A COMPARATIVE APPRAISAL OF THE APPLICATION OF DIVESTITURE AS A REMEDY UNDER THE SOUTH AFRICAN COMPETITION ACT

Dissertation submitted in partial fulfilment of the requirements for the degree of Magister Legum (Mercantile Law)

by

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DECLARATION STATEMENT

With the signature appended hereunder, I Bianca Joan Maree, hereby declare that the work presented in this thesis is based on my own research, and that I have not submitted this thesis to any other University or institution of higher learning to obtain any academic qualification.

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Date: 22 December 2017
Summary

When competition law is contravened the question inevitably arises as to what would constitute an appropriate remedy and whether such remedy should be structural or behavioural in nature. Especially in the context of merger regulation structural remedies can play a significant role in restoring a market damaged by the anti-competitive effects of a merger to its pre-merger competitive status. It is in this regard that divestiture as a structural remedy is especially useful.

In South Africa however divestiture as a remedy has not yet received that much attention and there is a dearth of literature on the topic itself. This dissertation therefore aims to investigate the concept of divestiture as set out in section 60 of the Competition Act 89 of 1998 and examine the cases in which it has been applied (i.e. merger cases and also one prohibited practice case) in order to extract some principles that may aid in understanding the application of the remedy of divestiture better.

It also looks at the application of the divestiture remedy in the EU as comparative jurisdiction. Specific attention is also given to the risks associated with the remedy of divestiture and how to best deal with these risks. Finally some conclusions are reached and recommendations are made.
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CHAPTER 1: INTRODUCTION TO STUDY

1.1 Purpose of Competition Policy and Competition Law

Competition Law contains rules that aim to sustain a market where vigorous and fair competition exists and where the most efficient allocation of economic resources and goods and services are produced at the lowest possible prices. Competition Law is therefore designed to create a level playing field on which businesses of all sizes can fairly and effectively compete for the business of that market’s consumers.¹

Free and fair competition benefits consumers by allowing for choice of products as well as encouraging lower prices for such products in any particular market.² The primary aim of Competition law and policy is the maintenance and promotion of market competition. There is however, no universally accepted definition of the concept of ‘competition’. This fact is reiterated when considering how the South African Competition Act³ (“the Act”) is silent on this point and contains no clear, express definition for ‘competition.’

In terms of law and policy considerations, ‘competition’ can be interpreted to be ‘the process of rivalry that exists between contestants or firms within a particular market, a of whom are trying to gain some advantage over each other, through a multitude of strategic behaviours.’⁴ The problem for Competition authorities is therefore, not in understanding this concept, but rather, in the adequate and timeous identification of ‘red flags’ in the form of potentially anti-competitive activities, and to pick up when circumstances arise that are harmful to ongoing healthy market competition. Competition authorities need to ask questions continually to determine whether market competition in fact exists, or to determine the impact that a particular transaction or specific conduct will have on the level of existent competition within the market under consideration. Likewise they have to take into account the impact on the market occasioned by remedies they may impose for contraventions of competition legislation.

1.2 The Competition Act 89 of 1998

The 1998 Competition Act applies to all economic activity within or having an effect within South Africa; it however does not apply to collective bargaining agreements and is not applicable to certain conduct without a commercial purpose.

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² Neuhoff 12.
³ Act 89 of 1998.
⁴ Neuhoff 26 - 27.
As per section 2 the purpose of the Act is to promote and maintain competition in South Africa in order:
“(a) to promote the efficiency, adaptability and development of the economy;
(b) to provide consumers with competitive prices and product choices;
(c) to promote employment and advance the social and economic welfare of South Africans
(d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
(f) to promote a greater spread of ownership: in particular to increase the ownership stakes of historically disadvantaged persons.”

The Act specifically regulates the following categories of conduct: restrictive horizontal and vertical practices, abuse of dominance, certain pricing behaviour and also mergers. In order to enforce the Competition Act a three-tiered hierarchy of competition authorities is created, comprising of the Competition Commission, Competition Tribunal and Competition Appeal Court. The Commission is responsible for investigating and prosecuting transgression of the Competition Act whereas the Tribunal, and in some instances the Competition Appeal court imposes sanctions and orders remedies.

1.3 Sanctions/Remedies for contraventions of the Competition Act
Remedies are imperative to the enforcement of rights and prohibitions under the law but it is important to always ensure that they fit the matter at hand without being unduly burdensome. Each particular remedy should only be applied where it has a real prospect of achieving the desired outcome. Generally remedies in competition law are categorised as being either behavioural or structural in nature. Remedies all present certain advantages and disadvantages, which, once a remedy has been designed and implemented, should be assessed in terms of its ability to produce the desired outcome. In recent times, elements of both classes of remedies are being employed in conjunction with one another when designing adequate remedies, to allow for the most effective, pro-competitive outcome.

Structural remedies are usually one-off interventions to restore competitive market structure through the allocation of property rights. Divestiture, which is the focus of this dissertation, is a structural remedy, and structural remedies as a whole are generally considered simpler to administer, usually only requiring one-time intervention by competition authorities in order to be successful.

5 Neuhoff 16.
6 Section 19 and 21 (Competition Commission); section 26 and 27 (Competition Tribunal) and section 36 and 37 (Competition Appeal Court).
Divestiture, being a structural remedy, is often cheaper, less time consuming and less complex to design than behavioural remedies. Its advantage is that it is comparatively easy to administer as it requires minimal ongoing supervision.8 The holding, ownership and control of fixed businesses, shares, entitlements or assets in accordance with a divestiture order are to be sold off in the particular manner as delegated by the relevant authority and thereafter the defendant firms may continue their day to day business operations without being monitored or managed further – the necessary structural changes to the market and shareholdings within the market that were deemed necessary will be given effect to, and thereafter the interference and action of the authorities will be concluded.9

Behavioural remedies however, are ongoing interventions modifying or constraining behaviour of merged firms. These are remedies which set constraints on the merged firm’s rights or assets, and for example the merging parties can be obligated to undertake to act in a certain way or to refrain from certain actions. It is worthy to note that in most jurisdictions10 behavioural remedies are preferable for vertical market conduct and where public interest is a factor under consideration, while structural remedies are sooner applied to horizontal market related conduct.

1.4. Nature and Scope of Dissertation

The purpose of this dissertation is to investigate divestiture as a competition law remedy as provided for in the South African Competition Act and to take a deeper look at how it has to date been applied by the South African competition authorities. The divestiture remedy is first dealt within the realm of South African law and case studies are presented to point out how it has been applied. It should be noted that there is scant information on divestiture as a remedy in South African law. This makes it necessary to look at how other jurisdictions have approached the remedy of divestiture. A large part of this dissertation will thus be spent on looking at what studies, documents and guidelines by other Competition Authorities and authors reveal about the most suitable application of the divestiture remedy and how risks relating to divestiture can be minimized. Finally it will be considered whether there are any aspects of how these international jurisdictions approach the divestiture remedy that may be instructive to South African Competition Authorities.

While certain points of interest and possible recommendations or comparisons may at times be drawn from the UK approach and the approach of the Federal Trade Commission11, the South African

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8 Motta 4.
9 Ibid.
10 Such jurisdictions include: South Africa, United States of America and most European countries.
11 The United States of America Federal Trade Commission.
perspective and experience with the application of competition law remedies will be compared predominantly with the broader perspective and methodologies applicable and enforced by the European Union (“The EU”). Notably South African competition law is derived mainly from European competition law and policy. In light of this, the EU position will primarily be looked at for the purpose of comparative analysis, being that it is most closely related to the rules and regulations currently in place in terms of our Competition Laws in South Africa.

1.5 Lay-out of Dissertation

The lay-out of the dissertation will be as follows: Chapter One provides an indication of the nature and scope of the dissertation and how the studies will be approached. Chapter Two considers the application of divestiture as a remedy in the South African context. Chapter Three looks at the remedy of divestiture and its application mainly in the EU. Chapter Four considers risks inherent in the divestiture remedy and how these risks can be mitigated. Chapter Five contains final remarks, conclusions and recommendations.

CHAPTER 2: DIVESTITURE AS A REMEDY IN SOUTH AFRICAN COMPETITION LAW

2.1 Rationale behind divestiture
Divestiture is defined in the Oxford English Dictionary as: “The action or process of selling off subsidiary business interests or investments.” As indicated in Chapter One, divestiture is a structural remedy employed by the Competition Authorities.

Structural remedies, as per the ICN Merger Remedies Guide (2016) are “one-time remedies intended to maintain or restore competitive structure of the market”. Typically, structural remedies involve the sale of one or more business, certain physical assets or other rights. Remedies that are non-structural mean that they relate to conduct and as such are behavioural remedies; and modify or constrain future conduct of merging firms. Structural remedies are however preferred in the merger context as a merger results in lasting structural change and the remedy should thus also have a lasting effect and should ideally not require ongoing long-term monitoring.

Divestitures are the most common form of structural remedy, used as a tool by the Competition Authorities, to ensure that competition is preserved in a relevant market after a merger has been implemented. This may occur in the form of creating a fresh competitor in the market through the forced sale of a business or assets of an entity to a purchaser who is newly entering the market. Alternatively, a divestiture can be achieved through sale of an asset to an existing source of competition in the relevant market, and sometimes divestiture sales entail a mixture of sales to both new and existing competitors in the relevant market. The benefit of divestiture is clear where a new competitor is introduced to a specific market. Similarly where the divestiture is to a purchaser already established in the market, but who independently competes against the merging parties and has no affiliation to these merging parties, divestiture promotes competition because by acquiring the divested asset or business unit, the existing purchaser gains a competitive advantage in relation to divesting party, and the existing purchaser becomes a stronger competitor within the relevant market.

Divestiture as a general business practice involves a company selling its assets to improve its value and obtain higher efficiency. Many companies use divestiture to sell off peripheral assets as a way to aid in regaining focus on their core business and while most corporate divestitures are conscious tactical efforts by the divesting firm concerned. However when used by the competition authorities as a structural remedy divestiture is mandatory. A prime example of mandatory divestiture occurs in competition law cases where divestiture is imposed on firms as a remedy with the intention of

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14 ICN Guidelines at8.
15 ICN Guidelines at 8 para 1.
16 ICN Guidelines at 8 para 1.
17 ICN Guidelines at 11 paras 1-4.
preventing anti-competitive behaviours and transactions that are predicted to lead to the substantial 
lessening or prevention of competition within a market.\(^{19}\)

Divestiture as a competition law remedy usually entails the sale of a stand-alone business. An existing 
business entity generally includes all physical assets, personnel, customer lists, supplies, information 
systems, intangible assets (such as intellectual property), and management infrastructure needed for the 
effective production and distribution of the relevant product(s).\(^{20}\) A divestiture can also sometimes take 
the form of certain designated assets, such as shares, brands or business units held by the divesting 
entity. Divestiture should however not entail giving the asset away at a bargain price. Thus the price 
should be commercially sound and reasonable in relation to the market in which it is being sold. It 
should not be so low as to attract a party who would otherwise not be a viable purchaser and not so high 
that it strategically delays the divestiture from taking place.\(^{21}\)

2.2. **The remedy of divestiture as set out in section 60 of the Competition Act**

The South African Competition Act also provides for divestiture as a structural remedy. Section 60 
(1)(a) and (b) states that if a merger is implemented in contravention of Chapter 3, the Competition 
Tribunal may order a party to the merger to sell any shares, interest or other assets it has acquired 
pursuant to the merger; or declare void any provision of an agreement to which the merger was subject. 
Section 60 further states that the Competition Tribunal, in addition to or in lieu of making an order 
under section 58, may make an order directing any firm, or any other person, to sell any shares, interest 
or assets of the firm if the firm has contravened section 8\(^{22}\), and the prohibited practice in question (i) 
cannot adequately be remedied in terms of another provision of this Act; or (ii) the prohibited practice 
is substantially a repeat by that firm of conduct previously found by the Tribunal to be a prohibited 
practice.\(^{23}\) Section 60(3) requires that any divestiture order made by the Competition Tribunal in terms 
of subsection (2) must be confirmed by the Competition Appeal Court if it is to have any force or effect, 
and finally, section 60 also provides that any order made in terms of subsection (1) or (2) may set a time 
for compliance, and any other terms that the Competition Tribunal considers appropriate, having regard 
to the commercial interests of the party concerned.\(^{24}\)

2.3 **Application of divestiture in South African competition cases**

\(^{19}\) Sutherland & Kemp (Service Issue 19)) “*Competition Law of South Africa*” Chapter 10 (hereinafter Sutherland 
and Kemp.

\(^{20}\) ICN Guidelines 11 paras 1 - 3.


\(^{22}\) Section 8 contains the provisions prohibiting abuse of dominance by a dominant firm.

\(^{23}\) Section 60 (2)(a) and (b) of the Competition Act.

\(^{24}\) Section 60(4) of the Competition Act.
Divestiture as a remedy has to date not received a great deal of attention in South African competition law and has not been the subject of a great number of academic writings. It has however been used as a remedy in a few cases, as set out below. This overview of case law will provide an indication as to how the South African Competition Authorities have thus far dealt with divestiture.

2.3.1 Case law on divestiture in merger context

2.3.3.1 Introduction

Divestiture has been utilised in South Africa for merger regulation and it is common in other jurisdictions., However Sutherland and Kemp point out that a number of requirements will have to be met before divestiture will cure an anti-competitive merger, namely:25

a) The merging parties must provide clear and comprehensive information on how divestiture will take place.

b) The merged firm must remain viable after the divestiture.

c) The precise assets to be divested must be identified.

d) The purchasers or prospective purchasers will have to be identified and evaluated. It is insufficient to simply show that all attempts were made to sell the assets.

e) The price that the divested assets are to be sold for, and whether the price is so low that it diminishes the items viability or perhaps so high that it deters true potential purchasers.

f) The length of time required for the divestiture should be short otherwise there is an incentive for the merged firm to neglect the assets that are to be divested.26

g) The post-divestiture relationships between the merged and divested entities are also very important and there should be no collusion potential created through the transaction.27

h) The prospect of competition in the relevant market being maintained post-merger.

In the Nasionale Pers merger it was indicated that it is paramount to identify a worthy candidate as the purchaser who is to buy the divested property. It thus has to be asked whether the purchaser has the knowledge and ability to continue to use the assets effectively and to run the divested business portion competitively and whether these assets will be viable as a competitive business operation when removed from the entity that is divesting the asset.28 In the JD Group/Ellerines merger it was indicated that “[A]cceptable conditions hinge critically on the viability of the divested assets” and that if the assets will cause the new competitor to remain dependent on the merging firm, be ‘frozen in static product”, or “locked in a narrow competitive niche”, then the divestiture cannot cure an anti-competitive merger. The divested entity must thus have the same potential and incentives to expand and innovate as the firm

25 Sutherland & Kemp par10.1.
27 Sutherland & Kemp par 10.1.
28 Nasionale Pers Ltd/Education Investment Corporation Ltd Case No. LM/Apr00 para 52, and Nestle (SA) (Pty) Ltd/Pets Products (Pty) Ltd 21/LM/Apr01para 69.
that disappeared. It must be clear that the assets are sufficient to allow a competitor to compete effectively. 29 In the JD Group/Ellerines merger the Commission proposed that the merged group, a furniture and appliance retailer in a number of markets, divest 150 of its furniture stores in the market for low-income customers. The Tribunal concluded that this divestiture could not cure anti-competitive effects, as the newly created firm would have been too small and undiversified to compete with other firms in the market.

What has to be shown is that there is a likely purchaser and the Tribunal has rejected the argument that establishing this fact is not necessary, since its approval can be withdrawn if conditions are not met. It will often be very difficult to undo the implemented merger at the time of withdrawing the condition as by this stage the anti-competitive process may already have occurred. With regards to the price of the divested assets it must be asked whether the purchaser will reasonably be able to afford the divested asset and if it is divested at an “affordable” price, whether it will be so low that the divesting party will make a massive loss and have to sell at non-market related value to find a buyer in the time frame imposed. The sooner they are divested, the better. However, to properly effect a transfer to a viable purchaser will obviously take some time and therefore a merged firm will often have to undertake that it will not take any steps to adversely affect the business to be divested.30

With regard to the post-divestiture relationship between divested and merged entity it is evident that the divestiture will only meet its purpose as a remedy if it is done in a manner that ensures that competition and not affiliation will exist between merged and divested entities. It would make no sense to sell of a part of a business to a purchaser who will not have at least the potential to compete in the ordinary sense as a participant in that given market sector, and a further consideration regarding the purchaser is that there should be no affiliation with the divesting party that would render the divestiture superfluous due to prospective collusion or working in cahoots with the divesting firm for mutual gain.31

There can be no collusion and also there should not be a scenario where a part of a business is divested to a third party but such portion of the business cannot effectively function without additional skills, know-how or equipment still tied in with the merged entity who divested it. If this is the case, Sutherland and Kemp remark that divestiture may be an inefficient or only partially effective remedy.32 Prospective maintaining of competition in the market post-merger entails considering whether the divested business will be a competitive one, meaning that the divested portion will be able to thrive in the market against

30 It may be required that assets are transferred into a trust in the interim to ensure the integrity of the assets are protected, or that assets should be divested up-front.
31 Sutherland and Kemp par 10.2.
32 Ibid.
or amongst the likes of the merged entity that divested it. Another consideration is whether the purchaser has market knowledge or any standing or customer loyalty as well as brand identification that pre-exists before buying the divestiture assets.  

A merger may further be made subject to a condition that the merged firm must divest itself of certain assets to a firm acceptable to the Commission. The CAC has subjected these types of decisions by the Commission to strict administrative scrutiny. On occasion it has also been determined that assets must be transferred to a Trust to be established by the Commission for the sale of the assets if they are not properly divested within the time frames set out in the conditions or that a trust must be created to smooth the transfer process. Such a condition in imposed in order to strike a balance between the need to know the purchaser of the divested assets and the difficulty a firm has in providing the information prior to the divestiture being conditionally approved. It balances the interests of competition with the interests of the merging parties. In this way firms get the opportunity to sell the divested assets but if they do not achieve this sale within the time they have been allocated for the sale, then the matter will be in the hands of the Commission.

Proper consideration of these aspects mentioned above thus allow for a better decision as to whether the divestiture is a good solution to the problems in market competition that may arise post-merger.

2.3.3.2 Examples

Other examples of the application of divestiture in the context of merger regulation can also be found in the following cases: In Life Healthcare and Joint Medical Holdings (JMH) in February 2016, in addition to the Tribunal imposing the largest administrative penalty to date (10 million Rand) on the parties for the implementation of a notifiable merger without approval, the parties also agreed, in anticipation of the consent agreement, to Life Healthcare divesting from JMH, and JMH acquiring nearly all of the shares in Life Healthcare by way of a share buy-back arrangement.

In the Unilever/Hudson Knight Merger, the Competition Commission was reluctant to unconditionally approve a merger between the merging parties, as it argued that high market shares and concentration levels resulting from the merger would likely to lead to lessening of competition in the identified markets. When it came to defining the relevant market concerned, the Competition Commission defined the market as narrowly as possible while the Respondents sought to define the market as broadly

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33 Ibid.
34 Sutherland & Kemp par 10.4.
36 Unilever Plc & others & the Competition Commission of South Africa Tribunal case number 55/LM/Sep01 (hereinafter Unilever).
The respondent firms have the core business of processed food production and sale in the retail and professional food sector. Despite trading in the same market, the merging parties however claimed to target different consumer classes within that market. The Merging parties categorized their trade into four broad relevant markets for the purpose of the merger transaction.

The Commission criticised how widely the merging parties defined the market, as well as the foundation on which their market definition was based. The Commission also pointed out perceived inconsistencies and omissions in the documents filed by the merging parties to validate the market definition relied on by them. The Commission further disputed the efficiencies that the merging parties claimed would arise from the conclusion of the merger transaction, and also further shed doubt on the objectivity of the study conducted by the merging parties. The Commission’s own investigation on the other hand showed overlaps between the merging parties’ products in 10 distinct markets. The Commission found that the market share held by parties in 9 of these 10 markets was exceptionally high, in that it ranged from 69.8% to 99.5% of the total market share in each of these markets.

The Commission’s main areas for concern in respect of the merger being implemented included points such as: (a) There were significant barriers to entry in identified markets; (b) the transaction would certainly result in the removal of an effective competitor; (c) it was not clear that under the circumstances, the parties’ customers would possess sufficient countervailing power to prevent the exercise of market power on the part of the merged entity; (d) efficiencies that were claimed were not convincingly substantiated and in any event, would not outweigh the anti-competitive effects of the merger. In conclusion the Commission held that the merger, if approved, would lead to a substantial lessening or prevention of competition in the relevant market. The Commission therefore, recommended that the merger be conditionally approved on the following terms:

a) That Unifoods divests the whole product portfolio currently marketed under the Royco and OXO brands, including all sub-brands;

b) That such divestiture to be to a viable third party to be approved by the Commission; and

c) That the divestiture should take place within a specified amount of months prior to the implementation of the merger.

37 Unilever 2 para 5.
38 Unilever 2-3 para 6-10.
39 Unilever 3-5 para 11-15.
40 Unilever 3-4 para 11.
41 Unilever 5 para 15.
42 Unilever 5-6 para 16.
43 Unilever 5 para 17.
While the Commission wanted the entire Royco and Oxo brands as well as their sub-brands to be divested, the merging parties attempted to submit alternative proposals. However the Commission indicated that these alternative proposals did not effectively address all its concerns. At a later stage an agreement was reached, in terms of which the merger was to be conditionally approved as per the above recommendations but the recommended divestiture was adjusted to exclude certain agreed sub-brands from the portfolio of brands being so divested.\textsuperscript{44}

The Competition Tribunal accepted the agreement, and ordered divestiture as per the agreement but in addition to the terms agreed, the Tribunal went further and added a provision to ensure that compliance with the divestiture remedy was monitored to some extent, to secure the effectiveness of the divestiture and in order to obtain adequate feedback as to whether there was a likelihood of the remedy being sufficiently effective in the long-run. This was implemented by the Tribunal’s qualified acceptance of the agreement, through its addition of a provision which required that a trustee was appointed to oversee and monitor the entire divestiture process and to provide on-going feedback to the Commission.\textsuperscript{45}

\textit{The Astral Foods Limited (Astral) and National Chick Limited (Natchix)}\textsuperscript{46} transaction involved both horizontal and vertical aspects because of a product overlap in the animal feed market\textsuperscript{47} and through the acquisition of an independent downstream producer of day-old chicks.\textsuperscript{48} The merger was initially prohibited by the Competition Commission as it would substantially lessen competition in the relevant markets through the removal of an efficient competitor. The Commission was also concerned that the post-merger vertical structure of the market would provide Astral with the ability to price-discriminate in favour of its own downstream operations because the dominant supplier would be purchasing its largest independent customer. It was argued by the Commission that Astral’s largest upstream competitor would not be able to take up excess demand in this market and that many independent breeders would be without any alternative source of supply should Astral implement a “margin squeeze” in terms whereof it leveraged its dominance as vertically integrated upstream supplier to impede competition downstream.\textsuperscript{49}

The merger was however, subsequently conditionally approved by the Tribunal. The Tribunal prescribed a structural remedy for the horizontal leg of the merger and the full shareholding of Astral held in Nutrex (an efficient competitor of Astral) had to be sold by way of a divestiture to an independent third party buyer within a specified time period.In the event that a suitable buyer could not be found

\textsuperscript{44} \textit{Unilever} 6 para 21.
\textsuperscript{45} \textit{Unilever} 14 para 9 and 14.
\textsuperscript{46} \textit{Astral Foods Limited and National Chick Limited} Tribunal Case No 69/AM/Dec01.
\textsuperscript{47} The horizontal aspect of the merger.
\textsuperscript{48} The vertical aspect of the merger.
\textsuperscript{49} Binge & Van Eeden (2010) (see note 24) at14 para 1.
within the prescribed time frame, a trustee would be appointed to carry out the divestiture. For the vertical leg of the merger certain behavioural remedies were prescribed, namely that a standard supply contract had to be implemented in terms of which, in the event of force majeure or any other supply constraints, Astral was not allowed to stop supplying its independent customers in favour of its own in-house operations where supply constraints of any nature might occur, and supply would be reduced on a pro-rata basis. Astral was also prohibited from discriminating against its independent customers who did not wish to conclude the standard agreement or customers that sold products from other suppliers through various price or volume discounts.50

On 4 August 2016 the Tribunal approved a larger merger between Ferro South Africa (Pty) Ltd (‘Ferro’) and Revertex South Africa (‘Revertex’)51 subject to a divestiture condition being imposed on the merging parties. The proposed merger raised competition concerns in the powdered coating market, in that it would create a structural information-sharing opportunity between Akzo Nobel (one of the shareholders of Revertex’s joint venture, Arkem) and Ferro.52 In order to alleviate the potential information-sharing concerns, the merger was subsequently approved subject to the following divestiture conditions:

a) The first Divestiture – Acquisition of Akzo Nobel’s Shareholding in Arkem.53 In terms of this divestiture the merging parties were obliged to purchase the fifty percent shareholding held by Akzo Nobel in Arkem;

b) The second Divestiture - Acquisition of the merging parties shareholding in Arkem.54 In terms of this divestiture, if the merging parties fail to acquire the shareholding with a certain period of time55 from the approval of the transaction the merging parties must then dispose of their fifty percent shareholding in Arkem to an independent third party.

c) Trustee Divestiture – Sale of the merging parties’ shareholding in Arkem56. The trustee divestiture will come about if the merging parties failed to conclude the second divestiture within a certain period of time57 after the first divestiture period, then a trustee (a third party appointed by the commission who is independent from both the merging parties and from Akzo Nobel) shall be responsible and entitled to dispose of the merging parties’ fifty percent shareholding in Arkem to an independent third party.

50 Astral Foods 2 para 1.4
51 Ferro South Africa (Pty) Ltd and Revertex South Africa Case No LM261March16 (Hereinafter Ferro South Africa).
52 Ferro South Africa para 25.
53 Ferro South Africa (Pty) Annex A 5 para 4.
54 Ferro South Africa at 5-6 para 5.
55 Time period allocated in terms of the condition is claimed as confidential in the case material.
56 Ferro South Africa 6-7 para 6.
57 Time period allocated in terms of the condition is claimed as confidential in the case material.
2.3.2 Divestiture in the context of prohibited practices

2.3.2.1 Introduction

Divestiture can also be ordered or applied to certain instances of conduct or practices which are expressly prohibited by the Act. Where divestiture is used as a remedy in this context it should be applied in addition to, or in lieu of any other remedy to address the contravening actions. As such divestiture can be applied where the abuse of dominance provisions of the Act have been contravened, or in the event that a specific prohibited practice cannot be effectively or comprehensively addressed by way of any alternative remedies or measures provided for within the Act. At times divestiture can also be the best solution where the conduct in question amounts to a substantial repeat by the respondent firm, of conduct previously found to be a prohibited conduct.  

There is one notable difference between divestiture applied as a merger condition versus its application when used to remedy a prohibited practice. Unlike in merger approvals, where either the Competition Commission or the Competition Tribunal can enforce the remedy, its use in respect of a prohibited practice will only be of force and effect when such divestiture is confirmed by the Competition Appeal Court (CAC).

2.3.2.2 Examples

Divestiture was applied to remedy a prohibited practice in contravention of the Act by the Tribunal while deciding on a complaint referral from the Commission, for the first time under in South African competition law, in the fertiliser case between the Competition Commission and Sasol Chemical Industries (hereafter interchangeably referred to as ‘Sasol’ or ‘SCI’).

The somewhat technical facts of this matter were that Ammonia is produced by Sasol at both their Secunda and Sasolburg plants. Ammonia is the key input into the production of nitrogenous fertilisers. Nitrogenous fertilisers include Limestone Ammonium Nitrate (“LAN”), Ammonium Nitrate Solutions (“ANS”), and to a limited extent, urea. Other suppliers of imported ammonia in South Africa are Omnia, Foskor and Kynoch (Yara). These three firms supply ammonia through their shared ownership of the Richards Bay ammonia import facility, each owning a share of twenty five percent, with Sasol being the fourth shareholder. At present Sasol remains the dominant supplier of ammonia in South Africa. Ammonium nitrate, in either its liquid (concentrated) or solid form is used in the production of fertilisers

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58 Section 60 (2) (b) (i) and (ii).
59 Section 60(3) of the Act clearly sets out that CAC is to confirm any divestiture order where it relates to a prohibited practice under the Competition Act.
60 Sasol Chemical Industries and the Competition Commission. Case No. 45/CR/May06 & Case No. 31/CR/May05 (hereinafter Sasol Chemical Industries).
or explosives. Sasol, Omnia and AECI\(^62\) have the necessary infrastructure, in particular nitric acid plants, to produce ANS solutions. LAN production, which is essentially ANS reacted with limestone to stabilise it, forms solid (granular) fertilisers, and Sasol and Omnia are both producers of LAN.\(^63\)

Further downstream there are blenders and traders, such as Nutri-Flo and Profert, which prior to the Competition Commission’s ("the Commission") intervention sourced input from Sasol to create blended fertilisers. This level of the market was less concentrated as opposed to the upstream markets in the period prior to the Commission’s intervention.\(^64\) However, the growth of market participants at this level was dependent on Sasol as the key upstream input supplier of ammonia. Both Nutri-Flo\(^65\) and Profert\(^66\) filed complaints with the Commission in 2003 and 2004 respectively, alleging that Sasol, acting in concertation with Omnia and Kynoch (Yara), engaged in a series of anticompetitive practices. These ranged from exclusionary abuse of dominance by Sasol and various collusive agreements between Sasol, Omnia and Kynoch (Yara).\(^67\)

The alleged conduct had the effect of depriving the complainants of their ability to achieve a competitive outcome in the market for the blending and distribution of nitrogenous based fertilisers. It was further alleged that this interdependence between Sasol, Omnia and Kynoch (Yara) also prevented certain market participants such as the complainants, Nutri-Flo and Profert from growing their businesses and competing effectively.\(^68\)

In May 2005, upon the consolidation of its findings under the Nutri-Flow Complaint, the Commission referred the complaint to the Tribunal alleging that Sasol had contravened section 8(a)\(^69\); section 8(c)\(^70\) and alternatively 8(d) (ii)\(^71\) of the Act. The Commission later amended the referral to include a contravention of section 4(1) (b)\(^72\) against Sasol, Omnia and Kynoch (Yara). In an earlier settlement reached on the collusion aspect, Sasol admitted to contravening section 4(1)(b) of the Act and settled the matter by paying an administrative penalty of a hefty R250 million.\(^73\)

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\(^{62}\) AECI is the fourth Respondent cited in the Sasol Chemical Industries Case, Supra.

\(^{63}\) Grimbeek 2 para 2.

\(^{64}\) Grimbeek 2 para 3.

\(^{65}\) Nutriflow referral Case No. 31/CR/May05.

\(^{66}\) Profert referral Case No. 45/CR/May06.

\(^{67}\) These three large suppliers in the market were found to have been colluding to divide the market for ammonia based fertilizers (LAN & ANS) amongst themselves, as well as having agreed to the price fixing of LAN and ANS within the market.

\(^{68}\) Grimbeek 2 para 4.

\(^{69}\) Section 8(a) prohibits a dominant firm to refuse to give a competitor access to an essential facility when economically feasible to do so.

\(^{70}\) Section 8(c) prohibits a dominant firm generally to engage in exclusionary acts.

\(^{71}\) Section 8(d) prohibits a firm from engaging in certain named exclusionary acts.

\(^{72}\) Section 4(1)(b) prohibits cartel activity such as market division, bid rigging and collusion.

\(^{73}\) Tribunal Case No. 31CRMay05. CC Case No’s 2007Aug3147 & 2017Dec3382.
On 25 May 2006, the Commission referred the Profert complaint to the Tribunal, alleging that Sasol had contravened sections 9(1)74, 8(c) and/or 8(d)(ii) of the Act. In the Profert referral75, the Commission alleged that SCI had engaged in price discrimination to the detriment of Profert and had excluded Profert in other ways, such as refusal to supply. Sasol admitted that together with Omnia and Kynoch (Yara) they acted in concert through agreements on various pricing formulae for, and discounts to, products manufactured or supplied by itself, Kynoch (Yara) and Omnia.76 In respect of the section 8 and section 9 contraventions, Sasol reached an agreement with the Commission. The Commission engaged in settlement negotiations on the basis that SCI would make reasonable endeavours to settle with the two complainants, Nutri-Flo and Profert, and the Commission on the 25th of June 2010, which settlement agreement was subsequently confirmed by the competition tribunal on the 14th of July 2010.77

It was through these complaints brought by Nutri-flow and Profert, that the Commission uncovered various anticompetitive practices that were impeding the fertiliser industry. Following the consolidation of the complaints into one investigation, the Commission intervened in the industry in 2009 and 2010 with the aim of restoring competition in the relevant markets. In order to rectify the situation in the market, the Tribunal (pursuant to the filing of the complaints) imposed a series of conditions on Sasol. Broadly stated, these agreements effectively imposed behavioural and structural conditions on Sasol.

With regards to the behavioural aspect, Sasol undertook to provide fertilisers on an ex-works basis and to further not discriminate across customer types (i.e. blenders, traders and end-users) and across geographic regions (i.e. inland and coastal regions). As for the structural conditions, Sasol undertook to divest five of its blending plants. The rationale behind these conditions can be seen as limiting Sasol’s presence in the downstream market and thereby reducing Sasol’s ability to manipulate market conditions. Sasol, however, did not admit liability to these contraventions. In July 2010, the Tribunal confirmed the settlement order.78

In terms of this Settlement Agreement, Sasol agreed to very extensive restructuring of its Sasol Nitro business and operational structure. Within 12 months from the confirmation of the agreement by the Tribunal, Sasol had agreed and would be obliged to do the following:

(a) Sasol would divest five out of six of its fertiliser blending facilities which are located across the country. The divestiture would include disposing of its facilities situated in Belville, Durban, Kimberley, Potchefstroom and Endicott to independent third party purchasers who would need

74 Section 9(1) prohibits price discrimination.
75 Profert referral.
76 Tribunal Case No. 31/CR/May05.
77 Sasol Chemical Industries 11 para 5.
78 Grimbeek 3 para 1.
to be pre-approved by the Commission. The only exception was that Sasol was allowed to retain the full production and ownership of its plant situated in Secunda.

The Tribunal advocated as part of the conditions that Sasol must divest certain of its fixed assets. Sasol undertook to divest the blending facilities located in Durban, Bellville, Potchefstroom, Endicott and Kimberley. The conditions were aimed at restoring a more competitive landscape in the market for nitrogenous fertilisers. In order to reduce Sasol’s presence in the downstream market and limit the ability to manipulate pricing in the retail segment, the Tribunal ordered that Sasol must dispose or divest of all its blending facilities. This also serves to undermine the collusive agreements that were in place between Sasol, Omnia and Kynoch.

(b) Sasol had to sell ammonium nitrate based fertilisers on an ‘ex-works’ basis from its plants at Sasolburg and Secunda and also within 100km radius of these plants;

The ability of Sasol to discriminate in pricing across regions and by customer was eliminated through the Tribunal’s order that all ammonium nitrate based fertilisers must be sold on an ex-works basis. With this condition, Sasol cannot impose any restrictions or obligations upon the customer with respect to the terms of usage and resale of fertilisers.

(c) Sasol committed not to differentiate in its pricing of ammonium nitrate based fertilisers, other than on standard commercial terms such as volume and off-take commitments, which had to be transparent and available to all customers and not merely as per its discretion or to its favoured customers;

Furthermore, Sasol may not differentiate in its pricing other than on standard commercial terms such as volume and off-take commitments. This is further aided by the requirement that any discounts and/or allowances granted shall be transparent and available to all customers willing and able to meet such volume and off-take commitments. This condition aimed to ensure that there would be greater transparency in the market.

(d) SCI agreed to remove the ammonia plants and business operations relating thereto from Sasol Nitro and house these as a business unit separate with separate audited books of account.

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79 *Sasol Chemical Industries* 11 para 5.2 and Annexure ‘A’ – ‘Settlement Agreement’.
80 Grimbeek 5 (3.2 - 2).
81 Ex-works basis describes the agreement where the seller (Sasol in this instance) makes goods available and ready for collection at its premises or place of business and all transport cost and other risk in respect of the sale are to be assumed by the buyer, meaning that all sales made by SCI from this plant had to be done in simple sale of product terms and that not additional transportation or delivery fees or taxes and extra costs could be worked into the pricing charged to its customers.
82 Grimbeek 5 para 3.2-3.
Other conditions imposed by the Tribunal included separating the business units responsible for ammonia production in Sasolburg from the business unit responsible for the marketing of ammonia produced at Sasolburg and supplied from Secunda. The separation of the business units eliminates the scope for shorting the supply of ammonia as planning becomes difficult to co-ordinate. Further, Sasol undertook to cease all importation of ammonia into South Africa, within a period of twenty five months from the date of the confirmation of the settlement agreement, other than those imports on behalf of third parties that may be occasioned due to supply and logistic disruptions and plant maintenance shutdowns. Prior to the intervention Sasol played a major role in facilitating ammonia imports. Competitors such as Omnia were deterred from importing and used locally produced Sasol ammonia.83

2.4 Final remarks

As pointed out divestiture can be applied as a remedy in the context of merger regulation, as well as in the context of other contraventions of the Competition Act. However, in South Africa to date it has mainly been ordered in the merger context.

Typically divestiture has been ordered to remedy concerns prior to final approval of a proposed merger, where outright approval of such merger would likely give rise to competition concerns. It is here that divestiture is sometimes ordered as a pre-condition for the final approval of the merger by the competition authorities. The Sasol case is a landmark case for South African competition law owing to the fact that it is the first structural remedy that has been imposed in a referred prohibited practice case, given that divestiture was previously confined in application only to merger transaction cases.

From the standpoint of the Competition Commission, it is important to understand that conservation and survival of healthy competition in any given market sector should always be the core objective of competition enforcement. In conditional merger approvals, the divestiture is ordered prior to approval and is as such used as a corrective tool in anticipation of anticompetitive consequences that the merger would likely give rise to. In this way the unfavourable outcomes that are predicted to arise can be reduced or possibly avoided completely. In the case of prohibited practices divestiture as a remedy can also serve to restore the competitive equilibrium in the market.

83 Sasol Chemical Industries 12-13 para 5.
CHAPTER 3: COMPARATIVE ANALYSIS

3.1 Introduction

Competition law systems currently in place in jurisdictions such as Europe and the United State of America (being the jurisdiction where competition law originated) are regarded as systems that have been calibrated to an international best practice level. The strength and influence of the European system is resounded by the fact that not only does it govern the ever-expanding field of competition in the European Union, but from a South African perspective, the European system is particularly noteworthy due to the weighty influence that was drawn from this jurisdiction in the promulgation of various provisions of the South African Competition Act.\(^\text{84}\)

This chapter in particular considers the remedy of divestiture as applied by competition authorities in the context of merger regulation and approval. Divestiture applied as a pre-condition to the final approval of a merger transaction is this chapter’s primary focus, mainly because the use of divestiture to remedy potentially anti-competitive mergers has been documented a great deal more than the application of divestiture in the context of any other prohibited conduct under competition law.

Ngwenya\(^\text{85}\) states that in order to ascertain whether a remedy will have the desired outcome, or at least a viable prospect of success, one needs to consider whether the remedy has been appropriately designed. To ensure that remedies are appropriately and adequately designed, three primary considerations should be weighed up in any competition authority’s process of implementation. These considerations are: \(^\text{86}\)

(a) Proportionality: Remedies should always be proportional to the gravity of the conduct in question, or proportionally measured against the effect of such conduct. The remedy should neither be overly burdensome in correlation to the extremity of the conduct, nor should it have a more extensive remedial effect than what the conduct actually calls for.

(b) Suitability: The remedy needs to be adequately suited to both the respondent company and to the specific circumstances, as well as being suitable to the particular market in question.

(c) Necessity: Authorities must consider whether any less stringent alternatives exist, and whether such less stringent alternatives would be adequate in order to obtain the desired outcome. If there appears to be a remedy that is any less

\(^{84}\) Sutherland & Kemp Chapter 2 para 2.5.


\(^{86}\) Ngwenya & Robb 4.
burdensome but sufficiently effective, then such a remedy should, as far as reasonably possible, be opted for instead. The remedy under consideration must be absolutely necessary in light of all other remedial options available.

A general consensus in European jurisdictions is also that the remedy should always correlate with the gravity of the offence, i.e. that it should be proportionate. Remedies further need to appear objectively capable of achieving their desired aim. Deterrence is an important objective; the regulatory sentiment is however that deterrence motives should not be so central to the designing of remedies that the remedies actually hinder natural competition in a market. Competitors should not be so afraid of punishment that they resultantly become too self-restraining to effectively compete.

3.2 Objective of remedial action in merger regulation

3.2.1 Merger Regulation – A European Perspective

In the context of merger regulation, remedies have been defined by Davies and Lyons as: “Interventions that are designed to avoid the ant-competitive effects of a merger, while not impeding anticipated efficiency gains.” They explain how remedies are only to be used in any circumstance where it has been investigated adequately and it has been deemed necessary and reasonably practicable in rectifying an anti-competitive outcome that is predicted to ensue, or where the anti-competitive situation already exists in that particular market.

The [European] Commission’s Remedy Notice (hereafter the “Remedy Notice”), is the most prominent text in relation to understanding the European Commission’s perspective on the use of remedies in the context of merger regulation.

In European Union merger assessment the principal test conducted by competition authorities is termed “the substantial lessening of competition” test. This entails an in-depth evaluation and assessment into the existing level of competition in the relevant market, and as well as looking at the specific factors that might have a noteworthy effect on the presence or the absence of competition within that particular marketplace. The European Competition Commission would be required to look at specific factors during the evaluation, in order to best ensure that a proper investigation is undertaken with regards to

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87 Binge & Van Eeden 3 para 2.1.
88 Binge & Van Eeden 3 para 2.1.
90 Binge & Van Eeden 7.
92 Directorate-General Competition (2013) Explanatory note “best practice guidelines - the commission’s model texts for divestiture commitments under the EC merger regulation” (hereinafter Director General Competition Explanatory Note).
the likely impact of the merger on the competition within a given market. These factors will include for example:93

a) The level of import competition existing in the market;
b) The level of countervailing power existing in the market;
c) The existence of any vertical integration;
d) The barriers to entry and ease of entry by any new participant pre and post-merger;
e) Assessments will also need to be made as to whether any technological or pro-efficiency gains exist that will only arise due to the approval and implementation of the merger;

Bonn states that “[T]he aim of merger remedies is to enable a modified outcome to merger transactions which restores or maintains competition while permitting the realisation of the relevant merger benefits”94 Where the European Commission comes to the conclusion that a particular merger transaction under assessment has resulted or may be likely to result in substantial lessening of competition, it is required to decide whether remedial action needs to be taken to mitigate or prevent any possible anti-competitive outcome that may arise from the merger, or alternatively, to alleviate any adverse effects that may result from such substantial lessening of competition.95

3.2.2 The application of the divestiture remedy in the European Union.

In order to further understand how to approach a merger in the EU and how to deal with the aspect of merger-spesific divestiture, the European Commission has published the Standard Model for Divestiture Commitments96 (“Divestiture model”) as well as a the Standard model for Trustee Mandates97 (“Trustee model”). These models dictate the best practice guidelines for merging parties to follow as a general framework where divestiture is being ordered, or where the parties to a merger wish to submit their proposed divestiture undertakings to the European Commission for consideration, and to provide guidance in respect of the nature and scope of the mandate of independent trustees if such trustees are appointed in terms of the divestiture remedy.

The divestiture model is based on the European Commission’s experience to date, in dealing with merger cases that involve remedies.98 It is important to note however, that the standard models are not legally binding and that they are non-exhaustive in terms of the issues addressed as there is common acceptance of the relevant issues that may arise in new matters which may require certain additional or

93 Ibid.
95 Section 35 and Section 36 of the Enterprise Act of the United Kingdom, 2002.
96 Directorate-General Competition Explanatory Note 1.(2013) (See note 83 above).
97 Ibid.
98 ICN Guidelines 11.
alternative provisions that have not been addressed in the standard model. These models contain the archetypal provisions that should always be present as the bare minimum general considerations in the designing of any divestiture remedy, but they do allow for the modification where necessary to address certain requirements that go outside of the general scope of the standard model. The divestiture procedure calls for this additional clarification since divestiture has been noted as the preferential remedy of the European Commission in merger regulation, and therefore the guidelines allow for enhanced understanding of what is expected in a general divestiture design and implementation.

In the explanatory note, the DG Competition (being the authority responsible for enforcement of EU competition laws) explains that the purpose of the divestiture model is essentially to expedite the merger remedy process. Timing has been accepted as being crucial to the success of the divestiture, particularly at the remedy stage and by using the model, the burden placed on the European Commission as well as on the parties is lessened by enabling parties to focus on the substance and implementation of divestiture instead, and as such seeks to alleviate the constraints that would otherwise exist in terms of the time and resources of all parties involved.

The Divestiture Model sets out the requirements for full and effective compliance necessary to get the clearance of the merger. The model is designed to:

- Clearly describe the “Divestiture Business” as well as the Divestiture procedure and the obligations of the merging parties in respect of the Divestiture Business for the interim period until completion of the divestiture.
- Set out the responsibilities of the merging parties to the Commission, the trustee and the Divestiture Business respectively;
- Emphasise the importance of an acceptable purchaser in order to ensure the new entity is viable and competitive within the market that the Divestiture is made.

The first phase of the procedure is the First Divestiture Period: at this stage the parties have the sole responsibility to find a suitable purchaser. If they are unsuccessful in doing so, then a Divestiture Trustee is appointed with the exclusive mandate of disposing of the Divestiture Business at no minimum price. This occurs within a Trustee Divestiture period. For the avoidance of exposure to lengthy uncertainty regarding the Divestiture Business, it has been shown that the shorter the Divestiture period, the greater the chances are of the divestiture being successful. A period of around six months is generally given for the first divestiture period and a further three to six months for the extended period

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99 Directorate-General Competition Explanatory Note1 para 2.
100 Ibid.
101 Ibid.
102 Ibid.
103 Directorate-General Competition Explanatory Note3 para 15.
as appropriate. These timelines may be modified depending on the facts of any case justifying this adjustment.\textsuperscript{104}

The Divested business must include all assets that contribute to its current operation, or that are necessary to ensure the viability and competitiveness of the business post-divestiture. Personnel who are currently employed or necessary to ensure the viability and competitiveness\textsuperscript{105} can be retained either by operation of law or sometimes the acquirer can make offers of employment and retain and select the personnel.\textsuperscript{106} Interestingly, but not surprisingly, the purchaser is also given obligations under the Divestiture model. This is to ensure that the Divestiture business will be sold to a suitable purchaser who is independent and unconnected to the divesting parties and their affiliated undertakings, and who possesses the financial resources, proven expertise and incentive to maintain and develop the Divestiture business as a viable and active competitive entity in the marketplace.\textsuperscript{107}

The acquisition by the particular purchaser must not be likely to create prima facie competition concerns on the basis of available information and must also not appear to give rise to risk of implementation being delayed.\textsuperscript{108} The sale may be approved without some parts of the business or without certain key personnel provided it will not affect the viability to compete effectively, e.g., the purchaser has such omitted assets or key personnel already and can meet the full success requisites by bringing these to the table on its own.\textsuperscript{109} For example where the purchaser already owns or possesses the omitted items and can therefore trade using resources already at the purchaser’s disposal.

The Competition authorities strive to tailor whatever remedies, or combination of remedies, that are most likely to effectively address the competitive harm predicted, while preserving the potential benefits of the proposed merger.\textsuperscript{110} Divestiture is usually considered a very drastic remedy and its implementation invites much controversy. It can be argued however, that this remedy is more likely to have long-run pro-competitive effects when compared with what has historically been seen in cases where behavioural remedies alone are applied.

Ordinarily it is required that a divestiture is comprised of an entire stand-alone business, and the ICN Merger Remedies Guide indicates that “Divestiture of an intact, ongoing, standalone business has the

\textsuperscript{104} Ibid.
\textsuperscript{105} Ibid.
\textsuperscript{106} Directorate-General Competition Explanatory Note 3 para 16. However what this means in light of employee rights is not very clear from the standard model texts or from the Notice.
\textsuperscript{107} Generally financial or industrial investors but financial investors should further demonstrate “proven expertise” by financing a management buy-out.
\textsuperscript{108} Directorate-General Competition Explanatory Note 6 para 27.
\textsuperscript{109} Ibid.
\textsuperscript{110} Binge & Van Eeden 5.
lowest composition risk as it has already demonstrated its ability to compete in the relevant market and generally ensures that the buyer will also be able to compete immediately following the implementation of the remedy.”\textsuperscript{111} To achieve the restoration or maintenance of competition, authorities often require divestiture of an existing, autonomous business unit of either the acquired or acquiring firm operating in the relevant market.\textsuperscript{112}

The merging parties will usually have the inherent incentive to divest fewer assets than required, and as such the burden of proof rests on the merging parties to show that the asset package being divested is in fact sufficient.\textsuperscript{113} Competition authorities generally require that the merging parties show that their proposed divestiture asset package will have the likely effect of maintaining or restoring competition.\textsuperscript{114} They will need to demonstrate that the business unit contains all necessary components, that it is separable from the merging businesses and that the buyer will be able to maintain or restore competition upon the implementation of the remedy. The merging parties will need to explain the unit’s business operations and provide relevant financial information about the entity. Where the divestiture of the business in a certain market is insufficient to restore competition then the package would be deemed insufficient.\textsuperscript{115} The Authority may then consider the inclusion of such additional assets in the package as may be necessary to effectively preserve competition and therefore it would be tailored to best address the specific competitive harm.\textsuperscript{116} What is also generally required is for all the assets to come from one party/entity to avoid the “mix-and-match” scenario where each merging party divests parts or portions of the entire divestiture asset package.\textsuperscript{117}

Finding an appropriate purchaser is a very important element, which includes the following standard criteria\textsuperscript{118}:

a) the purchaser must have the required financial capability,

b) it must have the required managerial expertise,

c) it must have required operational capacity,

d) it must have independence from the parties to merger,

e) it must demonstrate intent to compete in the relevant market;

f) the divestiture itself must not raise competition issues.

\textsuperscript{111} ICN Guidelines 11.
\textsuperscript{112} ICN Guidelines 10.
\textsuperscript{113} ICN Guidelines 11.
\textsuperscript{114} Ibid.
\textsuperscript{115} ICN Guidelines 11.
\textsuperscript{116} Where integrated facilities produce multiple products and separation would harm production related efficiencies then the additional assets so integrated, may be included to retain overall efficiency even though the competition concern does not relate to these products in particular.
\textsuperscript{117} ICN Guidelines 16.
3.3 Final remarks

As pointed out, remedies are imperative to the enforcement of rights and prohibitions under competition law but it is important to always ensure that they fit the matter at hand without being unduly burdensome and are to be applied only where a true prospect of bringing about the desired outcome is foreseen. Remedies could thus be applied to for example, rectify the negative impact arising out of cases of abuse of dominance by a firm or alternatively they can be implemented to ameliorate the harmful effects of a merger, or at least some of these adverse effects.

Divestiture is an attractive remedy to competition authorities in many jurisdictions because if they are well designed and implemented, they should solve competitions concerns in a one-off transaction without the need for ongoing monitoring and intervention.\footnote{Ngwenya and Robb 4, para 2.1.} This is because behaviour does not have to be monitored for compliance on an ongoing basis but rather, the structure or ownership and control of certain entities or assets are sold in a particular manner and thereafter the firms continue without being monitored or managed further.

As pointed out by Ngwenya and Robb, there are, however, risks associated with structural remedies, as they are mostly irreversible and there are various challenges to their effective implementation.\footnote{Ngwenya and Robb 4 para 2.1.} Mainly these challenges stem from the misalignment of the incentives of the various parties involved. The Competition Authorities are naturally concerned with making sure that the firm acquiring the divested assets has the capacity to be a strong competitor in the quest to try and restore the market to its pre-merger level of competition. The divesting firm or the merging parties as a whole would most often prefer the acquirer not to be a strong competitor within their own market, as they do not seek additional rivalry while conducting their business. The following Chapter thus looks into the risk posed by the divestiture remedy in more detail and how this aspect has been dealt with by EU Competition Authorities, the UK Authorities and to some extent by the American Federal Trade Commission as US antitrust enforcement agency.
CHAPTER FOUR: DIVESTITURE RISKS

4.1 Introduction
There can be numerous issues when it comes to designing and implementing a successful divestiture. Davies and Lyons indicate that these issues arise either because they were initially not considered at all or because the true gravity and impact of such issues were not properly understood by the authorities who designed and implemented the remedies at the time.  

4.2 Divestiture risks
Divestitures may be subject to a variety of risks and such risks often limit how effectively the remedy will address the anti-competitive outcome in a market. It is thus helpful to distinguish between three broad categories of risks that may impair the effectiveness of the divestiture remedy.

In 1999, a study of divestiture as a remedy that was conducted by the Federal Trade Commission showed that purchasers often did not have enough information at their disposal to prevent mistakes from arising in the course of the acquisition of divested assets. One major complication that arises in the divestiture process is that the merging parties generally understand the true value of the assets being divested much better than the relevant competition authority, or than any outside firm possibly could. This allows for asymmetries of information under consideration as divesting parties may tend not to accurately or fully disclose all relevant factors to the authorities or the prospective purchasers. Such failure to disclose relevant information allows for opportunistic behaviour of the seller and causing of ex-post delays and hurdles for the purchaser after the divestiture is completed. Studies conducted by the EU Director General of Competition in 2005, as well as the Competition Commission Guidelines on Merger Remedies both highlight three broad categories of common risks related to divestiture. In an article published in the European Competition Law Review, authors Papandropoulos and Tajana also discuss the remedy of divestiture by primarily focusing on these three groupings of risk, before going on to consider some additional risks that may arise. The three primary risks are the following:

4.2.1 Composition Risks

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121 Davies and Lyons 6.
122 CC8 – UK Commission (2008) 17 para 3.3
124 Baer 2.
127 CC8 – UK Commission (2008) (See above note 27) 17 para 3.3 (a)-(c).
128 Papandropoulos & Tajana 446.
These risks relate to the scope of the divestiture package. The divestiture package may be too constrained or it might not be appropriately configured in order to attract a suitable purchaser, or it might not be sufficient to enable the purchaser to operate as an effective competitor in the market.\textsuperscript{129} It is apparent upon further investigation that the effectiveness of a divestiture can be strongly threatened if the scope of the divestiture is insufficiently or inadequately defined. In 79 percent of the 84 cases discussed in the Merger study (2005), an ineffective package being divested posed real problems with the eventual effectiveness of the divestiture.\textsuperscript{130} It was found that key assets and resources needed in order for the business being divested to viably compete within a market post-divestiture are often omitted from the scope of the asset package.\textsuperscript{131}

Papandropoulos and Tajana indicate that wherever possible the divestment of an entire ongoing business rather than merely a part of a business, should be employed, given the much higher success rate noted in past cases where this type of divestiture remedy is applied by Competition authorities.\textsuperscript{132} This is confirmed by Baer who points out that the Federal Trade Commission’s study revealed that the likelihood of an entity’s post-divestiture success is much higher when an entire ongoing business is divested and not just selected assets.\textsuperscript{133} Divesting a stand-alone entity has proven in most cases to be more successful than mix and match divestitures where the assets and personnel of a business operation are divided and split-up between the retained business and the divested business.\textsuperscript{134} This re-iterates the fact that the composition of the asset package should always be a prime consideration prior to final implementation of the divestiture.

Papandropoulos and Tajana refer to the aforementioned study of the divestiture remedies conducted in the European Union which found divestiture to be an effective remedy in 56% of cases and partially effective in 25%, where success is determined as a scenario where the divested entity remained a viable and effective competitor in the few years following the divestiture. The authors thus remark that while the overall result is not very impressive it can be seen upon deeper digging that it is even less effective than it prima facie appears.\textsuperscript{135}

It is submitted by Papandropoulos and Tajana, that the fact that a business still operates within a given market is not to say that the purchaser is effectively competing.\textsuperscript{136} The evolutions of market shares,
therefore, provide an additional indication on whether the remedy is likely to be effective. They point out that market share decreased for the divested business in 44% of the divestiture cases studied, at times such decrease is notable or even drastic, and can be seen in some cases to drop by up to 50% of its market share post the year of divestment. Interestingly in 57% of cases studied by Papandropoulos and Tajana the retained business frequently outperformed the divested one. 137

4.2.2 Purchaser Risks

Purchaser risks138 involve the risks relating to the purchaser in a divestiture transaction. These include the risks that a suitable purchaser is not available or that the merging parties will dispose to a weak or otherwise inappropriate purchaser. 139 The wrong purchaser or rather, an ineffective one, has also proven to lead to a partially or wholly ineffective divestiture order. This may occur because an adequate purchaser is not available, or possibly as a result of the misaligned incentives of the merging parties. The parties would generally prefer to sell to a weak purchaser in order to reduce the competitive threat of a divested firm post-merger. As pointed out by Ngwenya and Robb the FTC study certainly showed a tendency of merging parties to elect and identify weak purchasers. 140

In the Merger Remedy study done by the European Commission141 there was only one case that included an upfront-purchaser clause in the divestiture order. The benefit of an up-front purchaser clause however, proved to have a variety of positive effects. Papandropoulos and Tajana indicate that the requirement of an upfront-purchaser tends to speed up the process of the divestiture as it safeguards that no merger transaction can be finally implemented until the concerns under competition law are resolved, the risks of any deterioration of the divestiture asset package during the interim phase thereby being substantially reduced. 142

The speed-up benefit is still a debatable one though as Papandropoulos and Tajana remark that this provision can also have negative consequences. In the event that merging parties are unable to find an up-front purchaser it may in fact delay the divestiture process and the merger itself. This could result in a loss of the cost-reduction effect that was expected to ensue by virtue of the impending merger and possibly a reduction in the price of the divestiture package. A further concern with this is that the

137 Papandropoulos & Tajana 446 para 2.2.
138 Papandropoulos & Tajana 446 and 447 paras 2.2.1, 2.2.2, 2.2.3.
139 CC8 –UK Competition Commission (2008) (See note 27 above) 17 para 3.3 (b).
140 Ngwenya & Robb 4 para 2.1
141 “DG Competition Merger remedy study” (October 2005) 46 para 41.
142 Papandropoulos & Tajana 446 para 2.2.2.
purchaser is suddenly placed at the centre of the entire transaction, giving the purchaser leverage power beyond what should reasonably be placed on such a role-player in a divestiture transaction.\footnote{Ibid.}

### 4.2.3 Asset Risks

These risks exist as a result of the danger that the purchaser’s ability to compete post-divestiture will be compromised due to assets deteriorating prior to the sale.\footnote{Ngwenya & Robb 4 para 2.1.} These include risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture, for example through loss of customers or key staff members.\footnote{CC8 –UK Competition Commission (2008) (See note 27 above) CC8 –UK Competition Commission (2008) 17 para: 3.3 (c).} For the remedy package to remain competitive and avoid its deterioration during the divestiture process, the European Commission’s merger study indicates that several effectiveness-reducing measures were encountered during the interim preservation phase.\footnote{Eg. Retention of key know-how or pricing promotions prior to divestiture in order to depress the sales in post-closure period.}

Empirical evidence from the statistics and findings set out in two different European studies\footnote{CC8 –UK Competition Commission (2008) ; and DG Competition, Merger remedy study’ (October 2005), A Kopke, ‘Merger remedies study’ (2005) Competition Policy newsletter.} has shown that the asset value can deteriorate in the interim in some cases and it is important to put provisions in place to prevent this outcome.\footnote{Ngwenya & Robb (2009). 4 para 2.1.} As a result, the Remedies Notice\footnote{Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under commission regulation (EC) No 802/2004 (OJ C 267, 22.10.2008.1).} as well as the Divestiture Commitment Model\footnote{Both Merger Remedies Notice and Model Divestiture commitments and trustee mandates can be found at http://Europa.eu.int/comm/competition/mergers/legislation/remedies.htm.} as put forward by the EU Commission set out two obligations that parties should meet to prevent this deterioration: (i) to preserve the activities and the values of the assets, and (ii) to hold assets separate pending the divestiture process.\footnote{Papandropoulos & Tajana 446 para 2.2.3.} It was found that many parties have been known to not keep the assets viable but to rather actively aid to their degradation and it was suggested that proper procedures to remedy this problem should still be better developed.\footnote{Directorate-General Competition Explanatory Notes 33.}

It is submitted in the Explanatory Note issued by the Directorate General of Competition\footnote{Directorate-General Competition Explanatory Notes 34.} that the freedom of the merging parties to steer the process and to allow them to seek a suitable purchaser is an important aspect of the divestiture remedy. When this freedom is coupled with the scarcity of information that sellers provide, or information that is otherwise available to the purchaser regarding the divestiture, there is frequently a gap for opportunistic behaviour from the divesting sellers who have
absolutely no incentive to co-operate with the purchaser.\textsuperscript{154} This is obviously since they do not stand to benefit from the creation of new and vigilant competitors entering into their market sector. Basically, the issue lies in the fact that a “window for mischief” is created for the divesting seller because not only does the seller have the freedom to choose a purchaser but also because such a potential purchaser is often ignorant as to the value of the divestiture asset and often also ignorant in respect of the market in which it will be operating post-divestiture.\textsuperscript{155} The EU Merger Remedy Study indicates that numerous dirty tricks\textsuperscript{156} are used by the seller in order to sabotage the true competitiveness of the assets in several ways, one of which would be to ensure that the divested business is rendered non-operational by the time the business is offered up for sale.\textsuperscript{157} This occurs in a number of ways, for example by the divesting seller transferring incomplete or insufficient assets to the purchaser, or through hampering necessary co-operation to delay the product development or some other progression of the purchasers business.\textsuperscript{158}

The merger study analysed in the article by Papandropoulos and Tajana\textsuperscript{159}, shows instances of asset degradation, inappropriate asset packages and information retention on the part of the seller. It also found that inexperienced purchasers could be induced to buy assets with limited competitive value and as a result can often fail to compete successfully post-divestiture. So Papandropoulos and Tajana conclude that it is clear that the sellers behave in a strategic manner and that they are not incentivised to create a strong competitor for themselves to have to compete with.\textsuperscript{160}

4.3 The economist’s perspective

Papandropoulos and Tajana also refer to certain criticism that was levied on the use of structural remedies from the perspective of economics which in their opinion could perhaps provide additional guidance to competition authorities in determining how best to implement the divestiture remedy effectively.\textsuperscript{161}

These criticisms entail that, first, there is a real risk of the seller divesting its least performing assets, or an asset without the necessary human resources and know-how. Unfortunately the omission of these imperative inclusions cannot always be immediately identified by an outsider third party as being absent but necessary. With this in mind the perception that divestiture is the most suitable and most easily

\textsuperscript{154} Papandropoulos & Tajana 446 para 2.2.3.
\textsuperscript{155} CC8 –UK Competition Commission (2008).
\textsuperscript{156} Merger remedy study’ Undertaken by the DG for Competition (October, 2005).
\textsuperscript{157} Papandropoulos & Tajana 447 para 2.2.3.
\textsuperscript{158} Papandropoulos & Tajana 445- 446 para 2.2.
\textsuperscript{159} “Merger remedy study” Directorate-General Competition (October, 2005).
\textsuperscript{160} Papandropoulos & Tajana 447 para 2.2.3.
\textsuperscript{161} Papandropoulos & Tajana 446 para 2.2.1
enforceable remedy becomes slightly less certain.\textsuperscript{162} In addition to this problem, structural remedies have been criticised for creating additional competition problems, like the prospect of enhancing market collusion.\textsuperscript{163} Papandropoulos and Tajana remark that the divestiture remedy should thus be adequately targeted to specific issues and not amount to “over-fixing” which affects the whole market in question. They indicate that designing a remedy in this way will ensure that a negative economic impact does not ensue, beyond simply solving a competition problem that needs remedying in a particular market.\textsuperscript{164}

Papandropoulos and Tajana remark that where contraventions raise barriers to entry in a particular market for example, the competition authorities must consider whether the remedy imposed would allow for entry barriers to be lowered back to pre-violation level. With this in mind divestiture is often considered a prospective solution which may assist in preventing or limiting the potential anti-competitive conduct that made arise or exist post-merger. It is also important that the divestiture remedy is proportional in the circumstances. A remedy that is proportional does not attempt to introduce more competition into a market but merely to restore an acceptable level of competition.\textsuperscript{165} The United States DOJ Anti-trust Division’s policy guide to merger remedies interestingly remarks that: “Although the remedy should always be sufficient to redress the antitrust violation the purpose of a remedy is not to enhance premerger competition, but to restore it.”\textsuperscript{166}

There is a risk that inappropriate divestiture may actually facilitate collusion to some extent through the restructuring of an industry in a manner that is more symmetrical or through the multiplication of multi-market contacts.\textsuperscript{167} In order to avoid this occurrence, Motta suggests that the EU Commission should also undertake a competitive assessment of the industry in terms of post-divestment asset distribution. (i.e. would the newly created market structure “significantly impede effective competition?”)\textsuperscript{168}

Collusion will also be more likely to occur if there has to be an ongoing relationship between purchaser and seller post-merger for example, where the purchaser needs to access certain inputs or technical assistance from the seller to effectively continue the trade operations of the divested entity.\textsuperscript{169} The price negotiations and incentives for asset sales by the purchaser should therefore be monitored and the competition authority should be cautious to rely on the purchasers to ensure that the divested assets will be designed in a manner that will aptly restore competition.\textsuperscript{170}

\textsuperscript{162} Papandropoulos & Tajana 447 para 2.3.
\textsuperscript{163} Papandropoulos & Tajana 446 – 447 para 2.2 - 2.3.
\textsuperscript{164} Papandropoulos & Tajana 450 para 3.3.
\textsuperscript{165} Ibid.
\textsuperscript{166} Papandropoulos & Tajana 448 para 3.
\textsuperscript{168} M Motta 107.
\textsuperscript{169} Ngwenya & Robb 5 para 2.1.
\textsuperscript{170} Papandropoulos & Tajana 447 para 2.2.
CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction
It has been demonstrated at times that if incorrectly designed and implemented, merger remedies, particularly divestiture, could lead to more problems than what are being solved. Without in any way suggesting that these proposals are fix-all solutions, some simple and practical adjustments that may have a positive effect on divestiture as a competition remedy will now be discussed below. Papandropoulos and Tajana submit that an insufficient level of contemplation is given to the actual restoration of effective market competition when divestiture is ordered and designed and that this may be attributable to the excessive emphasis that is often placed on the spreading of market share concentration, with too strong a focus being put on circumvention of monopolistic style market structures.\footnote{Papandropoulos & Tajana 453.}

An example of this risk is where market share is divested to a purchaser who lacks necessary assets, information or skills that are required to operate as a viable and competitive business in the post-divestiture market. Papandropoulos and Tajana submit that this is problematic as it does nothing to enhance competition and merely shifts a portion of the market share into the hands of a new market participant. The market is less centralised but the business is neither run effectively, nor is it run in a manner that enhances competition or that benefits the consumer. In their opinion this defeats the point of regulating the competitive efficiency of a given market.\footnote{Papandropoulos & Tajana 453 para 4.4.}

5.1.1 Earlier and stricter regulation of the divestiture process

Papandropoulos and Tajana state that although there is a disclosure obligation on the divesting parties however, there is too loose an obligation in the current EU procedural framework and the obligation is rather broadly and generally stated.\footnote{Papandropoulos & Tajana 453 para 4.5.} A major part of the issue is that insufficient information is often being disclosed, and the prejudice on the divestiture transaction is only discovered once the divestiture has already occurred. They therefore submit that the ex-post monitoring of the implementation of the divestiture remedy coupled with stricter and enhanced disclosure obligations may well aid in the alleviation of issues that are attributable to the initial phase of the divestiture process.\footnote{Ibid.}

5.1.2 Up-Front monitoring trustees

Trustees can have several functions in the divestiture process and there are two types of trustees that can be appointed, the one being a divestiture trustee. The first type of trustee which has most often been appointed by authorities is a monitoring trustee (also known as a hold-separate trustee). The

\footnote{Papandropoulos & Tajana 453.}\footnote{Papandropoulos & Tajana 453 para 4.4.}\footnote{Papandropoulos & Tajana 453 para 4.5.}\footnote{Ibid.}
second type is termed a divestiture trustee and while it seems divestiture trustees have only been appointed on rare occasion, there have been many authors to write about the benefits of such a trustee’s inclusion in the divestiture process.  

The main reason for trustees being appointed is that Commission cannot rely solely on participants to ensure compliance and implementation. The Commission also does not have the adequate administrative resources to monitor the parties. Further, the Competition Commission existent in any jurisdiction often lacks the industry-specific knowledge required to monitor the process effectively. There is also often information asymmetry that gives rise to a high risk of the purchaser or the seller in the transaction misleading the Competition authorities. For this reason, an independent third party with the relevant expertise is a better option, since having such a party to oversee activities of parties and to effectively monitor their compliance enhances the prospect of a successful divestiture.

Papandropoulos and Tajana indicate that while monitoring trustees are generally being appointed to oversee divestitures, this usually takes about one to two weeks from the time that the Competition Authorities make the decision of divestiture final. This still provides two full weeks of collusion and mischief for the divesting parties. This makes it evident that appointing a trustee is not the complete solution, and the timing of such an appointment may have a bigger role to play than what is outright evident. The authors remark that what is interesting to note is that in majority of the cases in the EU merger study there was a trustee appointed but effective monitoring was nonetheless lacking in the most crucial period of the divestiture process - in that the trustee had not yet been appointed in the initial phase which is where the assets require maximum protection from being diluted or from the seller allowing the deterioration of the asset value.

Papandropoulos and Tajana further state that this element may be overcome to some extent if parties were to look into the informal appointment of a trustee at an earlier stage. They suggest that it would be helpful to appoint a trustee as early as prior to the Competition authority making a finding that divestiture is to be implemented. They further submit that this would alleviate the time frame constraint. It would also ensure that right from the moment of the divestiture being ordered, the monitoring trustee is already in the loop regarding the facts of the divestiture being ordered and the assets and market involved and further, the trustee is ready and on stand-by for simultaneous and immediate appointment when the divestiture order is handed down.

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175 Ibid.
176 Papandropoulos & Tajana para 2.3
177 Papandropoulos & Tajana 443.
178 Papandropoulos & Tajana 443-454.
179 Papandropoulos & Tajana 445 para 2.3.
5.1.3 Shifting the risk

Motta submits that risk of failure in the divestiture process could be shifted at least in part to the merging parties. This can be done by inclusion of up-front purchaser and “crown jewel provisions” which give additional incentives to the parties to ensure the effectiveness and smooth running of the entire process.180 Baer points out that the issue with including such provisions is however that they are costly for the merging parties and should not be used too lightly unless absolutely necessary. While the up-front purchaser provision may not be too ideal due to the cost implications as well as the consideration that the purchaser’s identity goes hand in hand with this provision making it even tougher to implement effectively, the “crown jewel provision” is a great way to ensure that the divesting party ensures that the asset package is of adequate value and further it aids in the divesting party handling the matter in a timely and efficient manner.181 Baer remarks that there is no need to for authorities to adopt a “belt and suspenders approach” however, and they should not go beyond what is necessary and structure illogical remedies.182 According to Papandropoulos and Tajana, with any of these risk-shifting suggestions there should always be a cost-benefit analysis so as to not unduly burden the merging parties who are being subjected to the divestiture.183

5.1.4 Proportionality

The principle of proportionality should never be forgotten entirely in the merger control process. The need to ensure the remedy’s effectiveness should always go hand in hand with the need to respect the proportionality principle. The EC Merger regulation emphasises that commitments should always be (i) proportionate to the competition problem and at the same time; (ii) entirely eliminate it. Papandropoulos and Tajana point out that proportionality is however barely mentioned in the body of “soft-law” governing remedies that the Commission adopts - which all seem to focus on the effectiveness that can be accepted to solve the competition problem.184 They submit that remedies need to be proportionate and ensure that competition at pre-merger level is maintained and should not be used to improve on the competitive state of the market. This is a fundamental principle to ensure that the purpose of the merger remedies, and ultimately the merger control is respected. In their opinion striking a fair balance between effectiveness and proportionality will likely pose the main challenge for an enhanced regulatory framework.185

5.1.5 Reconsidering the role of behavioural remedies

180 Motta 116.
181 Ibid.
182 Baer et al “Solving competition problems in merger control: The requirements for an effective divestiture remedy” (2001) at 930 para V.
183 Papandropoulos & Tajana 445 para 2.5..
184 Papandropoulos & Tajana 445 para 2.6..
185 Ibid..
According to Papandropoulos and Tajana it could also be advisable to revisit whether structural remedies are the most suitable solution in any given matter at hand.\footnote{Papandropoulos & Tajana 453 para 4.5.} They indicate that certain industries might require that behavioural considerations are implemented instead of structural ones as this may be better suited in situations where industries are already being monitored consistently by industry specific regulatory bodies.\footnote{Ibid.} They also submit that perhaps instead of sticking to the clear distinction between the two types of remedies, a further alternative may be that in some situations it could be most useful to try and use the two types of remedies together and to see how they could best be used in conjunction with one another for the most effective outcome.\footnote{ICN (2016) (See note 19 above) 10. para 13} They suggest that perhaps in a given situation a structural remedy could be coupled with some behavioural elements and the two classes of remedies can be implemented together in one go so as to attempt designing the most suitable remedy to fit the facts of the case or the structure of the market

Baer states that one insight gained from reviewing numerous divestiture studies, is that pre-merger mechanisms and procedures can assist in obtaining effective merger relief while still allowing the merging firms to seek potential efficiencies through integrating with one another.\footnote{Baer et al ”Solving competition problems in merger control - the requirements for an effective divestiture remedy” (2001) at 930 para V.} Currently there is little importance placed on the motive for the undertakings being made. As indicated in the Walmart/Massmart merger\footnote{Walmart Incorporated/Massmart Holdings Limited Case No. 73/LM/Dec 10 29/06/2011 para 73.}, what is essential is whether the conditions that are ordered to be undertaken by the merging parties are suitably feasible as a solution to the problems and concerns being addressed in a particular case. There may therefore be merit in non-intervention in certain seemingly anticompetitive mergers if the pre-merger structure was already anticompetitive as such mergers should not only be assessed in respect of the likely impact on competition but also in terms of the potential limits on what may actually be attainable through the intervention.

How effective is divestiture? As pointed out by Tajana divestiture is generally based on the assumption that the creation of a stronger or brand new competitor will generate adequate market competition but the cases studied show that this is not always outright the position.\footnote{Tajana (2006) “European Union- merger remedies study” Int TLR.N26-27. 1 para 1 and 2 (hereinafter Tajana).}

Due consideration must be had for all who stand to be affected by any pre-approval merger conditions that the Tribunal makes part of its final order.\footnote{Sasol Ltd/Sasol Oil Ltd Case No. 101/LM/Dec04. para 570-574.} Sutherland and Kemp state that the South African Competition tribunal has showed willingness to impose any conditions that are deemed viable and
reasonable, whether these conditions stem strictly from legal compulsion (where the Tribunal has elected the conditions to be ordered), or even where the conditions are introduced by parties, of their own volition, provided of course that the suggestions put forward by the parties are the most suitable and satisfactory conditions in the given circumstances being considered.¹⁹³

Numerous difficulties arising in the adoption of an effective divestiture commitment are still unresolved. The key issues that require further analysis in order to improve on our current application of this remedy include aspects like the determination of the scope of the divestiture. The scope being ill-determined appears to be the most serious threat to a divestiture’s effectiveness and it all too often occurs that insufficiently or inadequately defined scope of assets are being included in divestiture orders.

As pointed out by Tajana these aspects are problematic: First, key assets being omitted creates this inadequacy as these assets refer to those necessary for the divested entity’s viability to operate in a given market. Secondly, the lack of disclosure obligations in respect of exactly which parts of a business are required for the divested portion to run efficiently allows for opportunistic behaviours on the part of the seller.¹⁹⁴ Finally in terms of the scope, the manner of authorities defining a scope of a business can be criticised for only looking at market share and overlaps particular market and a party’s shareholding or control - this often overlooks other important concerns such as whether or not the purchaser has the know-how and/or the intention to effectively compete post-divestiture.

The divestiture process, mainly in the interim phase is also problematic. The common procedure here in South Africa and in other jurisdictions places the seller at the centre of the transaction and allows parties to choose a suitable purchaser but this gives rise to a multitude of opportunistic tricks and potential sabotage, as the person who controls the success of the transaction is the one who least wants to see it succeed.¹⁹⁵ Tajana also points out that the nature of the assets being divested can prove problematic where carve-outs and mix-and-match provisions are used and thus a stand-alone entity should as far as possible make up the asset to divest. As indicated by Baer, a large portion of problems appear to be alleviated or reduced by way of designing effective relief prior to consummation of the merger, as well as by way of inclusion of contingent provision such as crown jewel divestitures, but while these may be suitable authorities should caution against incorporating numerous contingent provisions within a divestiture order as the interests of the merging parties are also to be given a certain level of consideration.¹⁹⁶ Insisting on buyers upfront can also reduce certain interim harm that has been

¹⁹³ Sutherland & Kemp chap 10 para 10.12.
¹⁹⁴ Tajana 1 paras 3 and 4.
¹⁹⁵ Tajana 2 para 2.
¹⁹⁶ Baer 42.
known to occur, and furthermore what is clear is that the divestiture of an on-going standalone business with a loyal customer base tends to be a substantially more successful post-divestiture.\textsuperscript{197}

Issues regarding the purchaser also become clear when it is noted that in many cases the wrong choice of purchaser led to partially ineffective remedy and in fact a better purchaser could have been found.\textsuperscript{198} This reiterates the existence of purchaser risk and acknowledges that to some extent smaller companies struggle to compete after the acquisition of a newly divested business.\textsuperscript{199}

5.2 Conclusions and recommendations

It appears that there is much more to the divestiture remedy than initially meets the eye. What has transpired from this research is that ordering divestiture as a remedy has to be carefully contemplated and appropriately planned in order for divestiture to serve as a proportionate remedy geared at restoring competition to a market. Thus divestiture as a remedy requires appropriate design. The timing of divestiture is also crucial so as to limit the window of mischief that may lead to a decrease in the value of the divested asset. Other important features that have to be considered before imposing divestiture as a remedy in a given instance relates to a clear description of the business to be divested, which should preferably be a stand-alone business. Proper application of the divestiture remedy further requires careful consideration to be given to the responsibilities of all parties involved.

Central to the successful implementation of the divestiture remedy is the existence of an acceptable purchaser. It is thus necessary to consider whether the asset to be divested is of such a nature that another entity or person would be interested in acquiring it –if not, divestiture should be discarded in favour of another more effective remedy.

It is therefore recommended that the South African competition authorities consider the gravity and practical implementation of ordering divestiture as a competition remedy and take into account lessons from the other jurisdictions, particularly the EU on aspects important to managing and mitigating the various risks associated with divestiture.

\textsuperscript{197} Baer 42.
\textsuperscript{198} Tajana 2 para 4.
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