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Deciphering Article 7(3): A strategic analysis of early merger implementations in EU competition law

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ABSTRACT

This article provides a comprehensive analysis of the European Commission's application of Article 7(3) in EU merger control, revealing a strategic balance between regulatory oversight and commercial realities. By examining all the decisions since 2004, it highlights the nuanced approach to granting derogations and exemptions, the conditions imposed for preserving the target's viability, and the selective use of monitors. The analysis underscores the importance of Article 7(3) in facilitating transactions while safeguarding competitive market structures, offering insights into evolving trends and the implications for future merger cases.

Cet article fournit une analyse complète de l'application par la Commission européenne de l'article 7(3) dans le contrôle des opérations de concentration, révélant un équilibre stratégique entre la surveillance réglementaire et les réalités commerciales. En examinant toutes les décisions prises depuis 2004, il met en lumière l'approche nuancée de l'octroi de dérogations et d'exemptions, les conditions imposées pour préserver la viabilité de la cible et l'utilisation limitée de mandataires. L'analyse souligne l'importance de l'article 7(3) pour faciliter les opérations tout en préservant les structures concurrentielles du marché, et donne un aperçu de l'évolution des tendances et des implications pour les futures affaires de concentration.

1. In the complex landscape of EU merger regulations, Article 7 of EC Regulation 139/2004[1] (the ECMR) stands out as a pivotal provision, granting the European Commission the discretion to allow parties to implement mergers before obtaining final clearance under exceptional circumstances.

2. Like the EU regime, most countries with a mandatory merger control system impose a standstill obligation on the merging parties. The standstill obligation can be found, in similar wording, in Article 7(1) ECMR, Article L. 430-4 of the French Commercial Code or Section 7A(1)(b) of the Hart-Scott-Rodino Act in the United States.

3. The United States, however, stands out as a strong opponent to exempting transactions, or granting derogations, from the suspension introduced by the HSR, with some authors arguing that "[f]*ailing and 'flailing' companies, and specifically bankruptcy proceedings, have long been viewed by the federal antitrust enforcement agencies as presenting opportunities for potential mischief* (…) *For this reason, the premerger notification and waiting period obligations imposed by the Hart-Scott-Rodino (HSR) Act do not provide for an exemption for acquisitions in bankruptcy.*"[2]

4. Conversely, most other jurisdictions with a standstill requirement allow for exemption or derogation to the same, with two situations warranting such an exception: public offers on the stock markets and acquisition of distressed assets.

1 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, pp. 1–22.

2 M. R. Pfunder, Acquisitions from Financially Distressed Entities Under the HSR Act, *Antitrust*, Vol. 23, No. 2, 2009, pp. 18–23, at 18.

5. In EU law, paragraphs 2 and 3 of Article 7 ECMR allow for derogations in these specific situations. With Article 7(2) addressing stock market transactions, Article 7(3) in practice applies to the acquisition of distressed assets, where either a regulatory provision (such as submitting a binding offer in court) or an imminent threat to their viability requires that the purchaser be able to exercise a certain level of control before a decision on the merits.

6. Some countries, such as France, generally grant unrestricted exemptions,[3] notably in cases of liquidation of assets and court-mandated transactions.[4] Others grant more limited derogations. In most jurisdictions, exemptions and derogations from the standstill effect remain rare.

7. The application of Article 7(3) ECMR, while not frequent, underscores the Commission's flexible approach to merger control, balancing the need for thorough competition scrutiny with the commercial realities facing merging entities.

8. In that respect, the reader will certainly remember that Article 7(3) of Regulation 139/2004 elaborates on the provisions of Article 7(4) of Regulation 4064/89[5] to now require that the Commission weighs up the effects of the suspension with the potential threat to competition resulting from the exemption. Under the 2004 rewrite, does the granting of an exemption often amount to a pre-clearance under Article 6 ECMR?

I. State of play

1. The data

9. Data pool. A review[6] of European Commission decisions issued under the 2004 ECMR indeed reveals an intriguing pattern: out of 51 requests under Article 7(3), a favorable decision was granted in 50 cases, showcasing the Commission's tendency to accommodate business needs within the legal framework designed to protect market competition.

10. Over the span of these 20 years, the Commission issued 33 Article 7(3) decisions with "conditions and obligations" attached (and 17 without such conditions and obligations). The years 2004, 2006 and 2008 stand out, with six requests for exemptions decided under Article 7(3). Next is 2022, with four requests.

11. External monitoring of the conditions and obligations. Monitors external to the acquiror were appointed, as part of the conditions and obligations, in only six cases since 2004:

– The Commission requested that an "independent observer" be appointed in two cases[7] in 2007 and 2008.

– In four subsequent cases,[8] a "monitoring trustee" was appointed.

12. This very low number of decisions imposing external monitoring (12% of the total number of Article 7(3) decisions, and 18% of the number of conditional decisions) stands out as, while Article 6(1)b and Article 8(2) decisions are few and far between, external monitoring is usually the norm in cases where remedies[9] are required.

13. Remedies under Article 6(1)b or Article 8(2). Out of the 51 cases in which a decision under Article 7(3) was issued, the Commission only required remedies under Article 6(1)b six times, i.e., in 12% of the 51 cases. This figure is particularly significant as it represents more than double the annual average ratio of Article 6(1)b and Article 8(2) decisions with remedies to the total number of merger control decisions.

14. In three of those cases,[10] the Commission granted the Article 7(3) exemption with conditions and obligations, underlining from the start the threat posed by the transaction to competition. In two other cases[11] however, the Commission granted the exemption without requiring conditions or obligations and yet decided that the case required remedies at the end of its

3 Fr. NCA, Merger Control Guidelines of the Autorité de la concurrence, 23 July 2020, para. 147: "*The granting of such an exemption is, by definition, exceptional. Takeover bids for undertakings in liquidation or receivership are among the cases that may lead to the granting of an exemption.*"

4 R. Ferla, Dérogation à l'effet suspensif du contrôle des concentrations : Faut-il harmoniser les pratiques décisionnelles européenne et françaises ?, *Concurrences* No. 2-2022, art. No. 106352, www.concurrences.com. Mr Ferla indicates: "*Even if the Authority is careful to state that the granting of a waiver is exceptional, in practice, it generally grants waivers to companies that have to submit takeover bids for companies in liquidation or receivership*" (loose translation). This comment echoes the previous version of the French NCA Merger Control Guidelines (Lignes directrices révisées du 10 juillet 2013 relatives au contrôle des concentrations, para. 127), which stated with less ambiguity that "*although the granting of such a waiver is, by definition, exceptional, takeover bids for companies in liquidation or receivership often benefit from it, as such bids can lead to the parties automatically finding themselves in breach of Article L. 430-4 of the French Commercial Code, by virtue of the Commercial Court's decision awarding them control of the company concerned*" (loose translation).

5 Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, pp. 1–12.

6 *See* the (recently and greatly improved) European Commission database search tool at https://competition-cases.ec.europa.eu/search.

7 Comm. EC, decision Art. 7(3) R. 139/2004 of 12 June 2007, *Cerberus/Torex*, case COMP/M.4763; Comm. EC, decision Art. 7(3) R. 139/2004 of 2 July 2008, *Sun Capital/SCS Group*, case COMP/M.5267.

8 Eur. Comm., decision Art. 7(3) R. 139/2004 of 25 July 2012, *Sofiprotéol/Actifs Doux*, case COMP/M.6696; Eur. Comm., decision Art. 7(3) R. 139/2004 of 21 February 2019, *Connect Airways/Flybe*, case COMP/M.9287; Eur. Comm., decision Art. 7(3) R. 139/2004 of 7 April 2022, *CMA CGM/Gefco*, case COMP/M.10733; Eur. Comm., decision Art. 7(3) R. 139/2004 of 7 December 2022, *ICG/Scopelec/Setelen*, case COMP/M.10996.

9 In this paper, we will refer to "remedies" when mentioning "conditions and obligations" under either Article 6(1)b or Article 8(2) ECMR.

10 Comm. EC, decision Art. 7(3) R. 139/2004 of 11 April 2006, *Orica/Dyno*, case COMP/M.4151; Eur. Comm., decision Art. 7(3) R. 139/2004 of 27 October 2017, *Lufthansa/Certain Air Berlin Assets*, case COMP/M.8633; Eur. Comm., decision Art. 7(3) R. 139/2004 of 21 February 2019, *Connect Airways/Flybe*, case COMP/M.9287.

11 Comm. EC, decision Art. 7(3) R. 139/2004 of 27 October 2008, *BNP Paribas/Fortis*, case COMP/M.5384; Eur. Comm., decision Art. 7(3) R. 139/2004 of 22 December 2009, *Otto/Primondo Assets*, case COMP/M.5721.

phase one investigation. Lastly, in one other case,[12] the exemption was refused, but remedies were eventually necessary to secure a clearance. To be thorough, only one case[13] decided with conditions and obligations under Article 7(3) led to a decision under Article 8 ECMR. No prohibition decision was ever issued in a case where an exemption from Article 7(1) was sought.

15. Violation of the conditions and obligations. Lastly, in no instance did the Commission have to prosecute the parties for a breach of the conditions and obligations attached to an Article 7(3) decision.

2. The substance

16. Let's be reminded of the substance of Article 7(3): "*The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, be it before notification or after the transaction.*"

17. Conditions and obligations aiming to preserve the viability and stability of the target fall under the first part of the second sentence of Article 7(3) (effect on the parties concerned), while additional requirements such as holding separate or reversibility fall under its second part (the threat to competition).

18. Observations on the conditions and obligations most found in Article 7(3) will be presented in the following section.

2.1 Conditions and obligations aimed at preserving the viability and stability of the target assets

19. A particular focus among the 50 favorable decisions based on Article 7(3) on conditions and obligations aimed at preserving the target's viability is evident, reflecting the Commission's strategic foresight in safeguarding market dynamics while ensuring that the exemption does not have adverse "*effects* (. . .) *on one or more undertakings concerned.*"

20. As such, and up to 2015, most of the Article 7(3) decisions concerned themselves with strictly identifying the key decisions which were necessary for the preservation of the viability or stability of the target given the "immanence" of peril, and thus granted a derogation for the same. In the *Sun Capital/SCS Group* decision of 2008, the Commission granted the derogation in the following terms: "*Until the Commission has adopted a decision on the compatibility of the operation, this derogation is granted solely insofar as it allows the acquirer to take all actions that are strictly necessary to restore the viability of the Target as a going concern following signing of the share purchase agreement.* (. . .) *The day-to-day operation of the Target is the responsibility of its management. Any actions by Sun Capital apart from those outlined above must be approved by the Commission after a reasoned request.*"[14]

21. Since then, and except for one case[15] in 2019, the dynamics of the conditions requested by the Commission have significantly evolved. Indeed, more recent decisions only seldom restrict the level of control to be exercised (or specify the type of decisions that can be taken by the acquiror), but rather address the need to ensure the viability of the target in broad terms. In the *UBS/Crédit Suisse* decision of 2023, the Commission merely indicated: "*Until the Commission has adopted its decision on the compatibility of the Transaction, this derogation would allow UBS to take only such actions which are necessary to restore Credit Suisse's viability and/or stability including such actions as described in Section 3 of this Decision.*"[16]

22. In fact, Article 7(3) decisions have morphed from granting a limited derogation from the application of Article 7(1) for certain decisions specifically identified as necessary to preserve the viability of the target to a more general (and unrestricted) exemption from the standstill.

2.2 Conditions and obligations regarding a merger control submission

23. A consequence of the above is that rather than mingling into the operations of the acquiror/target relation, the Commission today concerns itself mostly with requiring that the deal can be examined as soon as possible: a prompt notification is a common condition of the exemption.

24. In *UBS/Crédit Suisse* (2023), for instance, this condition reads as follows: "*UBS and Credit Suisse shall submit a complete notification of the Transaction to the Commission without delay, and in any event no later than six weeks from the adoption of the Article 7(3) decision in order to allow the assessment of the compatibility of the proposed concentration with the internal market and the EEA agreement.*"[17]

12 Eur. Comm., decision Art. 7(3) R. 139/2004 of 11 February 2011, *SCJ/Sara Lee*, case COMP/M.5969.

13 Comm. EC, decision Art. 7(3) R. 139/2004 of 19 March 2008, *STX/Aker Yards*, case COMP/M.4956.

14 Comm. EC, decision Art. 7(3) R. 139/2004 of 2 July 2008, *Sun Capital/SCS Group*, case COMP/M.5267, paras. 21–23.

15 Eur. Comm., decision Art. 7(3) R. 139/2004 of 21 February 2019, *Connect Airways/Flybe*, case COMP/M.9287.

16 Eur. Comm., decision Art. 7(3) R. 139/2004 of 4 April 2023, *UBS/Crédit Suisse*, case COMP/M.11111, para. 50(b).

17 Ibid., para. 50(a).

2.3 Conditions and obligations ordering the ring-fencing of the target assets

25. Ring-fencing provisions, which constitute the bread and butter of the monitoring of structural commitments, are only seldom required as part of the conditions and obligations in Article 7(3) cases.

26. A necessary *à côté* of a hold separate arrangement (see below), ring-fencing was requested as a stand-alone commitment in only two cases, once[18] in 2006 and once in 2017. For instance, in *Banco Santander/Banco Popular Group* (2017), the condition read as follows: "*The derogation is made subject to the condition that Santander will adopt the organizational measures to ensure that the BPE's business is ring-fenced and not operationally integrated with the Notifying Party, limiting the Notifying Party's influence to the minimum necessary, until the Commission has taken a final decision on the Transaction.*"[19]

2.4 Conditions and obligations pertaining to holding separate and limiting voting rights

27. Another heavy trend in earlier decisions, also in line with the above, is that the conditions and obligations aimed at preventing integration between the target and the acquiror, thus maintaining some measure of standstill.

28. In a fashion like structural commitments, the conditions and obligations required the acquiror not to implement the transaction and to exercise its voting rights only to the extent necessary for the preservation of the viability of the target and its own investment.

29. Three decisions[20] went as far as ordering that a hold-separate manager be appointed to oversee the target until clearance was obtained under the ECMR. The *Parcom/Pon/Imtech Marine* (2015) decision reads: "*In order to ensure the orderly implementation of the measures under (ii) whilst maintaining Imtech Marine separate from Pon and Parcom businesses until clearance is eventually granted, Pon and Parcom shall appoint a hold-separate manager*" (para. 38).

30. There again, hold-separate conditions and obligations were common until 2015, and only saw a resurgence in two cases[21] since, in 2019 and 2022. The most recent decision[22] to date, *UBS/Credit Suisse* (2023), while not going as far as requiring reversibility (see below), required that the assets be maintained separate by prohibiting integration; oddly, neither a hold-separate manager nor a monitoring trustee was appointed.

2.5 Conditions and obligations requiring reversibility of actions undertaken by the acquiror

31. Lastly, and probably the most intriguing condition imposed by Article 7(3) decisions, is reversibility: the acquiror is to take no action that cannot be reversed, in the event the transaction is eventually prohibited or seriously amended and the target (or parts of it) needs to be divested. A subset of this reversibility obligation is the obligation to maintain certain arrangements or contracts, the termination of which would irremediably compromise the situation of the assets.[23]

32. Notably, the two decisions *Sofiprotéol/Actifs Doux* (2012)[24] and *ICG/Scopelec/Setelen* (2022) have in common that the Commission's focus was not so much on the preservation of viability of the assets, but rather on the reversibility of actions undertaken in the context of the liquidation process of the targeted companies and assets.

33. In *ICG/Scopelec/Setelen*, the parties committed: "*Not to implement the transaction in an irreversible manner or to enter into agreements that could prevent or make difficult the possible sale of the targets' assets to third parties (jointly or separately)*"[25] (loose translation).

34. As such, the *ICG* decision in 2022 appears to read contrary to 10 years of practice; indeed, since the *Sofiprotéol* decision of 2012, the Commission had resorted to granting general and unspecified exemptions from the standstill effect, thus in effect allowing for implementation and integration of the merger before its final decision under the ECMR. Integration was allowed (or not prohibited) in so far as it was necessary for the preservation of viability or stability. The *ICG* case, by returning to the pre-2012 practice, stands out as unconventional and sets an interesting precedent.

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18 Comm. EC, decision Art. 7(3) R. 139/2004 of 11 April 2006, *Orica/Dyno*, case COMP/M.4151.

19 Eur. Comm., decision Art. 7(3) R. 139/2004 of 7 June 2017, *Banco Santander/Banco Popular Group*, case COMP/M.8553, para. 34.

20 Comm. EC, decision Art. 7(3) R. 139/2004 of 12 June 2007, *Cerberus/Torex*, case COMP/M.4763; Eur. Comm., decision Art. 7(3) R. 139/2004 of 19 December 2013, *Ecom Agroindustrial Corporation/Armajaro Trading*, case COMP/M.7120; Eur. Comm., decision Art. 7(3) R. 139/2004 of 4 September 2015, *Parcom/Pon/Imtech Marine*, case COMP/M.7771.

21 Eur. Comm., decision Art. 7(3) R. 139/2004 of 21 February 2019, *Connect Airways/Flybe*, case COMP/M.9287; Eur. Comm., decision Art. 7(3) R. 139/2004 of 7 April 2022, *CMA CGM/Gefco*, case COMP/M.10733.

22 Eur. Comm., decision Art. 7(3) R. 139/2004 of 4 April 2023, *UBS/Crédit Suisse*, case COMP/M.1111.

23 For instance, Eur. Comm., decision Art. 7(3) R. 139/2004 of 11 November 2022, *BMWK/Sefe*, case COMP/M.10963, where BMWK committed to maintaining fiduciary arrangements concerning the target.

24 Eur. Comm., decision Art. 7(3) R. 139/2004 of 25 July 2012, *Sofiprotéol/Actifs Doux*, case COMP/M.6696.

25 Eur. Comm., decision Art. 7(3) R. 139/2004 of 7 December 2022, *ICG/Scopelec/Setelen*, case COMP/M.10996, para. 41(b).

II. Views from the monitor

35. It is our opinion, however, that this decision—and the conditions and obligations attached—is more a tribute to the complexity of imposing conditions and obligations in cases where the standstill can in fact not apply, rather than a reversal of recent precedents.

1. Relevance of external monitoring (aka "*Extension du domaine de la lutte*")

36. As mentioned above, external monitors were appointed in a very limited number of cases: only 12% of the 51 decisions under Article 7(3) ECMR required the appointment of an "independent observer" (two cases) or of a monitoring trustee (four cases).

37. It is our guess that, as the transaction should in principle be notified to the DG COMP within a very short timeframe after the exemption is granted, the designation of a monitoring trustee could be viewed as impractical or ineffective.

38. It is indeed a fact in merger control that, even though the parties must submit names of candidates for the role of monitoring trustee within a few days or weeks of the decision (be it Article 7(3), Article 6 or Article 8), the actual appointment of the monitoring trustee may take additional weeks (submission, interviews, formal approval).[26] Most cases where an Article 7(3) exemption or derogation was granted are decided on the substance in the following few months by the Commission. It may happen that the monitoring trustee has only hardly started working that the assignment is already over. In the *ICG* case (2022), the Commission had requested that the monitoring trustee be appointed immediately after the decision by the French commercial court granting control over the distressed assets, thus ensuring the effectiveness of the appointment.

39. In view of the current practice of the Commission, the designation of a monitoring trustee in Article 7(3) cases should be the norm, irrespective of how detailed the conditions and obligations, if only to remind the parties of the exceptional nature of the exemption granted and of their commitment (express or implied) to obtaining a clearance as soon as possible.

40. Indeed, as will be further detailed below, once the exemption from the standstill is granted, the parties may be more focused on integration rather than performance of their regulatory duties—owing to the state of the target (distressed) and the breadth of decisions to be implemented to preserve its viability.

2. Challenges in the implementation of conditions and obligations under Article 7(3)

41. Successfully implementing the conditions and obligations prescribed by an Article 7(3) decision rests on the same pillars as any other case with commitments or remedies: engagement, transparency, and adaptability from all the stakeholders.

42. However, this holds even more true in these cases where time is of the essence (the immanency of the target's failure is always a possibility despite the exemption or derogation) and difficulties arise out of order (information on the extent of the issues may be scarce at the time when the exemption is granted).

2.1 Rapidity of execution and practical decision-making

43. In this context, a dedicated organization on the side of the acquiror can be key to a swift and efficient execution of the many workstreams linked with preserving the viability of the target and attaining the goals of Article 7(3) decision. Beyond the legal function, high-level executives with the power of decision will need to be involved from the get-go and remain focused on the tasks at hand.

44. When appointed, the monitoring trustee will need to be available to troubleshoot issues and suggest pragmatic solutions, often outside the box. As recent Article 7(3) decisions do not provide for a clear guide map of what is (strictly) authorized or not for the acquiror, the extent of the intervention of the acquiror in the target's business will need to be assessed on a case-by-case basis, with the best interest of the target in mind. Any such determination by the monitoring trustee will need to happen almost in real time, to meet what is required by the target to survive.

45. Transparency and access to key people within both the acquiror and the target organization help streamline this process.

2.2 Interactions with the case team

46. It is obviously not to say that the acquiror and the monitoring trustee will act unsupervised by the European Commission case team. Yet, a "do first, ask for permission later" approach is sometimes necessary, but can only work if the Commission is regularly kept appraised of the way events unfold, and expectations shared by and between the stakeholders, all in keeping with the conditions and obligations and particularly the absence of threat to competition.

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26 In that respect, we suggest that a list of potential monitoring trustees should be provided together with Form RM (or Form RS in the case of Article 7(3) proceedings) and that the review of the candidates be conducted alongside the review of the commitments, to ensure that the monitoring trustee can be appointed from day one of the decision.

47. In that respect, continued interactions between the monitoring trustee (at least) and the case team are paramount. As the case team had to decide on granting the exemption based on a necessarily limited amount of information, it will rest on the external monitor (and the acquiror) to provide sufficient comfort to the Commission that the decisions being taken, again in real time, are both necessary and in the best interest of the target, all the while having a limited impact on competition and not precluding the Commission's further analysis on the substance.

2.3 Detailed conditions imposed by the commercial courts

48. This holds even more true in consideration of cases such as *Sofiprotéol* (2012) and *ICG* (2022), in which the transaction was court-mandated and, thus, came with strings attached. As an Article 7(3) decision is generally issued before the court order, these strings may outright contradict the Commission decision or prove cumbersome to work around to remain with the remit of the exemption.

49. In similar situations, the ability to act will be constrained for both the acquiror and the monitoring trustee. There again, pragmatism must dictate action. Didacticism may also be required to put in plain words the what and the why of certain actions undertaken by the acquiror because of the court order.

2.4 Reversibility

50. But what to do when, as in the *Orica* (2006), *Sofiprotéol* (2012) and *ICG* (2022) cases, the Article 7(3) exemption is granted with a specific condition that any action undertaken by the acquiror must be reversible. *ICG* went as far as specifically prohibiting any divestment before clearance.

51. The de facto consequence is that stakeholders will in effect have to draw up a roadmap of actions to be taken, and check whether these entail irreversible consequences. This could be viewed as a return to pre-2015 precedents where the Commission only granted a limited derogation to the standstill.

52. Once again, while it is possible to foresee the broad outlines of this roadmap, the devil is in the details, and many decisions will have to be taken for which the question of reversibility will be complex to analyze and balance.

53. It is certainly the case when the transaction does not concern an incorporated company, or when the assets concerned by the transaction are being liquidated.

54. What, for example, of situations in which, because of the terms and conditions of the asset takeover dictated by a commercial court, employees are directly integrated into the purchaser? In such cases, the consequences in terms of social status for these employees are by nature irreversible (at least under French law), even though the transfer of these employees was a necessity (*de jure* or de facto).

55. What if contracts must be assigned directly to the acquiror, either by request of the contracting party (which can rightfully seek reassurance after the demise of the original counterparty) or by the effect of the court order? What if limited divestments are in fact necessary to preserve the viability of the larger ensemble of assets acquired?

56. What again when the situation of the assets or the company requires that they are rebranded (to a new brand or the brand of the acquiror), for instance to ward off the consequences of the demise, ill repute of the liquidated company, or simply because the original company has in fact ceased to exist because of the liquidation? What of the email addresses of the employees, the websites and similar communication tools? Such a rebranding or change of name is certainly irreversible in these situations.

57. Even if they are in fact irreversible, all the actions listed in the example situations above (incorporation of employees, transfer of contracts, limited divestments, rebranding, change of email addresses, etc.) could be viewed as necessary for the preservation of the viability, stability, and resale value of the target assets.

58. One can wonder whether stating that the acquiror must "*not implement the transaction in an irreversible manner or to enter into agreements that could prevent or make difficult the possible sale*"[27] (loose translation) of the assets does not, in fact, void the purpose of the exemption under Article 7(3), the purpose of which is precisely to allow for anticipated implementation to the extent necessary to preserve viability.

59. This begs the question of whether, instead of making the exemption conditional to reversibility, the Commission should not instead return to granting limited derogations (i.e., stating a limited list of authorized decisions) like it did in the past.

60. We contend, however, that accrued practice vindicates trusting the acquiror with being responsible for the preservation of the viability of the assets, including taking measures that may be irreversible but are in the best interest of the target and mindful of preserving market conditions.

61. In only one of the three cases that specifically contained this reversibility provision did the Commission eventually require remedies in the final Article 6(1)b decision, which were in fact implemented not by divesting assets from the target but by divesting subsidiaries of the acquiror.[28]

27 Eur. Comm., decision Art. 7(3) R. 139/2004 of 7 December 2022, *ICG/Scopelec/Setelen*, case COMP/M.10996, para. 41(b).

28 Comm. EC, decision Art. 7(3) R. 139/2004 of 11 April 2006, *Orica/Dyno*, case COMP/M.4151.

62. Likewise, there is no instance on the record where the Commission eventually prohibited the transaction. There also is no instance where the Commission had to seek redress for a violation of the terms of the exemption granted under Article 7(3).

63. One way of mitigating certain aspects of the risk entailed by the acquisition of the assets before the formal clearance would be to rethink how to structure the takeover of distressed assets, at a very early stage in the project.

64. We could argue for Article 7(3) decisions to require, as standard, that the assets taken over be placed in an ad hoc holding company, under the supervision of a monitoring trustee. This solution would reinforce guarantees of non-integration beyond what is strictly necessary, holding separate and ring-fencing, making the monitoring of their viability easier and verifiable.

III. Concluding remarks

65. With only a handful of precedents (51 decisions in nearly 20 years) to refer to, practitioners may have to guess whether conditions and obligations will be required in a specific Article 7(3) case, and whether these conditions and obligations will extend beyond a simple requirement to notify the transaction in due time.

66. It is obviously not in the European Commission's habit or interest to invest itself in micromanaging companies via conditions and obligations (be they decided under Articles 7(3), 6(1)b or 8(2) ECMR). This is, however, very much the responsibility of the acquiror and the purview of the monitoring trustee (as the case may be).

67. We also believe that 20 years after the ECMR came into force, practitioners and companies are sufficiently aware of their responsibility under this regulation to be able to benefit, not from limited derogations under Article 7(1), but from broad exemptions under Article 7(3).

68. Yet, with Article 7(3) decisions granting exorbitant liberty from one of the most important rules of EU merger control (standstill until clearance), it would only be right that a clear framework is applied to every instance.

69. As such, practitioners would welcome a dedicated notice from the European Commission on the regime of requests submitted under Article 7(3). This notice would make applying for an exemption one less thing for companies to worry about in an already complex and time-constrained situation. Two "must-include" provisions would come to mind:

- Firstly, that the acquired assets and companies are placed (or maintained) in a holding company from the onset.
- Secondly, that independent monitoring arrangements are made, also from the onset.

70. Companies, lawyers, and trustees alike would certainly welcome the opportunity to engage in this discussion with the European Commission. ■

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