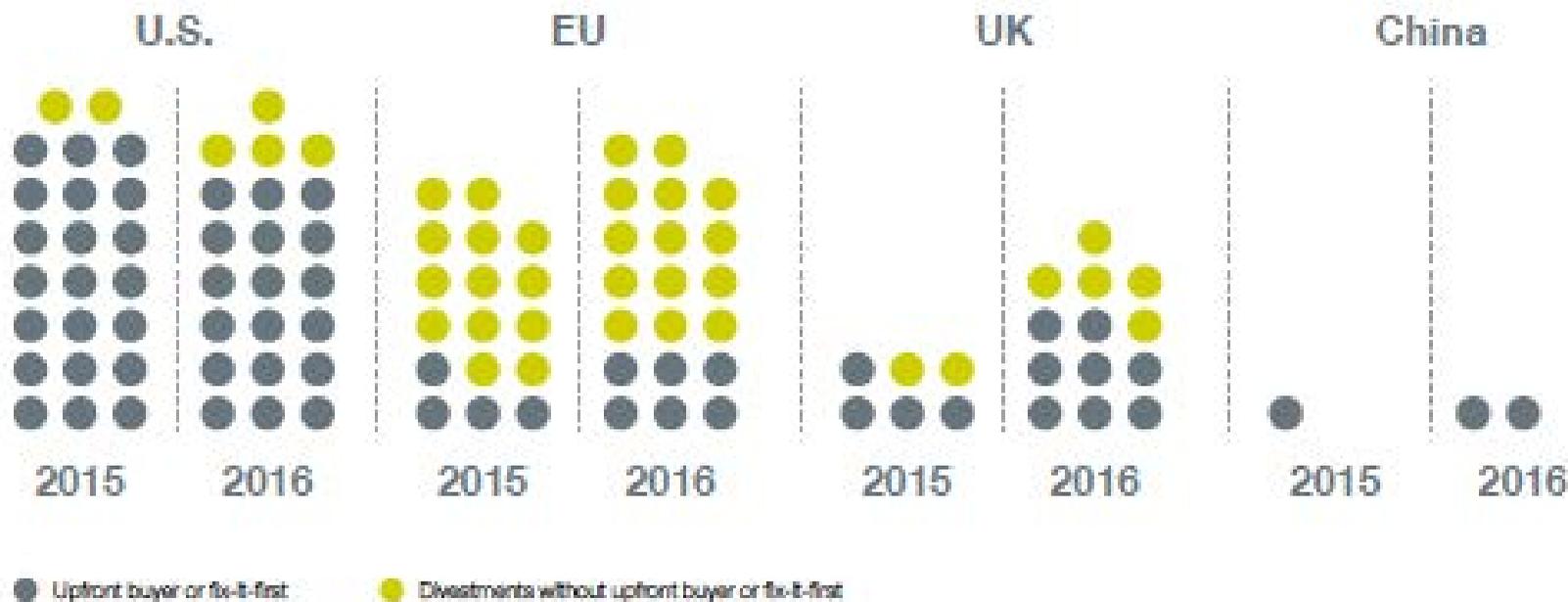
In 2017, approximately one in three of all EC remedy decisions imposed an upfront or fix-it-first purchaser clause



A rising tide of upfront buyer and fix-it-first remedies



USE OF UPFRONT BUYER AND FIX-IT-FIRST REMEDIES COMPARED TO THE TOTAL NUMBER OF DIVERSTMENT REMEDY CASES



Source Allen Overy (2018). Global Trends in Merger Control Enforcement

http://www.allenoverly.com/publications/en-gb/mergercontroltrends/Documents/Global_trends_in_merger_control_enforcement_Feb_2017.pdf

Purchaser approval and suitability



The Purchaser, in order to be approved by the Commission, must:

- (a) Be independent of and unconnected to the Parties;*
- (b) Have the financial resources, proven expertise and **incentive to maintain and develop the Divestment Business** as a viable and active competitive force in competition with the Parties and other competitors;*
- (c) Neither be likely to create, in the 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, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business*

The Trustee review of the proposed purchaser



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What do we look at?

- Independence
- Finances
- Expertise, strategic rationale and incentives
- Competition issues

This requires expertise in:

- Finance and accounting
- Business strategy
- Economics

Is common ownership becoming an issue for purchaser approval?

Incentives to compete
Incentives to innovate

Praxair, Inc. Signs Agreement to Sell European Assets to Taiyo Nippon Sanso Corporation

DANBURY, Conn., July 5, 2018 – Praxair, Inc. (NYSE:PX), in accordance with its proposed business combination with Linde AG (LIN.DE), has signed an agreement to sell the majority of its businesses in Europe to Taiyo Nippon Sanso Corporation.

Shareholder Structures Praxair/Tayo Nippon Sanso



PRAXAIR (PX) / Linde PLC

Major Shareholders	Equities %
Capital Research & Management Co. (World Investors)	6.11%
The Vanguard Group, Inc.	4.05%
Norges Bank Investment Management	3.27%
SSgA Funds Management, Inc.	2.37%
Massachusetts Financial Services Co.	2.37%
BlackRock Fund Advisors	2.21%
Wellington Management Co. LLP	1.47%
Parnassus Investments	1.02%
Franklin Advisers, Inc.	0.97%
Walter Scott & Partners Ltd.	0.80%

TAIYO NIPPON SANSO CORPORATION (4091)

Major Shareholders	Equities %
<u>Mitsubishi Chemical Holdings Corp.</u>	50.60%
Taiyo Nippon Sanso Business Association	4.33%
<u>JFE Holdings, Inc.</u>	2.92%
Meiji Yasuda Life Insurance Co.	2.31%
<u>Mizuho Financial Group, Inc.</u>	1.89%
Japan Agricultural Cooperatives Group	1.62%
Asset Management One Co., Ltd.	1.49%
Nomura Asset Management Co., Ltd.	0.89%
The Vanguard Group, Inc.	0.85%
Capital Research & Management Co. (Global Investors)	0.84%

mitsubishi chemical holdings corp. (4188)

Major Shareholders	Equities %
<u>Mitsubishi Chemical Holdings Corp.</u>	5.52%
Meiji Yasuda Life Insurance Co.	4.27%
Asset Management One Co., Ltd.	4.20%
Sumitomo Mitsui Trust Asset Management Co., Ltd.	4.05%
BlackRock Fund Advisors	3.58%
Nippon Life Insurance Co.	2.82%
Nomura Asset Management Co., Ltd.	2.66%
The Vanguard Group, Inc.	2.19%
BlackRock Japan Co., Ltd.	1.80%
Norges Bank Investment Management	1.60%

Learning from experience



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Merger Remedies Study

Public version

DG COMP, European Commission
October 2005

The FTC's Merger Remedies 2006-2012

A Report of the Bureau of Competition and Economics

January 2017



FEDERAL TRADE COMMISSION



Understanding past merger remedies

Report on case study research

“The report demonstrates that in the vast majority of cases the Commission’s remedies protect or restore competition. Divestitures of ongoing businesses are particularly successful. The study also provides valuable insight on how to improve the divestiture process,” said Maureen K. Ohlhausen, Acting Chairman of the Federal Trade Commission.

Evaluation and Implementation of merger remedies



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In 2017 the UK CMA published a review of 15 merger remedies:

<https://www.gov.uk/government/publications/understanding-past-merger-remedies>

Also in 2017 the FTC published a review of 89 merger remedies over a period 2006 - 2012:

<https://www.ftc.gov/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics>

In 2005 the European Commission published:
http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf

Thomas Hoehn, Merger remedies and competition law: An overview of recent EU case law and international policy developments, 27 September 2018, e-Competitions Bulletin Merger Remedies, Art. N° 87957

<https://www.concurrences.com/en/bulletin/special-issues/merger-remedies/merger-remedies-and-competition-law-an-overview-of-recent-eu-case-law-and-en>

In Divestitures We Trust, 2014, Justin Menezes and Matthew Gaved

http://competitionrx.com/wp-content/uploads/2015/02/2014_Menezes_Gaved-In-divestitures-we-trust.pdf

Monitoring Compliance with Merger Remedies – the Role of the Monitoring Trustee,
Thomas Hoehn and Jonas S Brueckner

http://competitionrx.com/wp-content/uploads/2015/02/2010_Brueckner_Hoehn-Role-of-Monitoring-Trustee_CLI.pdf



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