GCR INSIGHT

MERGER REMEDIES GUIDE

THIRD EDITION

Editors
Ronan P Harty and Nathan Kiratzis

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Structural Remedies

Charles F (Rick) Rule, Andrew J Forman and Daniel J Howley[1]

Overview

The US Supreme Court states that restoring competition is the 'key to the whole question of an antitrust remedy'.[2] This goal is echoed by the antitrust agencies, which, in considering merger remedies, generally seek to preserve or restore competition that they believe may be lost by the transaction. The Department of Justice's (DOJ) 2004 Policy Guide to Merger Remedies (the 2004 DOJ Remedies Guide) states that '[a]lthough 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.'[3]

1 Charles F (Rick) Rule and Andrew J Forman are partners, and Daniel J Howley is counsel, at Paul, Weiss, Rifkind, Wharton & Garrison LLP. The authors thank W Michael Holden, a paralegal at the firm, for his assistance.

2 *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).

3 Dep't of Justice, Antitrust Div., Antitrust Division Policy Guide to Merger Remedies, 4 (October 2004) www.justice.gov/atr/page/file/1175136/download (the 2004 DOJ Remedies Guide). Assistant Attorney General Makan Delrahim withdrew the 2011 DOJ Remedies Guide, which similarly states that a successful merger remedy must effectively preserve competition in the relevant market. US Dep't of Justice, Antitrust Div., Antitrust Division Policy Guide to Merger Remedies, 1 (June 2011), www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf (the 2011 DOJ Remedies Guide). Shortly before publication, the DOJ issued a new Merger Remedies Manual, available at www.justice.gov/atr/page/file/1312416/download (the DOJ Merger Remedies Manual). The new Manual is similar in many ways to the prior guidance, in particular the 2004 Remedies Guide, and outlines a strong preference for structural relief and divestitures of existing stand-alone businesses.

Likewise, the Federal Trade Commission's (FTC) 2017 report on merger remedies states '[t]he goal of any remedy is to preserve fully the existing competition in the relevant markets at issue.'[4] The European Commission (EC) has similar goals for its merger remedies.[5]

These goals are generally accomplished through structural remedies or conduct remedies, or both. This chapter focuses on structural remedies. Structural remedies are often used to address competitive problems that the enforcers identify in horizontal mergers (i.e., mergers involving companies with competing products at the same level of the distribution chain). As the FTC states, where a remedy is required, 'most orders relating to a horizontal merger will require a divestiture.'[6] The DOJ notes that 'structural remedies generally will involve the sale of physical assets by merging firms' and in some instances can also require 'that the merged firm create new competitors through the sale or licensing of intellectual property . . . rights'.[7]

As discussed in more detail below, agencies generally look to ensure, among other things, that the divested assets are sufficient to preserve competition; that the buyer has the business and financial capability to compete successfully; and that the actual mechanics of the divestiture are likely to enable success.

In terms of the assets to be divested in structural remedies, the requirements are fact-specific. Although each transaction is unique, the 'Division favors the divestiture of an existing business entity that has already demonstrated its ability to compete in the relevant market.'[8] However, depending on the facts and circumstances, the agencies may accept a divestiture of less than an existing, intact business or may demand more than an existing, intact business. In situations where less than an existing business is being divested, the agencies may consider other protections, such as an upfront buyer or 'crown jewel' provisions, both of which are discussed in more detail below.

The agencies will also examine the potential buyer or buyers to try to ensure that the divested assets are likely to be used to preserve competition. As discussed below, the analysis of buyers is influenced by a variety of factors, including the nature of the assets in the divestiture package and the timing of the remedy. For example, there can be different considerations and procedural requirements in the context of a divestiture to an 'upfront buyer' than in the context of a divestiture without an initially identified buyer.

Finally, there are various requirements that the agencies can use to help ensure that the mechanics of the divestiture are likely to enable success, including appropriately tailored transition services agreements.

4 Federal Trade Commission, The FTC's Merger Remedies 2006–2012, 15 (January 2017) (the FTC's Merger Remedies); see also Federal Trade Commission, Frequently Asked Questions About Merger Consent Order Provisions (FTC FAQ), www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq#Overview.

5 Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004 (2008), http://ec.europa.eu/competition/mergers/legislation/files_remedies/remedies_notice_en.pdf.

6 FTC FAQ.

7 2004 DOJ Remedies Guide, at 7. See also 2011 DOJ Remedies Guide, at 6 .

8 2004 DOJ Remedies Guide, at 12. See also 2011 DOJ Remedies Guide, at 9.

Assets to be divested

Tangible and intangible assets

The antitrust agencies recognise that 'there are certain intangible assets that likely should be conveyed whenever tangible assets are divested.'[9] While the specific assets that must be divested and the type of disposition varies from deal to deal, depending on the products, industries and buyers at issue, generally divestiture buyers must receive all tangible and intangible assets needed to replicate competition that may be lost due to the merger. As the DOJ states, 'the divestiture assets must be substantial enough to enable the purchaser to maintain the pre-merger level of competition, and should be sufficiently comprehensive that the purchaser will use them in the relevant market and will be unlikely to liquidate or redeploy them.'[10]

For tangible asset divestitures, the mechanism for accomplishing the divestiture is usually a sale of the assets to the divestiture buyer. If a sale is not practical, the agencies may permit merging parties to divest via other arrangements, such as leases or licences. For example, in 2017, the DOJ permitted CenturyLink and Level 3 Communications to merge, but required that they divest certain fibre-optic cable through long-term leases that were 'typical industry practice'.[11]

For intangible assets, such as intellectual property or rights, divestitures are usually accomplished through either the sale of the assets or licensing. For instance, in the remedy resolving the DOJ's challenge to the 2013 merger between US Airways and American Airlines, the DOJ required, among other things, the parties to divest certain slots – which are rights to take off or land – at slot-controlled airports. The DOJ believed the slot divestitures, along with the other required remedies, would help ensure that low-cost carriers would have the ability and incentive to compete successfully against the merged entity.[12]

Merging parties will occasionally require use of the intangible assets that are subject to divestiture. For example, where intellectual property is required to be divested, if the merging parties also require access to that intellectual property, the agencies will consider permitting a non-exclusive licence of the intellectual property back to the merging parties from the divestiture buyer. For example, the DOJ agreed to such a licensing arrangement in the settlement permitting the closure of the *Monsanto/Delta Pine Land* transaction in 2007.[13] There, the merging parties were required to divest the rights to certain cotton seed varieties, but were allowed to license back those rights for use in research. Similarly, agencies may permit non-exclusive

9 2004 DOJ Remedies Guide, at 10. See also 2011 DOJ Remedies Guide, at 7 ('to ensure an effective structural remedy, any divestiture must include all the assets, physical and intangible, necessary for the purchaser to compete effectively with the merged entity.').

10 2004 DOJ Remedies Guide, at 9–10. See also 2011 DOJ Remedies Guide, at 8 ('[t]he divestiture assets must be substantial enough to enable the purchaser to effectively preserve competition, and should be sufficiently comprehensive that the purchaser will use them in the relevant market and be unlikely to liquidate or redeploy them.').

11 Competitive Impact Statement, *United States v. CenturyLink Inc.*, 1:17-cv -02028, at 13 (D.D.C. 14 November 2017), available at www.justice.gov/atr/case-document/file/1011721/download.

12 Dep't of Justice, Justice Department Requires US Airways and American Airlines to Divest Facilities at Seven Key Airports to Enhance System-wide Competition and Settle Merger Challenge (12 November 2013), www.justice.gov/opa/pr/justice-department-requires-us-airways-and-american-airlines-divest-facilities-seven-key.

13 See, e.g., Competitive Impact Statement, *United States v. Monsanto Co.*, 11:07-cv-00992 (D.D.C. 31 May 2007), www.justice.gov/atr/case-document/competitive-impact-statement-154.

licences to be provided from the merging parties to the divestiture buyers. That said, the DOJ's new Merger Remedies Manual identifies '[a]llowing the merged firm to retain rights to critical intangible assets' as a 'characteristic[] of proposed remedies that increase the risk' that the 'remedy will not effectively preserve competition'.[14] This is because '[p]ermitting the merged firm to retain access to divested intangible assets . . . may make it more difficult for the purchaser to differentiate its product from its rivals, or may reduce the purchaser's incentive to invest in the business.[15]

Ultimately, the exact extent of the assets to be divested will often depend on the buyer and specific facts and circumstances. For example, if the buyer has or is likely to have certain assets already, the agencies may not require duplicative assets to be included in the divestiture package.

Existing business entities

Generally speaking, the antitrust agencies have expressed a preference for the divestiture of an existing business.[16] Enforcers 'favor[] the divestiture of an existing business entity that has already demonstrated its ability to compete in the relevant market'.[17] This is because '[a]n existing business entity provides current and potential customers with a track record they can evaluate to assure themselves that the unit will continue to be a reliable provider of the relevant products.'[18] As the FTC further explains:

> *The divestiture of an entire business (that is, an on-going, stand-alone, autonomous business, and which may include assets relating to operations in other markets) of either the acquired or acquiring firm relating to the markets in which there is a concern about anticompetitive effects, is most likely to maintain or restore competition in the relevant market, and thus will usually be an acceptable divestiture package.*[19]

14 DOJ Merger Remedies Manual at 21.

15 id.

16 See, e.g., 2008 EC Remedies Guide, at 10 ('The Commission has a clear preference for an existing stand-alone business. This may take the form of a pre-existing company or group of companies, or of a business division which was not previously legally incorporated as such'); Federal Trade Commission, Frequently Asked Questions About Merger Consent Order Provisions, www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq#The%20Assets%20To%20Be%20Divested ('The divestiture of an intact, on-going business generally assures that the buyer of such a package will be able to operate and compete in the relevant market immediately, thereby remedying the likely anticompetitive effects of the proposed acquisition and minimizing the Commission's risk that it will be unable to obtain effective relief').

17 2004 DOJ Remedies Guide, at 12. See also 2011 DOJ Remedies Guide, at 8 (Enforcers 'often will insist on the divestiture of an existing business entity that already has demonstrated its ability to compete in the relevant market').

18 2004 DOJ Remedies Guide, at 12. See also 2011 DOJ Remedies Guide, at 9 ('an existing business entity typically possesses not only all the physical assets, but also the personnel, customer lists, information systems, intangible assets, and management infrastructure necessary for the efficient production and distribution of the relevant product, and it has already succeeded in competing in the market.').

19 FTC FAQs.

The ideal divestiture package in the agencies' eyes is often an 'on-going, stand-alone, autonomous business' or division that includes all assets, personnel and contractual relationships necessary to compete and that does not meaningfully rely on other parts of the merging parties' business.[20] The agencies have also accepted divestiture of retail stores, factories, etc., where the divestiture includes all the assets needed to compete. For example, in 2014, the DOJ required the divestiture of two paper mills in clearing Verso Paper Corp's acquisition of NewPage Holdings Inc.[21]

Indeed, the DOJ's new Merger Remedies Manual identifies '[d]ivestiture of less than a standalone business' as a 'characteristic[] of proposed remedies that increase the risk' that the 'remedy will not effectively preserve competition'.[22] Similarly, '[m]ixing and matching assets of both firms' is identified as increasing risk.[23]

The antitrust agencies will also consider accepting divestiture of less than an existing business where it is 'possible to assemble an acceptable set of assets from both of the merging firms to create a viable divestiture'.[24] In order to do so, the agencies 'must be persuaded that these assets will create a viable entity that will restore competition'.[25] There are several examples of these types of divestitures, including numerous in the pharmaceutical sector.

Scope relative to relevant market

The antitrust agencies focus on whether the divestiture package will provide the divestiture buyer with the ability and incentive to compete at such a level as to replace the competition that is being lost as a result of the transaction. Accordingly, the antitrust agencies may require a divestiture package that goes beyond the specific relevant markets in which there are competitive concerns if additional assets are required to preserve competition effectively in those relevant markets.

Although often FTC and DOJ directives are confined to the US and to the relevant market at issue, in certain circumstances, the antitrust agencies may seek divestiture of a worldwide business or non-overlapping products to address a competitive problem related to overlapping products within a particular region. For example, in *Guinness/Grand Met*,[26] the FTC 'required divestiture of foreign assets even though the relevant geographic market was limited to the United States'.[27] Similarly, as part of the remedy in the *Bayer AG/Monsanto* transaction, the DOJ required 'the divestiture of additional complementary assets that are needed to ensure that

20 Federal Trade Commission, Frequently Asked Questions About Merger Consent Order Provisions, www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq#The%20Assets%20To%20Be%20Divested.

21 Dep't of Justice, Justice Department Requires Divestitures in Verso Paper Corp.'s Acquisition of NewPage Holdings Inc. (31 December 2014), www.justice.gov/opa/pr/justice-department-requires-divestitures-berso-paper-corps-acquisition-newpage-holdings-inc.

22 DOJ Merger Remedies Manual at 20.

23 id.

24 2004 DOJ Remedies Guide, at 13. See also 2011 DOJ Remedies Guide, at 9 (Agencies will 'consider accepting divestiture of less than an existing business when a set of acceptable assets can be assembled from both of the merging firms'.).

25 2004 DOJ Remedies Guide, at 13. See also 2011 DOJ Remedies Guide, at 9 (Agencies 'must be persuaded that these assets will create a viable entity that will restore competition'.).

26 Dkt No. C-3801.

27 FTC FAQs.

[the divestiture buyer] has the same innovation incentives, capabilities and scale that Bayer would have as an independent competitor including, most notably, Bayer's nascent "digital agriculture" business'.[28]

'Crown jewel' provisions

In certain circumstances, the antitrust agencies may require 'crown jewel' provisions, which require a more marketable divestiture package be provided to a divestiture trustee to sell if the merging parties are not able to sell the originally agreed package of assets within the agreed period of time. If the remedy includes a 'buyer upfront,' the agencies may not focus as much on crown jewel provisions.

As the FTC explains, these provisions may be required 'where there is a risk that, if the respondent fails to divest the original divestiture package on time . . . or if the original divestiture falls through for some reason, a divestiture trustee may need an expanded or alternative package of assets to accomplish the divestiture remedy.'[29] This situation can arise where a new buyer may need a different or larger package of assets to be competitive or because it will be easier and quicker for the divestiture trustee to sell a more marketable package. For example, the FTC included crown jewel provisions in the 2003 remedy that resolved Quest Diagnostic's transaction with Unilab. The original remedy required divestiture of specific Northern California assets to the third party, LabCorp. But in the event that divestiture was not consummated, 'the provisions require divestiture of a more extensive package of assets consisting of either Quest's outpatient Laboratory Services business or its entire Laboratory Services business in Northern California because a prospective buyer other than LabCorp may require additional assets to fully restore competition in the relevant market.'[30]

The DOJ has taken different positions over time on crown jewel provisions. The DOJ 2004 Remedies Guide states that 'crown jewel provisions are strongly disfavored'.[31] However, the now-withdrawn 2011 DOJ Remedies Guide acknowledges that crown jewel provisions are 'necessary' in certain cases 'to ensure that the remedy will effectively preserve competition'.[32] The EC Remedies Guide similarly recognises the need for such provisions in similar circumstances.[33]

28 Dep't of Justice, Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto (29 May 2018), www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened.

29 Federal Trade Commission, Frequently Asked Questions About Merger Consent Order Provisions, www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq#Crown%20Jewels.

30 *In the Matter of Quest Diagnostics Incorporated, et al.*, 135 FTC 350, 2003 WL 25797219 (FTC 3 April 2003).

31 2004 DOJ Remedies Guide, at 36.

32 2011 DOJ Remedies Guide, at 1.

33 2008 EC Remedies Guide, at 45 ('In such circumstances . . . the parties will have to propose a second alternative divestiture . . . Such an alternative commitment normally has to be a 'crown jewel', i.e. it should be at least as good as the first proposed divestiture in terms of creating a viable competitor once implemented, it should not involve any uncertainties as to its implementation and it should be capable of being implemented quickly in order to avoid that the overall implementation period exceeds what would normally be regarded as acceptable in the conditions of the market in question.')

The buyer of the divestiture package

Buyers of divestiture packages are subject to review and approval by the antitrust agencies. The antitrust agencies consider each buyer to ensure they are 'ready, willing, and able to operate the assets in a manner that maintains or restores competition in the relevant market'.[34] The agencies do so to guard against the risk that the buyer will fail to compete successfully with the divested assets.

The antitrust agencies will generally discuss a proposed divestiture package with the prospective buyer and will often request documents from the buyer, including their business plans for the assets to be divested. The FTC has stated that it evaluates potential buyers in numerous ways, including:

- considering whether the buyer has the financial resources to consummate the proposed divestiture and to remain a vigorous competitor in the market;
- assessing the proposed buyer's commitment to remain in the market by analysing its past operations and business plans as well as its future business plans for the divested assets;
- assessing the proposed buyer's experience and expertise to operate effectively in the market;
- considering the proposed buyer's historical financial documents and its future business plans for the proposed divestiture;
- talking with industry members familiar with the proposed buyer, such as competitors, suppliers and customers;
- talking with lenders and other creditors of the proposed buyer, particularly those involved in the possible financing of the proposed deal; and
- assessing the proposed buyer's current position in the relevant market[35] by carefully questioning prospective buyers about their requirements, operating plans and business plans regarding the assets that are sought to be acquired.[36]

The other antitrust agencies conduct similar evaluations. For example, the DOJ rejected the parties' proposed divestiture of certain Medicare Advantage health plans in the failed *Aetna/Humana* transaction. The district court agreed with the DOJ that the proposed buyer 'is not likely to have the internal capacity – including IT, ability to manage star ratings, and necessary personnel and management – to successfully operate the divestiture plans so as to replace the competition lost by the merger'.[37] In reaching its conclusion, the court relied in part on the 'extremely low purchase price' for the divestiture package and on internal emails at the proposed divestiture buyer that raised doubts about the buyer's belief in its ability to successfully operate the divested plans.[38]

Similarly, in AbbVie's acquisition of Allergan, the FTC approved the divestiture of assets related to three drugs; however, the approval came with two dissents from commissioners. Among other things, the dissenting commissioners disagreed with the divestiture of two of the

34 FTC FAQ.
35 id.
36 id.
37 *United States v. Aetna*, 240 F. Supp. 3d 1 (D.D.C. 23 January 2017).
38 id.

drugs to Nestle, SA, which one commissioner characterised as 'risky and concerning' and representing 'the first time the FTC is ordering drug divestitures to a company that does not offer any prescription drugs'.[39]

The agencies have found buyers acceptable in a wide variety of situations, including where a buyer 'has a track record of operating similar assets successfully', a buyer that has 'brought together a management team experienced in the relevant market', 'firms operating in different geographic markets but within the same product market', and 'smaller firms . . . operating within the same geographic and product markets'.[40] Ultimately, whether a particular buyer will be approved is a fact-specific question, and depends on the specific nature of the industry, the assets in the divestiture package and the identity, experience, wherewithal and plans of the buyer.[41] For example, as a result of the covid-19 pandemic and the associated economic difficulties, staff at the agencies have begun to consider the impact of covid-19 on the health and suitability of potential divestiture buyers.

Occasionally, the antitrust agencies will require that an entire package of assets be divested to a single acquirer only. The agencies may do this where they believe operations of 'a certain scale and/or scope may be necessary for the buyer of the assets to operate them efficiently or to have the incentive or means to operate them for anything but a short term'.[42] For example, the agencies may believe that a divestiture buyer must have a 'footprint' in a broad geography so as to have adequate brand recognition, scale efficiencies, etc., to compete effectively.

Generally speaking, where the antitrust agencies approve a buyer (or buyers), they either do so before or at the same time as the remedy that resolves the underlying competition concerns related to the transaction (this is referred to as an 'upfront buyer' in the United States and a 'fix-it-first' process in the EC); or they do not identify a specific buyer at or before the time the remedy is entered and retain the right to approve the buyer at a later stage. In the United States, the antitrust agencies agree to remedies under both processes; however, both agencies are 'increasingly requiring an identified buyer (upfront buyer)'.[43] The EC more often may agree to remedies without an identified buyer.

Depending on the circumstances and asset package, the antitrust agencies can believe that upfront buyers help to minimise the risk with the divestiture and speed up the divestiture sale. For example, the FTC has often required upfront buyers in supermarket transactions because the FTC tends to believe supermarkets are 'particularly vulnerable to having their assets deteriorate during the search for a post order buyer'.[44]

39 Dissenting Statement of Commissioner Rohit Chopra, *In the Matter of AbbVie, Inc./Allergan plc*, Commission File No. 1910169 (5 May 2020), available at www.ftc.gov/system/files/documents/public_statements/1574583/191-0169_dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_abbvie-allergan_redacted.pdf.

40 FTC FAQ.

41 For example, the DOJ has noted that 'in some cases a private equity purchaser may be preferred' due to 'flexibility in investment strategy' and a willingness 'to invest more when necessary'. DOJ Merger Remedies Manual at 24–25.

42 FTC FAQ.

43 Patricia Brink, et al., 'A Visitor's Guide to Navigating US/EU Merger Remedies', 12 *Competition Law International* (2016), www.justice.gov/atr/file/883616/download.

44 FTC FAQ citing *Ahold/Bruno's*, Dkt No. C-4027; *Albertson's, Inc./American*, Dkt No. C-3986; *Shaw's/Star*, Dkt No. C-3934 (divestiture in one market was post-order requirement); *Kroger/Fred Meyer*, Dkt No. C-3917; *Kroger/Groub*, Dkt No. C-3905; *Ahold*, Dkt No. C-3861; and *CVS/Revco*, Dkt No. C-3762.

The DOJ's new Merger Remedies Manual states that in 'most merger cases' with divestitures, an 'upfront buyer' is required and that only in 'limited circumstances' will an upfront buyer not be 'necessary'.[45]

Agencies can also, on occasion, impose penalties on parties that do not complete divestitures in sufficient time. For example, in the consent decree in *General Electric/Baker Hughes*, the DOJ included a requirement that for each day after certain defined dates, defendants 'pay to the United States $1,500 per day until all the Divested Assets' in certain jurisdictions were divested.[46]

More commonly, agencies will not seek financial penalties and rather seek the appointment of a divestiture trustee to oversee and effectuate the divestiture where deadlines have not been met. For example, in *Novelis/Aleris*, the parties agreed to an unusual arbitration proceeding regarding relevant market definition. The DOJ prevailed in the arbitration, which meant a divestiture would be required. When the divestiture was not effectuated by the agreed-upon dates, the DOJ sought the appointment of a divestiture trustee.[47]

Finally, it is possible, although rare, to divest a business via 'spin off' such that there is no third-party buyer. This only tends to happen where the divested businesses are deemed independently viable.

Ongoing entanglements and transition services

Agencies and courts 'are skeptical of a divestiture that relies on a "continuing relationship between the seller and buyer of divested assets" because that can leave the buyer susceptible to the seller's actions – which are not aligned with ensuring that the buyer is an effective competitor'.[48] Indeed, some orders have required divestitures to be 'absolute', meaning the merging companies 'have no continuing ties to the divested business or assets, no continuing relationship with the buyer, and no financial stake in the buyer's success'.[49]

The antitrust agencies are often concerned that continuing entanglements between the divestiture buyer and the combined firm would undermine the establishment of the divestiture buyer as a competitor with incentives to compete vigorously. Moreover, the continued interaction between these competitors raises the risk of improper coordination. For example, the DOJ's Remedies Guide cautions that 'close and persistent ties between two or more competitors . . . can serve to enhance the flow of information or align incentives that may facilitate collusion or cause the loss of a competitive advantage.'[50]

45 DOJ Merger Remedies Manual at 22.

46 *United States v. General Electric, et al.*, Final Judgment, 1:17-cv-1146 (D.D.C. 16 October 2017), www.justice.gov/atr/case-document/file/1056411/download.

47 Memorandum in Support of Application of Plaintiff United States to Appoint Divestiture Trustee, *United States v. Novelis, Inc., et al.*, Dkt No. 56-1 (N.D. Ohio 18 August 2020).

48 *United States v. Aetna*, at 91.

49 FTC FAQ.

50 2004 DOJ Remedies Guide, at 18, n. 26. See also 2011 DOJ Remedies Guide, at 19.

The FTC explains that:

> *[D]ivestiture proposals in which the buyer intends to rely on the respondent to finance the divestiture, or where the proposal includes performance payments by the buyer have been rejected. Financial arrangements that rely on performance-based payments are always troubling to the extent they may skew either parties' incentives to compete vigorously.*[51]

Similarly, the DOJ identified '[o]ngoing entanglements' as a 'characteristic[] of proposed remedies that increase the risk' that the 'remedy will not effectively preserve competition'.[52] Nonetheless, the antitrust agencies recognise that some degree of continuing relationship may be required post-divestiture to help ensure the competitive viability of the divestee. For example, short-term transition services agreements can be required as part of the divestiture package whereby the merged company provides supply contracts, IT support, human resources assistance, maintenance and repair commitments, etc. In fact, DOJ consent decrees often require that transition services be provided at the divestiture buyer's option and provide that those transition services agreements can be extended subject to the DOJ's discretion.[53]

The exact nature of any transition services agreement depends on the specific needs of the divestiture buyer in regard to competing with the divestiture package. For instance, the DOJ Remedies Guide notes that a short-term supply agreement may be appropriate 'if the purchaser is unable to manufacture the product for a limited transitional period (perhaps as plants are reconfigured or product mixes are altered) . . . '.[54]

The duration of such agreements is often closely examined by the antitrust agencies. The agencies may be concerned that agreements that are too short will not provide the divestiture buyer with enough time to become viable, but that agreements that are too long could reduce the divestiture buyer's incentive to compete against the merged parties.[55]

Similarly, the antitrust agencies may require other conduct that helps to ensure the divested assets will be able to compete effectively or be marketable, or both. For example, in August 2020, the DOJ settled allegations that Centurylink, Inc violated non-solicitation provisions in a final judgment associated with a divestiture required in connection with its acquisition of Level 3 Communications, Inc. According to the DOJ, '[d]espite provisions in the Final Judgment barring CenturyLink from soliciting customers that switched to the buyer of the divestiture assets, CenturyLink failed to comply, initiating contact on over 70 occasions over more than a year with former Level 3 customers who elected to switch to the divestiture buyer in the Boise City-Nampa,

51 FTC FAQ.

52 DOJ Merger Remedies Manual at 21.

53 See, e.g., Modified Final Judgment, *United States v. Parker-Hannifin Corp.*, 1:17-cv -01354-JEJ , at 10 (D. Del. 30 April 2018), available at www.justice.gov/atr/case-document/file/1059391/download.

54 2004 DOJ Remedies Guide, at 18. See also 2011 DOJ Remedies Guide, at 18 ('the Division might require a supply agreement to accompany a divestiture if the purchaser is unable to manufacture the product for a transitional period (perhaps as plants are reconfigured or product mixes are altered.')).

55 2004 DOJ Remedies Guide, at 18. See also 2011 DOJ Remedies Guide, at 18, n. 41.

Idaho MSA.'[56] The settlement required an extension of the non-solicitation period by two years, the appointment of a monitoring trustee and a 'payment by Defendant of the United States' fees and costs associated with investigating and prosecuting Defendant's violations of the Final Judgment'.[57]

On the heels of its settlement with CenturyLink, the DOJ announced a reorganisation that, among other things, established the Office of Decree Enforcement and Compliance, which will 'have primary responsibility for enforcing judgments and consent decrees in civil matters'.[58] This new office appears similar to the Compliance Division at the FTC, which, among other things, 'help[s] draft and negotiate Commission orders . . . and oversee[s] company conduct required by the order' and 'go[es] to court to enforce Commission orders and to seek penalties for order violations'.[59]

Conclusion

The general goal of the antitrust agencies in evaluating remedies is to restore the competition that may be lost in the underlying transaction. This general goal can be achieved in ways that are tailored to the specific facts of each transaction. For structural remedies, as described above, agencies evaluate many factors, including the sufficiency of divested assets, the adequacy of the divestiture buyer and the actual mechanics of the divestiture.

56 Dep't of Justice, Justice Department Brings Enforcement Action Against Centurylink, 14 August 2020, available at www.justice.gov/opa/pr/justice-department-brings-enforcement-action-against-centurylink.

57 Plaintiff United States' Unopposed Motion to Modify Final Judgment and Enter Amended Final Judgment, *United States v. CenturyLink, Inc.*, 1:17-cv-02028, Dkt 14 at 2 (D.D.C. 14 August 2020).

58 Dep't of Justice, Assistant Attorney General Makan Delrahim Announces Re-Organization of the Antitrust Division's Civil Enforcement Program, 20 August 2020, www.justice.gov/opa/pr/assistant-attorney-general-makan-delrahim-announces-re-organization-antitrust-divisions-civil.

59 www.ftc.gov/about-ftc/bureaus-offices/bureau-competition/inside-bureau-competition.

Appendix 1

About the Authors

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A partner and co-chair of the antitrust group, Rick Rule provides antitrust advice to major international corporations on 'bet-the-company' matters, including M&A, criminal and civil investigations by the US Department of Justice and the US Federal Trade Commission, and trial and appellate litigation. Over the past 30 years, Rick has advised on a number of the highest profile antitrust matters, including representing Exxon in its merger with Mobil, leading the team for Microsoft that settled its antitrust case with the DOJ and representing US Airways in its merger with American Airlines.

Rick began his career in the Antitrust Division of the Department of Justice, becoming, in 1986, the youngest person ever confirmed as the head of the Division. Rick left the Department in 1989 and has since been a partner and head of antitrust practices at several leading New York and DC firms. Rick received a JD from the University of Chicago Law School and a BA from Vanderbilt University.

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A partner in the antitrust group, Andy Forman focuses his practice on counselling clients in a wide range of antitrust matters, with an emphasis on mergers and acquisitions, joint ventures and investigations by the US Department of Justice and the US Federal Trade Commission. Throughout his career, Andy has represented numerous leading companies including Cigna, Eli Lilly & Company, Goodyear Tire and Rubber Co, Microsoft Corporation, Pfizer Inc, Salix Pharmaceuticals, Ltd and US Airways Inc.

Andy previously worked for the Federal Trade Commission's Bureau of Competition (Mergers I), where he helped lead antitrust investigations in large mergers and acquisitions in the pharmaceutical, medical device, consumer products, industrial products and aircraft components industries. He has been recognised by *The Legal 500*, *Benchmark Litigation* and

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A counsel in the antitrust group, Dan Howley advises clients on antitrust matters, including litigation, mergers and acquisitions, and civil and criminal investigations by the US Department of Justice and the US Federal Trade Commission. He also has significant experience in commercial litigation involving contractual disputes, business torts and shareholder class action and derivative claims. His notable clients include Cigna, Nestlé, AK Steel Holding Corp, the US Treasury and Microsoft.

Dan has had key roles in numerous high-profile matters including the *Sabre/Farelogix* litigation, the *Cigna/Express Scripts* transaction (nominated for 'Merger Control Matter of the Year – Americas' at the 2019 Global Competition Review Awards), the defence of Nestlé USA in the Chocolate Confectionary Antitrust Litigation (nominated for 2015 'Litigation of the Year – Cartel Defence') and the *US Airways/American Airlines* merger (2014 Matter of the Year Award winner). Dan received a JD from the University of Pennsylvania Law School and an undergraduate degree from Duke University.

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Successfully remedying the potential anticompetitive effects of a merger can be more of an art than a science. Not only is every deal specific, but, as noted in the introduction, every remedy contains an element of 'crystal ball-gazing'; enforcers must look into the future and successfully predict outcomes.

As such, practical guidance for both practitioners and regulators in navigating this challenging environment is critical. This third edition of the Merger Remedies Guide – published by Global Competition Review – provides such detailed guidance and analysis. It examines remedies throughout their life cycle: from the fundamental principles; to the remedies available; through how remedies are structured and implemented; to how enforcers ensure compliance. Insights from around the world, ranging from China to Russia, supplement the global analysis to inform the reality of multi-jurisdictional deals.

The Guide draws not only on the wisdom and expertise of 46 distinguished practitioners from 18 firms, but also the perspective of former enforcers Daniel Ducore and Diana Moss. It brings together unparalleled proficiency in the field and provides essential guidance for all competition professionals.

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