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MERGER REMEDIES GUIDE

FIFTH EDITION

Editors
Ronan P Harty, Nathan Kiratzis and Anna M Kozlowski

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CHAPTER 4

US Antitrust Agencies Take Stricter Approach to Structural Remedies Amid Growing Concern

Joshua M Goodman and Ryan Hoak[1]

Overview

The antitrust agencies' goal for merger remedies is to preserve or restore competition that may be lost because of a transaction. In 2022, the Federal Trade Commission (FTC) observed, in approving a merger settlement, that proposed divestitures would 'effectively restore an independent [competitor] in each relevant geographic market and will thereby preserve competition in each relevant market'.[2] Likewise, in 2023, the Department of Justice (DOJ) told a federal court in a merger case that 'the relief in an antitrust case must be effective to redress the violations and to restore competition.'[3] This goal has remained consistent across administrations and is anchored in the case law. According to the US Supreme Court, the 'key to the whole question of an antitrust remedy' is identifying 'measures effective to restore competition'.[4]

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2 Analysis of Agreement Containing Consent Order to Aid Public Comment, FTC, *In the Matter of Buckeye Partners, L.P.*, File No. 211-0144, at 1 (2 June 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/2110144C4765BuckeyeAAPC.pdf.

3 Plaintiff's Pre-Trial Brief, United States v. Assa Abloy, (D.D.C. 13 January 2023), ECF No. 59 (quoting *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972)) [*Assa Abloy* Plaintiff's Pre-Trial Brief], available at https://www.justice.gov/atr/case-document/file/1564461/download.

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

Agency guidance documents have reiterated this goal. The DOJ's 2020 Merger Remedies Manual (withdrawn in 2022) stated that preserving competition is the goal of antitrust remedies and underscored that 'preserving competition requires replacing the competitive intensity that would be lost as a result of the merger.'[5] And the FTC's 2017 staff retrospective report on merger remedies invoked the same objective: 'The goal of any remedy is to preserve fully the existing competition in the relevant markets at issue.'[6] The European Commission (EC) and UK Competition and Markets Authority (CMA) have similar goals for their merger remedies.[7]

The antitrust agencies pursue the goal of preserving or restoring competition with structural remedies, conduct remedies or both. This chapter focuses on structural remedies – remedies that affect the structure of the market, usually by creating, restoring or maintaining a firm that will compete independently. Structural remedies thus generally involve the sale of businesses or assets – or the prevention of businesses or assets from being combined in a merger in the first place.

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5 Department of Justice, 'Merger Remedies Manual' (September 2020), at 3 [2020 DOJ Remedies Manual], available at https://www.justice.gov/atr/page/file/1312416/download. The DOJ withdrew the 2020 DOJ Remedies Manual in April 2022 and has not issued a successor.

6 Federal Trade Commission, 'The FTC's Merger Remedies, 2006-2012: A Report of the Bureaus of Competition and Economics' (January 2017), at 15 [FTC 2017 Merger Remedies Study], available at https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf; see also FTC, Frequently Asked Questions About Merger Consent Order Provisions ¶ 1 [FTC FAQ], available at https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/frequently-asked-questions-about-merger-consent-order-provisions. The FTC FAQ remains active on the FTC's website, although it is described as '(Archived)' on an overview page about merger review. See https://www.ftc.gov/enforcement/merger-review (accessed 4 November 2023). Although the FAQ does not appear to have been recently updated, it is cited herein for historical perspective and/or where the authors believe its content remains relevant.

7 See Commission notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004 (October 2008) [2008 EC Remedies Guide], available at https://ec.europa.eu/competition/mergers/legislation/files_remedies/remedies_notice_en.pdf; see also 'Merger Remedies,' Competition & Markets Authority (December 2018), available at https://assets.publishing.service.gov.uk/media/5c12349c40f0b60bbee0d7be/Merger_remedies_guidance.pdf.

Structural remedies are typically the preferred approach for US antitrust agencies in merger cases. As the Supreme Court has explained, 'in Government actions divestiture is the preferred remedy for an illegal merger or acquisition.'[8] This preference comes from the belief that structural remedies are the simplest and most effective way to restore competition, or, as the Supreme Court put it, divestiture is 'simple, relatively easy to administer, and sure'.[9]

As discussed in the sections that follow, the antitrust agencies will generally seek to ensure, among other things, that three broad aspects of a structural remedy are sufficient to preserve competition:

- Assets: whether the divested assets or businesses are sufficient to enable the divestiture firm to compete at a level that will effectively preserve competition.
- Buyer: whether the proposed divestiture buyer has the commercial and financial capabilities to compete successfully and at a level that would preserve the competitive intensity that would exist absent the merger.
- Implementation: whether the actual mechanics of implementing the divestiture are practical, feasible and otherwise likely to succeed in preserving competition.

In recent years, the antitrust agencies have expressed particular concern that structural remedies may fail to achieve their objectives. This concern follows several divestitures that the agencies considered failures. For example, nine months after the FTC approved a divestiture settlement in *Albertsons/Safeway* (2015), the divestiture buyer filed for bankruptcy and later accused Albertsons of sabotaging the divestiture.[10] Albertsons later ended up buying back some of the divested stores.

Given these concerns, the agencies have signaled a lower tolerance for the risk of a divestiture failing and have narrowed the circumstances in which they are likely to agree to settle cases with structural remedies. In a 2023 speech, the Director of the FTC's Bureau of Competition stated:

8 *California v. American Stores Co.*, 495 U.S. 271, 280–81 (1990).

9 id, quoting *du Pont*, 366 U.S. at 329–31.

10 See Dissenting Statement of Commissioner Rohit Chopra, FTC, *In the Matter of AbbVie, Inc./Allergan plc*, Commission File No. 1910169 (5 May 2020) [Dissenting Statement of Commissioner Rohit Chopra] (also discussing *Hertz/Dollar Thrifty* and *Dollar Tree/Family Dollar* divestitures), available at https://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.

> *The Bureau of Competition will only recommend acceptance of divestitures that allow the buyer to operate the divested business on a standalone basis quickly, effectively, and independently, and with the same incentives and comparable resources as the original owner. This type of remedy has a better track record of success and a low risk that it will not maintain or restore the intensity of premerger competition. We will no longer consider remedies where there is heightened risk of failure. These include proposals of less than standalone business units, or where there are forward-looking entanglements between the buyer and seller, such as supply agreements, or where there is no strong and independent buyer.*[11]

In some public statements, the agencies have signaled even greater skepticism of settling cases with structural remedies. In January 2022, DOJ Assistant Attorney General Jonathan Kanter stated: 'I am concerned that merger remedies short of blocking a transaction too often miss the mark . . . in my view, when the division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction.'[12]

This view of negotiated structural remedies may have led to an increase in 'fix it first' transactions, where merging parties attempt to identify and implement structural remedies as part of their own transaction planning process, without first reaching agreement with the agencies on the appropriate scope of a remedy. Previously, the agencies appeared more inclined to disfavour 'fix it first' attempts. For example, in a 2019 blog post, FTC staff warned that 'parties should be aware of the significant risks and downsides to presenting a signed divestiture agreement to the Bureau as a *fait accompli* without having fully discussed it with staff.'[13] But some more recent statements indicate a more favourable attitude. For example, in a 2022 interview, FTC Chair Lina Khan reportedly stated that

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11 'Update from the FTC's Bureau of Competition,' Holly Vedova, Remarks at 12th Annual GCR Live: Law Leaders Global Conference, Miami, Florida (3 February 2023) [Update from the FTC's Bureau of Competition], available at https://www.ftc.gov/system/files/ftc_gov/pdf/vedova-gcr-law-leaders-global-conference.pdf.

12 'Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section,' Jonathan Kanter (24 January 2022), available at https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

13 'Unpacking Divestiture Packages', Angelike Andrinopoulos Mina, Bureau of Competition (13 June 2019), available at https://www.ftc.gov/enforcement/competition-matters/2019/06/unpacking-divestiture-packages.

extensive divestiture planning work is 'not work that the agency should have to do. That's something that really should be fixed on the front end by parties being on clear notice about what are lawful and unlawful deals.'[14]

The agencies have also turned to additional tools in an attempt to bolster structural remedies. For instance, in July 2021, the FTC rescinded a 1995 policy statement limiting the use of 'prior approval' provisions in FTC settlement orders.[15] Such provisions require that the parties to a Commission order seek prior approval from the FTC before engaging in future transactions subject to the provision. Following this policy shift, recent FTC divestiture agreements have included prior approval requirements.[16]

In any given matter in which a structural remedy agreement is under serious consideration, the antitrust agencies conduct a fact-specific assessment of the proposed divestiture assets, proposed buyer and anticipated implementation process. Several common issues that arise in that fact-specific assessment are discussed below.

Assets to be divested

Existing business entities

In general, the antitrust agencies have a strong preference for the divestiture of a standalone, ongoing business that has already shown it can effectively compete in the market.[17] As the FTC staff has explained:

14 'FTC's new stance: Litigate, don't negotiate,' Margaret Harding McGill, Axios (8 June 2022), available at https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan.

15 See FTC, 'Statement of the Commission on the Use of Prior Approval Provisions in Merger Orders' (21 July 2021), available at https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

16 See, e.g., Decision and Order, FTC, *Hikma/Custopharm*, Docket No. C-4771, § II.A (14 July 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/221%200002%20C4771%20Hikma%20Custopharm%20Final%20Order%20.pdf; see also Decision and Order, FTC, *In the Matter of EnCap/EP Energy*, Docket No. C-4760, §§ X-XI (14 September 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/C4760EnCapEPEnergyOrder.pdf.

17 See, e.g., FTC, 'A Guide for Respondents: What to Expect During the Divestiture Process' (June 2019) [FTC 2019 Guide for Respondents], available at https://www.ftc.gov/system/files/attachments/merger-review/a_guide_for_respondents.pdf; see also 2020 DOJ Remedies Manual, at 8–9.

> *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.*[18]

The agencies have continued to emphasise and even strengthen this preference, with the FTC's Bureau of Competition Director stating in 2023 that its current policy was that the Bureau would 'no longer consider remedies where there is heightened risk of failure', including 'proposals of less than standalone business units'.[19]

Nonetheless, the agencies perform a fact-specific analysis of proposed remedies in light of their ultimate goal of restoring competition, and have previously accepted structural remedies involving the divestiture of less than an entire business unit operating in the relevant market of concern. For example, in the 2017 FTC staff retrospective study of divestitures from 2006 to 2012, the study identified 28 orders to divest 'selected assets'.[20] However, the study did conclude that 'divesting selected assets poses more risk than divesting an ongoing business, even with an upfront buyer' and indicated that 'the Commission will accept such a proposal only if the respondent and the buyer demonstrate that divesting the more limited asset package is likely to maintain or restore competition.'[21]

Tangible and intangible assets

The antitrust agencies have long recognised that 'there are certain intangible assets that likely should be conveyed whenever tangible assets are divested.'[22] Generally, divestiture buyers must receive all tangible and intangible assets needed to replicate competition that may be lost because of the merger. For example, in the FTC's settlement in *Ardagh/Saint-Gobain* in 2014, Ardagh was required to

18 FTC FAQ ¶ 15.

19 Update from the FTC's Bureau of Competition.

20 FTC 2017 Merger Remedies Study, at 23.

21 id. at 23, 32.

22 DOJ, 'Antitrust Division Policy Guide to Merger Remedies' (October 2004), at 10 [2004 DOJ Remedies Manual], available at https://www.justice.gov/d9/pages/attachments/2019/07/30/205108.pdf. See also DOJ, 'Antitrust Division Policy Guide to Merger Remedies' (June 2011), at 7 [2011 DOJ Remedies Manual] ('[T]o 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.'), available at https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf.

divest several glass container manufacturing plants, as well as associated 'customer contracts, molds, intellectual property, inventory, accounts receivable, government licenses and permits, and business records'.[23]

Where competitively significant intangible assets are themselves the focus of the divestiture, such as intellectual property or rights, divestitures are usually accomplished through either the sale of the assets or licensing. For instance, in 2017, the FTC challenged Mallinckrodt ARD Inc's acquisition of the US rights to the drug Synacthen. The FTC alleged that the acquisition served to prevent the development of a US competitor to Mallinckrodt's monopoly drug, Acthar. In the remedy resolving the FTC's challenge, among other requirements, the FTC required Mallinckrodt to grant a licence to develop Synacthen to a licensee approved by the FTC.[24]

Remedies have occasionally provided for the merging parties to continue to use certain intangible assets that are subject to divestiture.[25] For example, when a divestiture includes intellectual property, if the merging parties also require access to that intellectual property, the agencies may consider permitting a non-exclusive licence of the intellectual property back to the merging parties from the divestiture buyer. Similarly, agencies may permit non-exclusive licences to be provided from the merging parties to the divestiture buyers. However, the DOJ 2020 Merger Remedies Manual identified 'allowing 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'.[26] This view reflects concern that 'permitting the merged firm to retain access to divested intangible assets . . . may make it more difficult for the purchaser to differentiate its product

23 Analysis of Agreement Containing Consent Orders to Aid Public Comment, FTC, *In the Matter of Ardagh Group S.A., Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain*, Docket No. 9356, § VI (10 April 2014), available at https://www.ftc.gov/system/files/documents/cases/140410ardaghanalysis.pdf.

24 Press Release, FTC, 'Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants' (18 January 2017), available at https://www.ftc.gov/news-events/news/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it-illegally-maintained-its-monopoly.

25 For example, the FTC agreed to such a licensing arrangement in the settlement permitting Honeywell International's acquisition of Intermec in 2013. There, the merging parties were required to license their patents for 2D scan engines to Datalogic IPTECH for the following 12 years. See Decision and Order, FTC, *In the Matter of Honeywell International, Inc.*, Docket No. C-4418 (26 November 2013), available at https://www.ftc.gov/sites/default/files/documents/cases/131126honeywelldo.pdf.

26 2020 DOJ Remedies Manual, at 20–21.

from its rivals, or may reduce the purchaser's incentive to invest in the business'.[27] While the 2020 DOJ Remedies Manual has been withdrawn, the agencies likely continue to have these same concerns, perhaps making these types of licensing arrangements more likely to be adopted in the context of a consummated merger remedy seeking to restore lost competition than for a pre-merger remedy seeking to preserve ongoing competition.

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

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 a level that will replace the competition that would otherwise be lost. Accordingly, the agencies may require a divestiture package that goes beyond the relevant product and geographic markets in which there are competitive concerns if additional assets are required to preserve competition in those relevant markets.[28] For example, the agencies may require broader divestiture assets to ensure the divested business will have adequate scale, supply chain security and research and development resources to compete effectively. In *Polypore International, Inc. v. FTC*, the Eleventh Circuit upheld an FTC order requiring the divestiture of an Austrian plant needed to serve North American customers and provide insurance against supply disruptions.[29] Similarly, in *United States v. Transdigm Group, Inc.*, the DOJ

27 See id. at 21.

28 See FTC, 'Negotiating Merger Remedies' (January 2012), at 6, available at https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf ('The proposed package may also include business components relating to markets outside the relevant geographic or product market, if such components are necessary to assure that the buyer retains the same efficiencies that the respondent had. For example, when the product is marketed and distributed with other products, the assets to be divested may include assets relating to these other products in order to remain efficient.').

29 *Polypore Intern. Inc. v. FTC*, 686 F.3d 1208, 1218–19 (11th Cir. 2012) ('The Commission reasoned that the Austrian plant needed to be divested to restore the competition eliminated by the acquisition and provide the acquirer with the ability to compete . . . It found that when Microporous produced CellForce for its foreign customers at its Tennessee plant, capacity constraints limited its ability to compete for additional North American business. However, once the Feistritz plant was constructed, Microporous was able to commit to additional North American sales to customers. Additionally, the Commission

required the divestiture of a business unit developing and manufacturing a full line of commercial aircraft passenger restraint products to remedy antitrust concerns related to a subset of those products.[30]

'Crown jewel' provisions

In certain circumstances, the antitrust agencies have required 'crown jewel' provisions, which require the divestiture of a different, more marketable set of assets if the merging parties are not able to sell the originally agreed-upon package of assets within the agreed period. As the FTC has explained in the past, crown jewel provisions may be included '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'.[31] This situation can arise when 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, thus restoring competition sooner. For example, the FTC included crown jewel provisions in the 2013 remedy that resolved Pinnacle Entertainment's acquisition of Ameristar Casinos. The original remedy required divestiture of casino assets to an FTC-approved buyer within six months. But if the merging firm did not find an FTC-approved buyer for those assets in that time, the provision permitted a divestiture trustee to divest other, more valuable, casino assets.[32] The EC Remedies Guide recognises the need for crown jewel provisions in certain circumstances as well.[33]

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reasoned that multiple plants provide insurance against supply disruptions and provide the ability to supply local customers, which in turn made Microporous a more effective competitor.').

30 Competitive Impact Statement, DOJ, *United States v. Transdigm Group, Inc.*, No. 1:17-cv-02735 (D.D.C. 2017), available at https://www.justice.gov/media/926541/dl?inline; see also 2020 DOJ Remedies Manual at 9 n.34.

31 FTC FAQ ¶ 26.

32 See Decision and Order, FTC, *In the Matter of Pinnacle Entertainment, Inc. and Ameristar Casinos, Inc.*, Docket No. 9355 (19 December 2013), available at https://www.ftc.gov/sites/default/files/documents/cases/131219pinnacledo.pdf.

33 See 2008 EC Remedies Guide, at 14 ('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.').

While the FTC has historically favoured crown jewel provisions in certain circumstances, the DOJ's 2004 Remedies Guide stated that 'crown jewel provisions are strongly disfavored', arguing, among other things, that 'because the Antitrust Division must be highly confident that the merger will not harm competition, its preference is to demand at the outset a remedy that provides this confidence — rather than one that may turn out later to require the addition of more assets, e.g., a crown jewel.'[34] However, the 2011 DOJ Remedies Guide took a different approach, acknowledging that crown jewel provisions are 'necessary' in certain cases 'to ensure that the remedy will effectively preserve competition'.[35] The subsequent (and also now withdrawn) 2020 DOJ Remedies Guide did not mention crown jewel provisions. While the agencies have not provided recent guidance on the topic, considering recent statements from the leadership of both the FTC and DOJ about their approach to remedies generally, discussed elsewhere in this chapter, it could be that both agencies currently disfavour crown jewel provisions.

The divestiture buyer

The agencies consider the buyer of divestiture assets or businesses to be a critical aspect of any structural remedy. Therefore, consistent with their overall remedial goal of restoring competition, the agencies will vet each proposed divestiture buyer to ensure it is 'ready, willing, and able to operate the assets in a manner that maintains or restores competition in the relevant market'.[36] The agencies seek to guard against the risk that the buyer will fail to compete with the divested assets successfully, fully and for a sufficient period of time.

Ultimately, whether the agencies will approve a particular buyer is a fact-specific question, and depends on the specific nature of the industry, the assets in the divestiture package and the identity, experience, resources and plans of the proposed buyer.

The antitrust agencies interview prospective buyers and typically request documents, including their financials and business plans for the assets to be divested. In the past, the FTC staff has identified multiple factors that it considers when evaluating potential buyers, including:

- whether the buyer has the financial resources to complete the proposed divestiture and to remain a vigorous competitor in the market;

34 2004 DOJ Remedies Manual, at 36–37.

35 2011 DOJ Remedies Manual, at 24–25.

36 FTC FAQ ¶ 5.

- the proposed buyer's commitment to remain in the market by analysing its past operations and business plans as well as its future plans for the divested assets;
- the proposed buyer's experience and expertise to operate effectively in the market;
- information from others in the industry familiar with the proposed buyer, such as competitors, suppliers and customers;
- the views of lenders and other creditors of the proposed buyer, particularly those involved in the possible financing of the proposed deal; and
- the proposed buyer's current position in the relevant market to ensure elimination of the anticompetitive effects of the transaction.[37]

The DOJ conducts a similar exercise, and the agencies do not always approve the proposed buyer. For example, the DOJ rejected the merging parties' proposed divestiture of certain 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'.[38] 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.[39]

In *AbbVie/Allergan* (2020), the FTC approved the divestiture of assets related to three drugs, but the approval came with two dissents from commissioners who, among other issues, raised buyer-related concerns. The dissenting commissioners disagreed with the divestiture of two of the drugs to Nestlé, 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'.[40]

In general, when the antitrust agencies approve a buyer, they do so before or at the same time as the remedy that resolves the underlying competition concerns. This practice is referred to as being an 'upfront buyer'. For example, the FTC Bureau of Competition in 2019 stated that the FTC has a 'strong preference for

37 See FTC FAQ ¶ 6.

38 *United States v. Aetna*, 240 F. Supp. 3d 1, 70 (D.D.C. 2017).

39 id. at 72.

40 Dissenting Statement of Commissioner Rohit Chopra, at 2.

upfront buyers' and only 'allows for post-Order divestitures to a Commission-approved buyer in certain limited circumstances'.[41] The DOJ 2020 Remedies Manual expressed a similar point of view.[42]

The agencies' preference for upfront buyers reflects their desire to minimise the risks of the divestiture, including risk of interim harm to competition that may occur while a divestiture process is pending. For example, the FTC has explained that it has required upfront buyers in past supermarket and retail divestitures because of concerns that such businesses are 'particularly vulnerable to having their assets deteriorate during the search for a post order buyer'.[43]

The circumstances in which the agencies are most likely to agree to depart from their preference for an upfront buyer are fact-specific, but likely to involve factors such as the divestiture of a standalone business, a low risk of interim deterioration of the business during the search for a buyer and evidence that there are likely to be multiple approvable buyers bidding on the divestiture package.[44] In such cases, the agencies are also likely to implement provisions to protect against interim harm and ensure timely completion of the divestiture, like orders to maintain assets or to appoint a divestiture trustee, as discussed further below.

Implementation considerations

Avoiding ongoing entanglements

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 at the mercy of a competitor.[45] As a court observed, 'it can be a problem to allow continuing relationships between the seller and buyer of divested assets after divestiture, such as a supply arrangement or technical assistance requirement, which may increase the buyer's vulnerability to the seller's behavior.'[46]

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41 'The uphill case for a post-Order divestiture,' Ian Conner (21 March 2019) [FTC 2019 'Uphill Case' Post on Post-Order Divestitures], available at https://www.ftc.gov/enforcement/competition-matters/2019/03/uphill-case-post-order-divestiture.

42 See 2020 DOJ Remedies Manual, at 22 ('In limited circumstances, the Division may decide that an upfront buyer is not necessary.').

43 FTC FAQ ¶ 9 (citing *Ahold/Bruno*'s, Docket No. C-4027; *Albertson's, Inc./American*, Docket No. C-3986; *Shaw's/Star*, Docket No. C-3934 (divestiture in one market was post-order requirement); *Kroger/Fred Meyer*, Docket No. C-3917; *Kroger/Groub*, Docket No. C-3905; *Ahold*, Docket No. C-3861; and *CVS/Revco*, Docket No. C-3762).

44 See FTC 2019 'Uphill Case' Post on Post-Order Divestitures.

45 *United States v. Aetna*, at 60 (quotation omitted).

46 *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 77 (D.D.C. 2015) (quotation omitted).

The antitrust agencies are therefore often concerned that continuing entanglements between the divestiture buyer and the combined firm would undermine the establishment of the divestiture buyer as a fully independent competitor with incentives to compete vigorously. Moreover, the continued interaction between these competitors may raise the risk of collusion. For example, the DOJ's 2020 Remedies Manual cautioned that 'close and persistent ties between the merged firm and the purchaser may serve to enhance the flow of information or align incentives, which may facilitate collusion'.[47] In *United States v. Assa Abloy* in 2023, the DOJ argued that 'incentives to compete can become dampened by ongoing entanglements.'[48] In that case, the acquirer initially proposed a divestiture in which it would have shared a manufacturing facility for smart locks with the divestiture buyer for an indefinite period of time.[49] Assa Abloy settled during trial with an agreement that, among other things, shortened the transitional period at the manufacturing facility to a matter of months.[50]

Transitional services and implementation risks

Despite concerns about ongoing entanglements, the antitrust agencies recognise that some degree of continuing relationship may be required in the short term to ensure the competitive viability of the divestiture. Accordingly, many divestiture agreements include provisions requiring the seller to provide the divesture buyer with various types of transition assistance for a limited time. For example, short-term transitional services required as part of the divestiture package may include the merged company providing the divestiture buyer with supply contracts, IT support, human resources assistance, technical product assistance, customer or regulatory support, and maintenance and repair commitments.

The exact nature and duration of any transition services agreement will depend on the fact-specific needs of the divestiture buyer to compete effectively with the divested assets or business. As a 2019 FTC tip sheet put it, 'Supply agreements can be critical, enabling buyers to enter the affected markets quickly. At the same time, the Commission seeks to minimize the length of time that buyers rely on

47 2020 DOJ Remedies Manual, at 13.

48 *Assa Abloy* Plaintiff's Pre-Trial Brief, at 11.

49 Competitive Impact Statement, *United States v. Assa Abloy*, (D.D.C. 5 May 2023), ECF No. 129, available at https://www.justice.gov/atr/case-document/file/1584876/download.

50 id.

respondents.'[51] While 12 months could be considered a fairly typical duration for transitional services, the agencies' historical settlement agreements reflect many different case- and market-specific considerations and provisions.

As part of their fact-specific assessment of a proposed divestiture, the agencies will also assess the overall risks associated with the operational complexity and practicality of accomplishing the divestiture and transition process. If the process is deemed too complex, or to result in too many entanglements, the agencies may conclude that a remedy is not feasible. For example, in seeking to block the proposed *Halliburton/Baker Hughes* merger in 2016, the DOJ alleged that the merging parties' proposed remedy would 'leave the buyer dependent on Halliburton for services that are crucial to the businesses being divested', and that the remedy was overly complex, in that it would require the court and the DOJ 'to regulate over many years what amounts to a major reorganization of the global oilfield services industry involving the division, sharing, and transfer of hundreds of facilities, thousands of employees, thousands of patents, hundreds of contracts, and numerous other assets across dozens of countries'.[52]

Interim orders, monitors and specific conduct requirements

Where a divestiture will occur after closing, the agencies will often impose detailed interim requirements designed to preserve the competitive viability of the divestiture assets. These requirements are usually reflected in a hold separate order or an order to maintain assets. For example, in *JAB Consumer Partners/Ethos Veterinary Health* (2022), the FTC required the divestiture of certain veterinary clinics within 10 days post-closing, and issued a 17-page order to maintain assets addressing a wide variety of topics designed to ensure the clinics continued to be operated appropriately.[53]

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51 See FTC 2019 Guide for Respondents.

52 Complaint, *United States v. Halliburton Co.*, Docket No. 1:16-cv-233 (D. Del. 2016), ECF No. 1 ¶¶ 9, 73-79, available at https://www.justice.gov/d9/press-releases/attachments/2016/04/06/hal-bhi_complaint_-_stamped_copy.pdf.

53 See Order to Maintain Assets, FTC, *JAB Consumer Partners/Ethos Veterinary Health*, Docket No. C-4770 (29 June 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/2110174C4770JABEthosOMA.pdf.

Further, the agencies often require provisions to ensure that the divestiture is completed in a timely way, such as provisions triggering the appointment of a divestiture trustee to complete the sale if it is not conducted by a deadline, or even potentially provisions imposing fines.[54]

The agencies will also often require the appointment of an independent, third-party monitor to oversee compliance with a divestiture order as a whole.

Finally, the antitrust agencies may also require other specific conduct that helps to ensure the divested assets will be able to compete effectively or be marketable, or both. For example, in *Tractor Supply Co./Orscheln* (2022), among other provisions, the FTC imposed a requirement for the appointment of a 'transition manager' for each buyer and an obligation to facilitate the buyer's interviewing and hiring of employees.[55]

Conclusion

The general goal of the antitrust agencies in evaluating remedies is to restore the competition that may be lost in the underlying transaction. As opposed to conduct remedies, structural remedies – those that seek to support the competitive structure of the market by restoring, creating or maintaining an independently competing business – are the agencies' preferred approach where they believe that a remedy is feasible. For any given structural remedy proposal, the agencies perform a fact-specific inquiry to analyse that overall 'key to the whole question of an antitrust remedy': whether the remedy will be 'effective to restore competition'.[56]

54 See, e.g., Decision and Final Order, FTC, *JAB Consumer Partners/Ethos Veterinary Health*, Docket No. C-4770 (14 October 2022), § IX, available at https://www.ftc.gov/system/files/ftc_gov/pdf/C-4770%20211%200174%20-%20JAB%20Consumer%20Fund-VIPW%20Final%20Order%28NoSig%29.pdf; see also Final Judgment, DOJ, *United States v. General Electric, et al.*, No. 1:17-cv-1146 (D.D.C. 16 October 2017), § IV ($1,500 per day fines for missing deadline), available at www.justice.gov/atr/case-document/file/1056411/download.

55 Analysis of Agreement Containing Consent Order to Aid Public Comment, FTC, *Tractor Supply Co./Orscheln Farm and Home LLC*, Docket No. C-4776 (11 October 2022), § IV, available at https://www.ftc.gov/system/files/ftc_gov/pdf/2110083TractorSupplyAAPC.pdf.

56 *Du Pont*, 366 U.S. at 326.

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 every remedy contains an element of crystal ball-gazing; enforcers must look to the future and successfully predict outcomes. As such, practical guidance for both practitioners and regulators in navigating this challenging environment is critical.

This fifth edition of the *Merger Remedies Guide* provides just such analysis. It examines remedies throughout their life cycle: through how remedies are structured and implemented, to how enforcers ensure compliance. Insights from four jurisdictions around the world supplement the global analysis to inform the reality of multi-jurisdictional deals. The Guide draws not only on the wisdom and expertise of distinguished practitioners from a range of jurisdictions, but also the perspective of former enforcers. It brings together unparalleled proficiency in the field and provides essential guidance for all competition professionals.

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