Giving Effect to the Remedy

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14 October 2019

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Introduction

Remedies are an important aspect of merger control because a large proportion of mergers where competition concerns are identified are cleared with remedies. For example, in the EU in 2018, six out of 12 mergers investigated in Phase II were cleared with remedies. In addition, in 17 out of 383 mergers that were cleared in Phase I, clearance was subject to remedies to avoid an in-depth Phase II investigation.

An effective remedy is one that fixes the competition concern caused by the transaction, while at the same time preserving the commercial rationale of the deal. There are two main categories of risk that can undermine the ability of a remedy to achieve this goal: composition risk and implementation risk. Composition risk refers to the possibility that the design of the remedy fails to address the competitive harm identified, while implementation risk relates to the possibility that the remedy might not work in practice, for example, because it takes too long to become effective or the new competitor the remedy aimed to create ultimately exits the market.

In October 2005, the European Commission (EC) undertook a critical appraisal of the effectiveness of remedies and identified a series of 'serious design and implementation issues affecting the effectiveness of remedies'.[2] The EC identified composition risk in terms of the divestment business being inadequate in scope as the most common issue. Since then, the EC has developed a remedies policy designed to minimise both composition and implementation risks. The US agencies' approach to remedies as developed over the years is very similar to that of the EC.

Crafting an effective remedy can be challenging and often depends on the competition concerns that need to be addressed, as well as timing (i.e., whether the parties have the time to fight the case on the merits or prefer to give a broader remedy early on in order to secure a quick clearance).

This chapter focuses on designing an effective remedy and then identifies guideposts for dealing with composition risk and implementation risk in the United States and the European Union.

Designing an effective remedy

US

The US agencies' view is that horizontal mergers will typically require a structural remedy to resolve any anticompetitive concerns.[3] This often takes the form of divestitures of existing business entities or assets.[4] Structural remedies can extend outside of traditional assets. For example, in the case of data-intensive technology companies, the Department of Justice (DOJ) treats data like any other asset class and, if data possession is critical to competition in the relevant market, merging parties may be required to divest one side's data collection if necessary to maintain effective levels of competition.[5]

The US agencies can also employ non-structural conduct (or behavioural) remedies. These often take the form of binding commitments designed to constrain the future conduct of the merged firm. While behavioural relief may sometimes supplement a required divestiture to fully achieve the remedial purpose, the US agencies generally consider behavioural remedies to be far inferior because of the difficulty and costs associated with constructing, implementing, monitoring and enforcing such remedies.[6] Under the current administration, the DOJ and Federal Trade Commission (FTC) have both stressed a strong preference for structural remedies relative to behavioural remedies or a hybrid of the two types of remedies.[7] For example, in the *T-Mobile/Sprint* transaction, a horizontal merger between mobile telephone service providers, the DOJ required divestiture of Boost Mobile, Virgin Mobile and a number of Sprint's prepaid customers, as well as Sprint's 800 MHz spectrum licences to the Dish Network. It also required T-Mobile to assist Dish to take over any retail or cell towers T-Mobile decommissions and to negotiate an agreement for T-Mobile to use Dish's unused spectrum while it builds out its network. Most unusually, however, the DOJ included Dish as a named defendant in the consent decree, meaning that Dish could be held in contempt if it does not comply with its obligations to use its mobile spectrum and build out a 5G broadband network.[8]

The US agencies' preference for structural remedies can extend to vertical mergers as well,[9] although behavioural remedies can often effectively address the anticompetitive issues raised by vertical mergers. Indeed, *Live Nation/Ticketmaster*, *Comcast/NBC Universal* and *Google/ITA Software* were all vertical mergers that the DOJ cleared, subject to behavioural commitments designed to address competitive concerns.[10] Similarly, the FTC applied behavioural remedies to address concerns related to the vertical aspects in *Staples/Essendant*, where it required a post-merger firewall between the merging parties to limit access to commercially sensitive information pertaining to Essendant's office supply customers that compete with Staples. [11] However, the US agencies appear less willing to accept behavioural remedies unless there is certainty that the anticompetitive conduct will be remedied. [12]

In November 2017, the DOJ filed suit against the *AT&T/Time Warner* transaction, a vertical merger. [13] In its complaint, the DOJ argued that were the merger to go through, AT&T would likely raise prices for other pay-TV distributors that pay for rights to Time Warner movies and shows. [14] Although AT&T was reportedly willing to accept a behavioural consent decree with restrictions similar to those the DOJ had previously accepted in *Comcast/NBC Universal* – analytically an almost identical transaction – the DOJ nonetheless found the relief inadequate to ensure the competitive landscape remained intact post-merger. [15] In June 2018, following a six-week long bench trial, the court rejected the DOJ's challenge and ruled that the transaction did not violate the antitrust laws. [16] The DC Circuit affirmed the trial court after the DOJ appealed the district court's findings on the DOJ's increased leverage theory, rejecting the DOJ's argument that the combined entity would have greater bargaining power in negotiating costs for Turner Broadcasting System's content. [17] Notably, the appellate court referred to Turner Broadcasting's decision a week after the DOJ filed suit to send letters to approximately 1,000 distributors 'irrevocably offering' to engage in 'baseball style' arbitration at any time in the next seven years should there be pricing disputes. Further, Turner Broadcasting stated that it would give the distributor the right to continue broadcasting content pending arbitration at existing terms. [18] The court noted that this 'baseball style' arbitration was part of the remedy in the *Comcast/NBCU* merger and referenced the government's statements in that merger regarding the efficacy of conduct remedies. [19] However, the court declined to articulate a new legal standard for the assessment of vertical mergers, since neither party challenged the district court's legal standards. [20] It remains to be seen whether the DOJ will become more willing to accept behavioural consent decrees consistent with past practice.

Restoring competition is the 'key to the whole question of an antitrust remedy'. [21] Thus, the US agencies will refuse to accept a divestiture buyer or proposed divestiture package where they have determined that the proposed remedies are insufficient to replace the lost competition or address competitive concerns. The US agencies have expressed a strong scepticism towards the suitability of divestitures of less than a full business unit. [22] For instance, in April 2016, the DOJ filed a suit seeking to block Halliburton Company's proposed acquisition of Baker Hughes Inc. [23] Before the lawsuit was filed, Halliburton had offered to divest up to US$7.5 billion in certain assets in an effort to address the department's competitive concerns. According to the DOJ's complaint, the proposal was inadequate because it did not include full business units, withheld many critical assets, involved a number of ongoing entanglements between the merged company and the proposed divestiture buyer, and overall failed to replicate the existing (pre-merger) competition. [24]

Similarly, the FTC found that the proposal by Staples Inc and Office Depot Inc to divest more than US$1.25 billion in large corporate customer contracts to the wholesaler Essendant was insufficient to remedy the significant competitive concerns caused by the transaction. [25] The FTC indicated that: (1) many of the contracts Staples proposed to transfer to Essendant were short-term, allowing customers the option to return to Staples/Office Depot when the contracts expired; (2) the proposed divestiture buyer did not currently serve any business-to-business (B2B) customers; and (3) wholesalers like Essendant were historically unsuccessful competitors for B2B business. Given these inadequacies, the FTC concluded that Essendant would be unable to compete with the combined Staples/Office Depot on day one, thus rejecting the proposed divestiture remedy.

While proposed merger settlements must be approved by a federal court under the Tunney Act, [26] this approval is almost always given without substantial inquiry or hearings. However, in a highly unusual decision, Judge Leon in the DC District called for live testimony in court as part of his approval of the remedies in the *Aetna/CVS* merger. [27] In December 2018, Judge Leon accepted conditions proposed by CVS to remain in place during his review, including that Aetna would maintain its historical control over pricing for its insurance customers, and that CVS and Aetna would not exchange competitively sensitive information, and allowed the deal to close. [28] However, despite objections from CVS, Judge Leon heard live testimony on the merits of the proposed settlement before ultimately approving the remedies. While this may remain an outlier in merger settlement review, the outcome of Judge Leon's inquiry could set a precedent for other judges to take similar action in the future.

EU

In the 2005 Remedies Study, the EC identified that in determining the business to be divested, previous decisions had focused on the aim of removing the overlap between the merging parties and placed too much weight on the structure of the market, measured in particular in terms of market shares rather than the ability of the divested business to restore effective competition. [29] The EC has since made significant efforts to refocus this approach stressing that 'the basic aim of commitments is to ensure competitive market structures.' [30]

Designing a remedy therefore needs to entail ensuring that the remedy covers a sufficient portion of the overlap and that the divestment will effectively operate in the market on a long-term basis with limited need for continued intervention from the EC. These objectives need to be addressed at the outset before the deal is cleared, resulting in sometimes difficult negotiations between the EC and the merging parties.

The EC generally requires a complete divestiture of the overlap in order to ensure that the divestment purchaser is a robust competitor that can effectively 'step into the shoes' of one of the merging parties to replicate the pre-merger competitive constraint on the merged entity. Divesting the entire overlap also ensures that the divestment purchaser can operate a viable stand-alone business on a long-term basis which would not be possible if the merging parties simply sold off some of the assets to enable them to get down to an 'acceptable' market share.

In addition, to ensure the long term viability of the remedy business, the EC will not only focus on the products on the market contemporaneously but may also require steps to sure this risk is managed in the future. For example, in *Dow/DuPont*, the parties offered remedies that would ensure that the purchaser had the capabilities to preserve the viability and competitiveness of the divested products throughout their life cycles. [31]

Commitments that are structural in nature, such as selling a business unit, are strongly preferred; they provide a clear-cut, immediate and permanent way to restore effective competition. In practice, however, there is a sliding scale between a clean-cut divestment remedy and behavioural commitments, for example access to key infrastructure or inputs on non-discriminatory terms. By way of example, in *Hutchison/VimpelCom*, the EC accepted a remedy which consisted of a divestment of assets (RAN masts and spectrum licences) combined with a national roaming agreement and a transitional network sharing agreement to facilitate the entry of a new mobile network operator. [32] In previous cases in this industry, the EC had accepted a commitment by mobile network operators to grant wholesale access to mobile virtual network operators to remedy its concerns (e.g., *Telefónica Deutschland/E-Plus* [33] and *Hutchison 3G UK/Telefónica Ireland*). [34] However, difficulties in the implementation and enforcement of these remedies (see for example the opening of non-compliance proceedings against the Telefónica in *Telefónica Deutschland/E-Plus*) drove the move towards the more structural solution in *Hutchison/VimpelCom*. Equally, where the imposition of a divestment remedy would be disproportionate to the identified harm, the EC may be convinced to consider quasi-divestments. For example, in *Huntsman/Rockwood*, the competition harm was limited to a product manufactured in a plant that also made multiple other products for which no harm was identified. The EC therefore accepted a tech-transfer remedy (i.e., divestment of know-how, production methodology and brand) because it would have the same effect as a structural remedy. [35]

While behavioural remedies in horizontal mergers are extremely rare and limited to specific cases or industries, the EC is generally more open to behavioural remedies in non-horizontal cases. For example, in *ASL/Arianespace*, where ASL (a joint venture between Airbus and Safran) acquired Arianespace, the EC was concerned that the transaction could give rise to Airbus and Arianespace sharing competitively sensitive information in relation to satellite manufactures and launch service providers. In particular, the EC was concerned that the flow of information could result in: less competitive tenders because Airbus would be able to adjust its pricing policy to neutralise any competitive advantage its rivals may have; and less innovation, since rivals would be discouraged from innovating because Airbus could easily copy their innovations. To resolve this, the parties implemented firewalls between Airbus and Arianespace for 25 years to restrict the flow of information that could harm competitors. [36] Behavioural remedies are often used in conglomerate mergers and require effective monitoring mechanisms because, in principle, the parties retain the ability to negatively affect competition, but are simply committing not to make use of that ability. By way of example, in *Broadcom/Brocade*, the EC required a remedy to ensure that the merged entity continued to ensure interoperability with competing HBA card suppliers to assuage its conglomerate concerns in these markets.

As part of the design of the remedy, the EC will try to ensure that the divestment business is up and running as soon as possible. This is partially dealt with by imposing strict deadlines on the process, as discussed below, but is also managed through the transitional agreements between the merged entity and the divestment business. On the one hand, such transitional agreements are needed to ensure that the divestment business has continued access to vital inputs, but on the other hand, the EC will seek to minimise any reliance on the merged entity post-transaction. In general, the EC is willing to accept transition agreements for approximately three years. [37] Anything that goes beyond this duration risks that the divestment business is not capable of operating as an effective competitor on a stand-alone basis.

If the divestment business is not a standalone entity, a carve-out is required to separate out the divestment business from the business remaining with the merged entity. While it depends on the proportion of the business being carved out compared to that remaining with the merged entity, the EC has a preference for reverse carve-outs so that the risks and disruption to the business of such a carve-out are borne by the merged entity rather than the divestment business. [38]

As noted above, the main way the EC addresses composition risk is to include the entire overlap to maintain the status quo on the market. To address implementation risk, the EC may, however, go further, requiring businesses in markets where competition concerns have not been identified to also be included if this is seen as necessary for the overall long-term viability and effectiveness of the remedy business. For example, in *Ineos/Solvay/JV*, the EC's competitive assessment focused on S-PVC, but the remedy required that in addition to removing the overlap between the parties, the divested plants had to enjoy full vertical integration of upstream chlorine and ethylenedichloride. Therefore, the divestment package included production assets in Tessenderlo and Runcorn so that the divestment purchaser had a fully integrated self-standing S-PVC business. [39]

Similarly, in relation to inputs, the merged entity may need to assign contracts for critical inputs to be available to the divestment purchaser even if concerns were not identified in that market. [40] For example, in *Solvay/Cytec*, the commitments gave the purchaser the possibility to acquire other products that were manufactured in the same unit to allow for the divested business to be operated in an effective manner. [41]

Implementing an effective remedy

Once the remedy has been designed, parties need to ensure that the purchaser is considered suitable, the divestment agreement replicates the agreed remedies and that the divestment business can operate on a stand-alone basis with minimal monitoring. These factors are key when dealing with implementation risk.

Acceptable purchasers

The viability of the remedy depends on the suitability of the purchaser, and therefore agencies will pay particular attention to the profile of the purchaser. The US and the EU are largely aligned in their approach in this regard. In both the US and the EU, the relevant agency must in all cases give prior approval to the divestiture buyer. The US agencies will scrutinise the financial and competitive viability of the prospective purchaser and will insist that the purchaser have both the ability and the intention to compete effectively in the relevant market.

Similarly, in the EU, the template text of the commitments requires that the purchaser meet three criteria: be independent of the merging parties; have the financial resources and proven relevant expertise to run the business long-term; and not present prima facie competition concerns in its acquisition of the divestment business. [42] The EC has a strong preference for trade buyers in the same or related markets. This approach aims to ensure that the purchaser's activities can be scaled up as quickly as possible to replicate the competitive force of the parties pre-merger. Consequently, private equity buyers are often considered not to be suitable purchasers and are excluded from the process by the inclusion of additional clauses in the text that mandate the type of experience that the purchaser must have. For example, in *Boehringer Ingelheim/Sanofi Animal Health Business*, the EC required that the purchaser had manufacturing capabilities, experience and expertise to successfully implement the technology transfer of antigens and finished products. [43]

Most importantly, the divestiture buyer must be able to replicate and replace the competition lost through the transaction. In the US and the EU, the purchaser will have to provide detailed financial documentation and demonstrate that it has the necessary financial resources to fund the acquisition (explaining all sources of funding), satisfy any immediate capital needs, and operate the divested assets on a going-forward basis (including any contingency plans if financial projections are not met). The purchaser will also have to prepare and present a business plan to the relevant agency to establish that the purchaser has adequate experience, incentives and commitment to compete. Parties should bear all these criteria in mind when selecting a prospective purchaser because they ultimately have the burden of convincing the authorities that the purchaser is suitable. [44]

In the US, the need for a buyer with strong financial resources is particularly important given recent divestitures that have resulted in failures after the buyer declared bankruptcy. For instance, in *Hertz Global Holding Inc/Dollar Thrifty Automotive Group Inc*, the divestiture buyer declared bankruptcy and the FTC had no choice but to allow Hertz to buy back some of the auto rental locations it had divested so that these locations could continue to operate. [45] The FTC was faced with a similar outcome in Albertsons LLC's acquisition of Safeway Inc, where Haggen Holdings LLC, the divestiture buyer of the grocery stores, also declared bankruptcy. Albertsons was allowed to reacquire the divested stores and the consent decree was modified to permit Albertsons to rehire employees. [46]

Statements from FTC Commissioners have expressed conflicting viewpoints on the potential suitability of private equity buyers. Commissioner Chopra has conveyed scepticism about the ability of private equity buyers to replicate the divestment business's competitive influence owing to a lack of long-term incentives and resources inherent in the private equity business model. [47] Following his comments, Commissioner Chopra was the sole dissenter in the FTC's acceptance of divestitures in the *Linde/Praxair* merger, based on the presence of a private equity firm as a partner in the purchaser joint-venture. [48] On the other hand, Commissioner Simons expressed his belief that private equity buyers have management experience and strong financial backing that can support the divestment business and encouraged a case-by-case review of potential buyers. [49] It remains to be seen whether Commissioner Chopra's views will have a lasting effect on buyer approval but, going forward, private equity purchasers may face increased scrutiny of their long-term commitment to the viability of a divestment business.

Both the US and EU agencies are unlikely to permit divestitures involving seller financing apart from in exceptional circumstances. For example, the US agencies may approve staggered payments to the seller, provided such payments are not tied to any performance-based benchmarks. The EC also sets out that it will not provide any seller financing if this were to give the seller a share in the future profits of the divested business. [50] The US agencies will also not accept a divestiture to a buyer that intends to redeploy the assets elsewhere. That said, while the prospective purchaser must have the ability and intent to compete in the relevant market for the foreseeable future, the US agencies will not insist that the buyer maintain the divested assets – or continue to employ them in the market – indefinitely. [51]

In the US and the EU, the divestiture buyer cannot be approved if the divestment would create competitive concerns. Thus, the buyer should not already be a significant participant or poised entrant in the relevant market pre-divestiture. It is notable in this regard that the former Director of the FTC's Bureau of Competition recently acknowledged that consolidation in some industries has made it more challenging to find qualified buyers for divestiture assets. [52] In the EU, this requirement is generally understood to mean that the divestment acquisition must not result in the buyer obtaining a combined market share of more than 25 per cent.

In 2016, the EC started publishing its formal purchaser approval decisions, although it made no formal announcement of this change. While we expect the number of purchaser rejections to be rare, the approval decisions will theoretically create greater transparency in the EC's appraisal process and may help future merging parties in the same relevant markets put together effective remedies where required. However, in reality, since such purchaser approval decisions evaluate the purchaser's financial viability, expertise and strategy, the content of most of these decisions are heavily redacted.

How to ensure expeditious and successful divestiture

US

The US antitrust enforcement agencies have a strong preference for an 'upfront' divestiture buyer, meaning that the parties must identify an acceptable buyer, and finalise and execute the purchase agreement with that buyer, before a consent order is issued. The US agencies are particularly likely to require the merging parties to identify an upfront buyer if the parties propose to divest less than a stand-alone business or a 'mix-and-match' package of assets. [53] An upfront buyer ensures that the divestiture package results in a purchaser that will preserve competition in the market, and it reduces the risk that the remedy will be ineffective or that harm to competition will occur in the interim period between the closing of the primary transaction and the implementation of the remedy. While there are instances where an up-front buyer is not required, this is generally the exception rather than the rule. [54] Indeed, the DOJ has demanded an upfront buyer in more than half of its merger challenges in the past several years. [55]

Notably, the FTC's recent study on merger remedies found that all prior remedies involving divestitures of stand-alone businesses succeeded in maintaining or restoring competition, but that divestiture packages comprising less than an ongoing business sometimes did not always succeed in remedying the competition lost as a result of the merger – even where there was an upfront buyer. The FTC thus announced that:

> Going forward, respondents and buyers can expect that proposals to divest selected assets, even when the proposal includes an upfront buyer, will undergo more detailed scrutiny to reduce further the risk that the buyer won't get what it needs to be an effective competitor. [56]

Where there is an upfront buyer, merging parties will execute the transaction (divestiture) agreement with the proposed purchaser before entering into a final consent decree with the FTC or the DOJ. By contrast, where there is a 'post-order buyer', the buyer is identified, and the divestiture agreement executed, only after a final consent decree has been issued.

In either case, whether the purchaser is upfront or post-order, the US agencies will carefully review the commercial agreements giving effect to the divestiture to ensure that they conform to the consent decree and its remedial objectives. The transaction documents should provide for the effective transfer of all necessary assets and detail any additional obligations, such as transitional services. The US agencies will not participate in negotiations between the merging parties and the divestiture buyer, but they will provide comments and guidance relating to commercial agreement provisions. [57]

The US agencies are generally not concerned with the purchase price for the acquisition of the divested assets and there is no minimum purchase price. [58]

EU

The standard course of action is for the EC to adopt a conditional clearance decision once an appropriate remedy package has been agreed, following which the parties are free to close the principal transaction. However, the EC will set a deadline by which a binding agreement must have been entered into for the sale of the divestment business. Although kept confidential in the commitments, this first divestment period is typically six months, which limits the time that the divestment business is exposed to the commercial uncertainty and disruption of being transferred to a new owner. In exceptional circumstances, this initial divestment period can be extended, although this rarely happens in practice. If the divestment has not taken place within the mandated period, a divestiture trustee is appointed to sell the business on behalf of the merging parties within a three-month period (normally the monitoring trustee or an investment bank appointed by the monitoring trustee).

If in its assessment of the commitments, the EC considers that implementation risk will arise from the fact that the remedy is particularly complex, there is only muted interest in the market or there is a limited pool of potential purchasers likely to be considered suitable, it may require the inclusion of an upfront buyer clause in the remedy package. In this case, the merging parties are prevented from closing their principal transaction until a binding agreement has been entered into with a suitable purchaser. The use of such upfront clauses has been increasing significantly in recent years, and since 2016 there have been 11 examples of such clauses being used (with six relating to Phase I cases and five to Phase II cases).

In addition to the inclusion of upfront buyer provisions in the remedies, fix-it-first solutions have been also used to deal with implementation risk concerns. While the two terms are often used interchangeably, a fix-it-first solution is procedurally quite different from a situation where an upfront buyer clause has been required. Fix-it-first solutions involve the parties coming to the EC during the substantive review with a proposed remedy package and potential buyer and this is included in the substantive review of the transaction. In this case, the EC can be assured that the remedy will be implemented before the principal transaction has been closed and it benefits the parties by allowing the negotiations to take place with more limited involvement from the EC and third parties. Giving the significant timing pressures, however, and the continued risk that the EC still needs to bless the solution, they have been less common.

The EC has shown a willingness to be pragmatic when it comes to fix-it-first solutions. For example, in *GE/Alstom*, GE proposed Ansaldo as the potential purchaser for its heavy-duty gas turbines business as a fix-it-first solution, but this was subject to the subsequent approval by the EC of the buyer and the SPA agreements, which occurred in a separate purchaser approval decision around six weeks after the clearance decision of the principal transaction.[59] The EC has also taken a flexible approach by allowing the parties' planned fix-it-first remedy to evolve into an upfront buyer scenario or allowing a fix-it-first to be combined with other remedy packages to secure Phase I clearance. For example, in *AB InBev/SabMiller*, the parties identified a fix-it-first solution early on, but later in the review additional competition concerns were identified. The EC allowed a dual remedy involving a fix-it-first solution and another remedy package to deal with the other competition concerns to secure a Phase I clearance.[60] While parties can have a 'pure' fix-it-first solution in Phase I, this is rare.[61] From a commercial point of view, parties would have to be willing to provide a broader remedy and identify a purchaser in (or even before) pre-notification discussions with the EC.

As a last resort to obtain clearance, the parties may also be willing to offer a 'crown jewels' package, in which parties commit to divest a more attractive business if they have not divested the originally proposed business by the end of the period fixed in the commitments. Such packages have not been used by the EC in recent years, the EC having been more aggressive in requiring attractive divestment packages in the first instance.

The EC, like the US, also carries out a detailed analysis of the commercial agreements to ensure that the remedy is effective and that the divestiture has a lasting impact on the market. In the case of an upfront buyer or fix-it-first solution, the parties should be prepared for the EC to take a hands-on approach to 'check in' on the progress of negotiations with the purchaser and the divestiture agreement. This becomes less relevant in the case of normal remedies where clearance has occurred and the monitoring trustee will step in to ensure that the remedy is correctly implemented.

Monitoring

US

In cases where the remedy imposes an obligation that requires a continuing ongoing relationship between the parties and the divestiture buyer, the US agencies often appoint an independent third party to monitor the parties' compliance with the consent order obligations.[62] The FTC's Compliance Division, among other tasks, monitors consent decrees, including evaluating requests to reopen, modify, or set aside orders and seek penalties for order violations. Recently, the DOJ announced that it has created a similar office solely dedicated to ensuring compliance and enforcement of the Antitrust Division's consent decrees.[63]

EU

In the EU, the parties must preserve the divestment business by ring-fencing it and not carrying out any acts that might have significant negative impacts on its value, management or competitiveness. Parties may also have to continue to finance the divested business to allow its ongoing development on the basis of the existing business plans and to retain key personnel by offering incentive schemes.

The supervision process is carried out by the monitoring trustee, which acts as the 'eyes and ears' of the EC in order to hold separate the divestment business, oversee carveouts, verify the sale process and review the proposed purchasers. The monitoring trustee is also obliged to report to the EC at regular intervals and can intervene in matters at the EC's request.

Conclusion

While there are differences in the merger procedure in the EU and the US, there is a clear convergence in their approaches. Over time, authorities in both jurisdictions have increasingly taken an aggressive and hands-on approach to ensuring that remedies address composition and in particular implementation risk. They have worked to craft remedies that are broad enough to effectively address the competition concerns and are implemented in a way that creates a meaningful and lasting change in the market. The authorities have also shown willingness to take flexible approaches to merger remedies. For example, the EC has been willing to consider blended remedy packages to address different competition concerns in a proportionate way and is willing to allow fix-it-first solutions that are not workable to evolve into upfront buyer solutions to ensure that there is an effective remedy. From experience, merging parties are also becoming more pragmatic and engage in remedy discussions with the authorities from the outset. For example, at the EC level, parties are routinely engaging in a longer pre-notification discussion as a means of paving the way for a Phase I clearance with remedies.

One factor that has increased significantly since the EC remedy study is the international cooperation between the EC, US and competition authorities in other jurisdictions such as Brazil, China and Korea. In a speech in 2016, Competition Commissioner Vestager stated that the EC cooperates with agencies outside of the EU in approximately 60 per cent of complex merger investigations,[64] and in a 2018 speech made reference to the high level of trust and cooperation between the EC and US authorities in particular in merger cases.[65] In cases where the competition concerns in the two jurisdictions were different, such as *GE/Alstom*, the EU and the US collaborated on overlapping, non-conflicting divestiture packages across the Atlantic to the same purchaser. Even in cases where the same outcome has not been reached, the authorities have been keen to stress that international cooperation in mergers (and therefore merger remedies) remains key. This can be seen in Commissioner Vestager's comments when the EU approved the *Staples/Office Depot* merger, which had been blocked by the FTC. This difference in approach was not a result of a lack of coordination, but rather, '[i]t only reminds us that however closely we coordinate, there will always be times when we come to different answers simply because the markets – or the remedies the companies offer to address our concerns – are different.' [66] Therefore, parties should take a global approach in order to design and implement effective remedies across the various jurisdictions in which they file. Indeed, in practice, the 'younger' authorities often wait for the EU and US processes to conclude in order to mirror the remedies imposed and give effect to the remedy in a consistent manner.

Notes

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[2] Merger Remedies Study, dated October 2005 (The 2005 Remedies Study), p. 139, http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf.

[3] For example, Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies (October 2004), www.justice.gov/atr/page/file/1175136/download (DOJ Policy Guide); see also Fed Trade Comm'n, Bureau of Competition, Negotiating Merger Remedies (January 2012), www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf (FTC Guidelines).

[4] See, for example, DOJ Policy Guide, p. 12; FTC Guidelines, p. 6.

[5] Brown, Aldrin, 'US DoJ could require merging companies to divest critical data – Delrahim', PaRR (1 May 2019), https://app.parr-global.com/intelligence/view/prime-2829161.

[6] See, for example, Dep't of Justice, 'Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum' (16 November 2017), www.justice.gov/opa/speech/file/1012086/download, pp. 5–9 (Delrahim Remarks).

[7] Id. See also *Steves & Sons Inc v. JELD-WEN Inc*, No. 3:16-CV-00545-REP, Statement of Interest of the United States of America Regarding Equitable Relief (EDVa 2018), www.justice.gov/atr/case-document/file/1069011/download; Fed Trade Comm'n, 'Vertical Merger Enforcement at the FTC', Remarks of D Bruce Hoffman, Acting Dir, Bureau of Competition, Credit Suisse 2018 Washington Perspectives Conference, Washington, DC (10 January 2018), www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf (Hoffman Remarks) ('the FTC prefers structural remedies to structural problems'). See also Fed Trade Comm'n, 'Prepared Remarks of Chairman Simons Announcing the Competition and Consumer Protection Hearings' (20 June 2018), www.ftc.gov/system/files/documents/public_statements/1385308/prepared_remarks_of_joe_simons_announcing_the_hearings_6-20-18_0.pdf.

[8] *United States v. Deutsche Telekom AG*, No. 1:19-cv-022320TJK (30 July 2019) (Competitive Impact Statement), https://www.justice.gov/opa/press-release/file/1189336/download.

[9] Hoffman Remarks, pp. 7–8 ('[I]t's important to remember that the FTC prefers structural remedies to structural problems, even with vertical mergers. . . . If we have a valid theory of harm, we start by looking at structural remedies for most vertical mergers.'); see also Dep't of Justice, 'The Interesting Case of the Vertical Merger', Remarks of Jon Sallet, Deputy Assistant Attorney General of the Antitrust Div, Am Bar Ass'n Fall Forum, Washington, DC (17 November 2016), www.justice.gov/opa/speech/deputy-assistant-attorney-general-jon-sallet-antitrust-division-delivers-remarks-american ('In vertical transactions, observers sometimes assume that conduct remedies will always be available and sufficient. But that is not the current practice of the division – if it ever was. . . . Some vertical transactions may present sufficiently serious risks of foreclosing rivals' access to critical inputs or customers, or otherwise threaten competitive harm, that they require some form of structural relief or even require that the transaction be blocked.'). But see Fed Trade Comm'n, 'FTC Imposes Conditions on Northrop Grumman's Acquisition of Solid Rocket Motor Supplier Orbital ATK, Inc.' (5 June 2018), www.ftc.gov/news-events/press-releases/2018/06/ftc-imposes-conditions-northrop-grummans-acquisition-solid-rocket.

[10] Behavioural remedies included anti-retaliation provisions protecting customers contracting with the firms' competitors, obligations to provide nondiscriminatory access to necessary inputs, requirements to continue to develop upgrades and invest in specific products, the creation of informational firewalls and various reporting requirements including reporting competitors' complaints. See, generally, William F Shughart II and Diana W Thomas, Antitrust Enforcement in the Obama Administration's First Term: A Regulatory Approach, CATO INST POL'Y ANALYSIS No. 739 (22 October 2013), at 14–17, http://object.cato.org/sites/cato.org/files/pubs/pdf/pa739_web.pdf.

[11] Fed Trade Comm'n, 'FTC Imposes Conditions on Staples' Acquisition of Office Supply Wholesaler Essendant Inc.' (28 January, 2019), https://www.ftc.gov/news-events/press-releases/2019/01/ftc-imposes-conditions-staples-acquisition-office-supply.

[12] See Delrahim Remarks pp7–9.

[13] Complaint, *United States v. AT&T*, No. 17-cv-02511 (DDC 20 November 2017).

[14] Id.

[15] *AT&T/Time Warner* offered to agree to enter into 'baseball-style' arbitration in any disputes with pay-TV distributors specifically to address the government's concerns. Ted Johnson, 'Judge Will Allow AT&T-Time Warner to Use Arbitration Offer in Defense of Merger,' Variety (13 March 2018), http://variety.com/2018/biz/news/att-time-warner-antitrust-trial-arbitration-offer-1202725268/.

[16] *United States v. AT&T Inc,* 310 F.Supp.3d 161 (D.D.C. 2018).

[17] *United States v. AT&T Inc*., 916 F.3d 1029 (D.C.Cir. 2019).

[18] Id. at 1035.

[19] Id.

[20] Id. at 1037.

[21] *United States v. E I du Pont de Nemours & Co*, 366 U.S. 316, 326 (1961). See also *Ford Motor Co v. United States*, 405 US 562, 573 (1972) ('The relief in an antitrust case must be "effective to redress the violations" and "to restore competition".').

[22] Nathan Wilson, the Deputy Assistant Director of the Bureau of Economics stressed the FTC's focus on divestment of full business units, stating in March 2019, 'going forward, there will be great scrutiny of divestiture short of an entire business'.

[23] Complaint, *United States v. Halliburton Corp*, No. 16-cv-00233 (DDC 2016).

[24] Dep't of Justice, 'Halliburton and Baker Hughes Abandon Merger After Department of Justice Sued to Block Deal' (1 May 2016), www.justice.gov/opa/pr/halliburton-and-baker-hughes-abandon-merger-after-department-justice-sued-block-deal.

[25] In the complaint filed in December 2015, the FTC alleged that Staples' acquisition of Office Depot would significantly reduce competition nationwide in the market for consumable office supplies sold to large business-to-business customers (B2B customers) for their own use. See Complaint, *FTC v. Staples Inc*, No. 15-cv-02115 (DDC 2015).

[26] 15 USC Section 16 (1974).

[27] Kendall, Brett, 'Federal Judge to Hold Hearings on Decision to Allow CVS-Aetna Merger', *Wall Street Journal* (5 April 2019), https://www.wsj.com/articles/judge-to-allow-witness-testimony-on-cvs-aetna-merger-11554494817?mg=prod/com-wsj.

[28] Memorandum Order dated 21 December 2018, *United States v. CVS Health Corp.*, No. 18-2340 (RJL), available at: www.courtlistener.com/recap/gov.uscourts.dcd.200760/gov.uscourts.dcd.200760.44.0_2.pdf.

[29] Merger Remedies Study, dated October 2005 (The 2005 Remedies Study), p. 33, http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf.

[30] OECD Policy Roundtables, Remedies in Merger Cases, 2011, p. 235, www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf.

[31] Commission Decision of 27 March 2017 in Case COMP/M.7932 *Dow/DuPont*.

[32] Commission Decision of 1 September 2016 in Case COMP/M.7758 – *Hutchison 3G Italy/Wind/JV*.

[33] Commission Decision of 2 July 2014 in Case COMP/M.7018 – *Telefónica Deutschland/E-Plus*.

[34] Commission Decision of 28 May 2014 in Case COMP/M.6992 – *Hutchison 3G UK/Telefónica Ireland*.

[35] Competition merger brief Issue 1/2015, 3 March 2015, http://ec.europa.eu/competition/publications/cmb/2015/cmb2015_001_en.pdf. See also Commission Decision of 10 March 2016

in Case COMP/M.7746 *Teva/Allergan* where the behavioural remedy was also accepted because it would eventually lead to a structural change in the market.

[36] Commission Decision of 20 July 2016 in Case COMP/M.7724 *ASL/Arianespace*. See also Commission Decision of 10 March 2016 in Case COMP/M.7746 *Teva/Allergan*, where a structural remedy was offered to deal with the vertical relationships in outlicensing involving either the upstream market (the divestment of the dossier and corresponding licensing rights across the EEA) or the downstream market (the divestments of rights and assets to manufacture and sell the molecule in the affected country), and Commission Decision of 26 January 2011 in Case COMP/M.5984 *Intel/McAfee* where behavioural remedies and access remedies were considered acceptable because the straight-forward obligations could be easily monitored by the monitoring trustee.

[37] Commission Decision of 9 November 2016 in Case COMP/M.7917 *Boehringer Ingelheim/Sanofi Animal Health Business* and Commission Decision of 8 August 2016 in Case COMP/M.7792 *Konecranes/Terex*.

[38] For example, Commission Decision of 8 September 2015 in Case COMP/M.7278 *General Electric/Alstom* (Thermal Power – Renewable Power & Grid Business) (*GE/Alstom*).

[39] Commission Decision of 8 May 2014 in Case COMP/M.6905 *Ineos/Solvay/JV*.

[40] Commission Decision of 16 May 2012 in Case COMP/M.6286 *Südzucker/EDFM*, where the EC accepted the assignment of a long-term supply contract for raw sugar to the purchaser of a brand-new refinery in order to ensure sufficient input of raw sugar for the divested refinery. Similarly, in Commission Decision of 10 September 2014 in Case COMP/M.7061 *Huntsman Corporation/Equity Interests* held by Rockwood Holdings, the purchaser would be able to purchase upstream inputs on the basis of a transitional supply agreement.

[41] Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004, para. 23, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008XC1022(01); and Commission Decision of 2 December 2015 in Case COMP/M.7777 *Solvay/Cytec*.

[42] Model text for divestiture commitments, available at http://ec.europa.eu/competition/mergers/legislation/template_commitments_en.pdf.

[43] Commission Decision of 9 November 2016 in Case COMP/M.7917 *Boehringer Ingelheim/Sanofi Animal Health Business*.

[44] For example, DOJ Policy Guide, pp. 30–33; FTC Guidelines, pp. 10–11. Note that the FTC has recently announced that it intends to give even greater scrutiny on a going-forward basis to buyer financing and any funding limitations that could hamper the buyer. See also Fed Trade Comm'n, 'Looking back (again) at FTC merger remedies' (3 February 2017), www.ftc.gov/news-events/blogs/competition-matters/2017/02/looking-back-again-ftc-merger-remedies.

[45] Fed Trade Comm'n, 'FTC Seeks Public Comment on Franchise Services of North America's Application to Sell Assets Related to Simply Wheelz to Hertz and Avis Budget Group' (17 April 2014), www.ftc.gov/news-events/press-releases/2014/04/ftc-seeks-public-comment-franchise-services-north-americas.

[46] Fed Trade Comm'n, 'FTC Approves Application for Modification of Divestiture Agreement Between Albertsons and Haggen Holdings, LLC' (25 September 2015), www.ftc.gov/news-events/press-releases/2015/09/ftc-approves-application-modification-divestiture-agreement.

[47] 'FTC Commissioner hits out at private equity', *Global Competition Review*, Sept. 25, 2018, https://globalcompetitionreview.com/article/usa/1174735/ftc-commissioner-hits-out-at-privateequity.

[48] *In the Matter of Linde AG*, Commission File No. 1710068, Statement of Commissioner Rohit Chopra (22 October 2018), available at https://www.ftc.gov/system/files/documents/public_statements-/1416947/17100 68_praxair_linde_rc_statement.pdf.

[49] 'Simons defends divestitures to private equity', *Global Competition Review*, 16 November 2018, https://globalcompetitionreview.com/article/usa/1176982/simons-defends-divestitures-to-private-equity.

[50] Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004, para 103, http://ec.europa.eu/competition/mergers/legislation/draft_remedies_notice.pdf.

[51] For example, DOJ Policy Guide, pp. 34; FTC Guidelines at pp. 10–11.

[52] Curtis Eichelberger, 'Comment: Foreign conglomerates among potential acquirers of divested assets of merging agriculture giants', MLex (14 June 2016), (citing comments by former Bureau of Competition Director Debbie Feinstein) www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=803441&siteid=191&rdir=1.

[53] For example, DOJ Policy Guide, pp. 12–13; FTC Guidelines, p. 7.

[54] The FTC has indicated that when the parties have shown that an acceptable 'buyer will emerge, that the asset package is an ongoing, stand-alone business and will maintain or restore competition in the market at issue, and that interim competition and the viability of the assets will be preserved pending divestiture, post-order divestitures have been accepted'. Fed Trade Comm'n, Frequently Asked Questions About Merger Consent Order Provisions, www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq.

[55] Flavia Fortes, 'DOJ requires upfront buyer in more than half of divestiture cases, senior official says', MLex (13 April 2018), www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=981452&siteid=191&rdir=1.

[56] Fed Trade Comm'n, 'Looking back (again) at FTC merger remedies' (3 February 2017), www.ftc.gov/news-events/blogs/competition-matters/2017/02/looking-back-again-ftc-merger-remedies.

[57] For example, FTC Guidelines, pp. 7–8, 12, 18.

[58] For example DOJ Policy Guide, pp. 34; FTC Guidelines, p. 11.

[59] Competition merger brief issue 1/2016, 21 March 2016, http://ec.europa.eu/competition/publications/cmb/2016/cmb2016_001_en.pdf. Commission Decision of 8 September 2015 in Case COMP/M.7278 *General Electric/Alstom* (Thermal Power – Renewable Power & Grid Business) (*GE/Alstom*). The clearance decision of the principal transaction was on 8 September 2015 and the purchaser approval was on 22 October 2015.

[60] Competition merger brief issue 4/2016, 12 December 2016, http://ec.europa.eu/competition/publications/cmb/2016/kdal16004enn.pdf. See also Commission Decision of 15 December 2014 in Case COMP/M.7252 *Holcim/Lafarge* which involved a hybrid FIFfix-it-first and other remedies package.

[61] Commission Decision of 9 November 2016 in Case COMP/M.7917 *Boehringer Ingelheim/Sanofi Animal Health Business*.

[62] FTC Guidelines.

[63] Dep't of Justice, 'Remarks of Assistant Attorney General Makan Delrahim at Competition and Deregulation Roundtable #2' (26 April 2018), www.justice.gov/opa/speech/file/1057841/download, p. 6.

[64] CPI Talks: Interview with Commissioner Margrethe Vestager, Commissioner for Competition of the European Union (Competition Policy International, April 2016), www.competitionpolicyinternational.com/wp-content/uploads/2016/04/Interview-with-Margrethe-Vestager-Supplement.pdf. See also Case Comp/ M.7585 *NXP Semiconductors/Freescale Semiconductor*.

[65] The importance of being open – and fair, European Conference, Harvard University, 2 March 2018, https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/importance-being-open-and-fair_en.

[66] Working together to support fair competition worldwide, UCL Jevons Institute Conference, 3 June 2016, https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/working-together-support-fair-competition-worldwide_en.

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Previous Chapter:Identifying a Suitable Divestiture Buyer and Related Issues

Next Chapter:A Practical Perspective on Monitoring

Merger Remedies Guide - Second Edition

Overview

Part I: Overarching Principles and Considerations

Part II: Types of Remedies

Part III: Process and Implementation

Part IV: Compliance

Part V: Remedy Negotiations: Practical Considerations

Part VI: Merger Remedies Insights from around the Globe