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GCR INSIGHT

MERGER REMEDIES GUIDE

THIRD EDITION

Editors

Ronan P Harty and Nathan Kiratzis

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PART II

TYPES OF REMEDIES

Non-Structural Remedies

Carrie C Mahan and Kristin H Sanford¹

There are two basic forms of merger remedies: structural remedies (e.g., divestitures) and non-structural remedies (e.g., conduct or behavioural remedies). Non-structural remedies are often used in conjunction with divestitures,² but the US federal antitrust agencies have a long-held bias against purely non-structural remedies, other than in very limited circumstances. As the DOJ has stated, '[t]he speed, certainty, cost and efficacy of a remedy are important measures of its potential effectiveness.'³ Thus, '[s]tructural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market.'⁴

The DOJ reaffirmed its strong preference for structural remedies in both horizontal and vertical mergers in its most recent published policy guide on merger remedies, the Merger Remedies Manual (the 2020 DOJ Merger Remedies Manual), issued in September 2020. The Manual states that 'conduct remedies are inappropriate except in very narrow circumstances.'⁵ According to the Manual, the limited circumstances where conduct remedies may be

1 Carrie C Mahan is a partner and Kristin H Sanford is an associate at Weil, Gotshal & Manges LLP.

2 See Bureaus of Competition & Econ, Fed Trade Comm'n, Report on The FTC's Merger Remedies 2006–2012, 18–19 (2017), www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/pl43100_ftc_merger_remedies_2006-2012.pdf (the 2017 FTC Merger Study).

3 US Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies at 7 (2004), available at www.justice.gov/sites/default/files/atr/legacy/2011/06/16/205108.pdf (the 2004 DOJ Policy Guide).

4 *id.*

5 US Dep't of Justice, Antitrust Division Merger Remedies Manual at 4 (2020), available at www.justice.gov/atr/page/file/1312416/download (the 2020 DOJ Merger Remedies Manual). In 2018, the Division withdrew the 2011 Policy Guide to Merger Remedies, which appeared to take a step back from the clear preference for structural remedies, and announced that the 2004 DOJ Policy Guide would be in effect pending release of an updated policy (Makan Delrahim, Assistant Attorney General, US Dep't of Justice, 'It Takes Two: Modernizing the Merger Review Process', Remarks at the 2018 Global Antitrust Enforcement Symposium (25 September 2018), available

appropriate are: (1) conduct relief to facilitate structural relief (i.e., hybrid remedies discussed below); and (2) stand-alone conduct relief when the parties prove that: a transaction generates significant efficiencies that cannot be achieved without the merger; a structural remedy is not possible; the conduct remedy will completely cure the anticompetitive harm; and the remedy can be enforced effectively.⁶

Despite some statements emphasising the potentially pro-competitive aspects of non-structural remedies, in recent years both antitrust agencies have demonstrated a strong trend of disfavouring the use of conduct remedies to resolve competitive concerns. For instance, in 2019, seven of the 10 FTC merger enforcement actions that settled involved divestitures (albeit with some conduct remedy components) to resolve competitive concerns.⁷ On the other hand, the FTC imposed non-structural remedies alone in only three transactions – one was a vertical merger and another was a joint venture's purchase of bankruptcy assets.⁸ The current leaders of the DOJ and FTC have publicly stated that the agencies will approach conduct remedies with heightened scepticism – even in vertical mergers.⁹ In July 2020, the DOJ did, in fact, require divestitures to address horizontal and vertical concerns relating to the merger of United Technologies Corporation and Raytheon Company,¹⁰ and the Manual is clear that the DOJ would do so in purely vertical mergers in the future.

at www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust). The 2020 DOJ Merger Remedies Manual supersedes both the 2011 and 2004 guides. DOJ Antitrust Division Merger Enforcement: Statutes and Guidelines, available at www.justice.gov/atr/merger-enforcement.

6 2020 DOJ Merger Remedies Manual at 14–26.

7 See Fed Trade Comm'n and US Dep't of Justice, Antitrust Division, Hart-Scott-Rodino Annual Report, Fiscal Year 2019 at 14–17, available at www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsran-annualreportfy2019_0.pdf. Includes enforcement actions in merger matters where the FTC approved a Final Order during fiscal year 2019 (1 October 2018 to 30 September 2019).

8 *id.*; *Corpus Christi Polymers LLC*, Docket No. C-4672, Decision and Order (29 February 2019), available at www.ftc.gov/system/files/documents/cases/181_0030_c-4672_dak_indorama_decision_and_order_2-25-19.pdf (joint venture acquisition of bankruptcy assets); *Sycamore Partners II, LP, Staples, Inc and Essendant Inc*, Docket No. C-4667, Decision and Order (28 January 2019), available at www.ftc.gov/system/files/documents/cases/1810180_staples_essendant_do_and_apps_a-g-redacted_public_version.pdf (vertical).

9 See, e.g., Christine Wilson, Commissioner, Fed Trade Comm'n, Vertical Merger Policy: What Do We Know and Where Do We Go?, Keynote Address at the GCR Live 8th Annual Antitrust Law Leaders Forum (1 February 2019), available at www.ftc.gov/system/files/documents/public_statements/1455670/wilson_-_vertical_merger_speech_at_gcr_2-1-19.pdf; Makan Delrahim, Assistant Attorney Gen, US Dep't of Justice, Antitrust and Deregulation, Keynote Address at American Bar Association's Antitrust Fall Forum (16 November 2017), available at www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar (the Delrahim 2017 Address).

10 *US v. United Technologies Corp and Raytheon Co*, No. 1:20-cv-00824, Final Judgment (D.D.C., filed 22 July 2020), available at www.justice.gov/atr/case-document/file/1296616/download.

Types of non-structural remedies

A wide array of non-structural remedies can be tailored to address specific competitive concerns, including internal firewalls, external remedies, hybrid remedies, third-party consents and approvals, and agency monitoring and reporting requirements. These different types of remedies are often used in combination to address specific industry dynamics.

Firewall provisions

Firewall provisions restrict the dissemination of, and access to, competitively sensitive information within a firm, which helps prevent improper information sharing between competitors and anticompetitive conduct.¹¹ In practice, firewalls ensure that competitively sensitive information is shared only with certain personnel of the merged company – generally employees without decision-making responsibilities for pricing, sales, contracting, marketing, or distributing the merged firm's competing products. For example, a firewall could be imposed in a vertical merger where an upstream manufacturer acquires a downstream distributor to ensure the personnel responsible for manufacturing do not have access to information about rival firms that use the merged firm's distribution services. Thus, the firewall minimises the risk that the integrated firm will use information to disadvantage a rival competitor, resulting in a reduction in competition. Moreover, the firewall can prevent the merged firm from using newly acquired information to facilitate coordination.¹² Firewall provisions are imposed for a specified duration to ensure the restricted information is isolated and not utilised for anticompetitive purposes. Firewalls also require monitoring to ensure compliance.

For example, when the Coca-Cola Company and PepsiCo Inc bought their largest bottlers, the FTC imposed a firewall within each company to prevent the vertical mergers from providing Coke and Pepsi with competitor information about Dr Pepper Snapple Group, the third-largest competitor in the industry.¹³ Similarly, in 2019, the FTC required a firewall as a condition to Staples' acquisition of Essendant. Essendant was a wholesale distributor of office products that sold exclusively to resellers. Staples was the largest vertically integrated reseller. The FTC required Staples to establish a firewall allowing only Staples' employees performing certain functions access to Essendant's commercially sensitive information about its customers that compete against Staples.¹⁴

11 See 2020 DOJ Merger Remedies Manual at 15; Bureau of Competition, Fed Trade Comm'n, Statement on Negotiating Merger Remedies at 5 (2012) www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf (the 2012 FTC Remedy Guide).

12 See 2020 DOJ Merger Remedies Guide at 15; 2017 FTC Merger Study at 16.

13 See *The Coca-Cola Company*, 75 Fed Reg 61,141 (FTC 4 October 2010); *PepsiCo Inc*, 75 Fed Reg 10,795 (FTC 26 March 2010).

14 *Sycamore Partners II, LP, Staples, Inc and Essendant Inc*, Docket No. C-4667, Decision and Order (28 January 2019), available at www.ftc.gov/system/files/documents/cases/1810180_staples_essendant_do_and_apps_a-g-redacted_public_version.pdf.

Firewalls may also be used where the merging parties have access to competitively sensitive information regarding assets ordered to be divested. Here, a firewall prevents harm to the asset purchaser that could occur if the competitively sensitive information were shared.¹⁵

External remedies

External remedies regulate how the transacting parties interact with other market participants.

Mandatory licensing provisions

As an alternative to divestiture, the agencies may require the transacting parties to license certain technology, intellectual property or other assets to third parties.¹⁶ Licensing provisions are generally used when the relevant intellectual property protection covers a broad range of products and the parties may need access to the intellectual property to research or develop other products. In these circumstances, the mandatory licensing arrangement can ensure that customers continue to have access to the products without stifling innovation.

In 2011, for instance, the DOJ permitted a joint venture formed by Comcast and NBCUniversal to proceed on the condition that the parties agreed to license programming to online competitors (among other conditions).¹⁷ In another matter, the FTC imposed a licensing arrangement rather than a divestiture because of the importance of providing consumers access to a lower-priced alternative to a breakthrough cancer pain drug.¹⁸

Fair dealing provisions

Fair dealing provisions are designed to ensure that equal access, efforts and terms are available to those who contract with the transacting parties. For example, in vertical mergers these provisions may require an upstream company to deal with all downstream competitors on equal terms, such as on price, quality, service and access. This can protect against the merged firm disadvantaging independent downstream firms by charging them higher prices, restricting their access to key inputs, or providing them lower quality products or services.

In 2018, for example, the FTC imposed non-discrimination requirements as part of its settlement with Northrop Grumman and Orbital ATK.¹⁹ Northrop Grumman was one of four suppliers of missile systems and Orbital ATK was 'one of only two viable suppliers of [solid rocket motors]',

15 See, e.g., *US v. Bayer AG, et al*, Docket No. 18-1241, Final Judgment (8 February 2019), available at www.justice.gov/atr/case-document/file/1165136/download; *Tesoro Corp*, Docket No. C-4405, Decision and Order (7 August 2013), available at www.ftc.gov/os/caselist/1310052/index.shtm; *Kinder Morgan Inc*, Docket No. C-4355, Decision and Order (14 June 2012), available at www.ftc.gov/os/caselist/1210014/index.shtm.

16 See 2020 DOJ Merger Remedies Manual at 7; 2012 FTC Remedy Guide at 9.

17 See *United States and Plaintiff States v. Comcast Corp et al*, Final Judgment, No. 1:11-cv-00106 (D.D.C. 2011, filed 1 September 2011), available at www.justice.gov/atr/case-document/file/492196/download; see also Press Release, US Dep't of Justice, Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions (18 January 2011), available at www.justice.gov/opa/pr/justice-department-allows-comcast-nbcu-joint-venture-proceed-conditions.

18 See *Cephalon Inc*, 138 FTC 583 (2004).

19 *Northrop Grumman Corp and Orbital ATK, Inc*, 83 Fed Reg 27,776 (FTC 14 June 2018), available at www.ftc.gov/system/files/documents/federal_register_notices/2018/06/northrop_published_analysis_frn_6-14-18.pdf.

a key input to the production of missile systems. The FTC was concerned that the merged firm ‘would have the ability to disadvantage competitors’ to its missile business ‘by denying or limiting their access to’ solid rocket motors.²⁰ To resolve the FTC’s concerns, the parties agreed to make solid rocket motors available on a non-discriminatory basis to competing contractors participating in the same missile system prime contracting process. The non-discrimination provisions prohibited ‘any potential discriminatory conduct affecting price, schedule, quality, data, personnel, investment, technology, innovation, design, or risk’.²¹

The agencies may also require an arbitration provision to allow complainants to resolve disputes without agency involvement.

Prohibitions on restrictive contracting practices

The agencies may, for example, prohibit the merged entity from engaging in restrictive contracting practices that could harm competition in the relevant market. Exclusive dealing contracts can be pro-competitive, anticompetitive or competitively neutral depending on the circumstances. If a merger would allow the combined firm to use exclusivity to prevent competitors from succeeding or entering into the marketplace, the agencies may impose restrictions. The agencies may temporarily prohibit the merged firm from entering into long-term exclusivity contracts or short-term contracts that contain automatic-renewal clauses.²² In some situations, the merged firm may be required to amend or terminate an existing exclusive contract.²³

The FTC recently ordered merging parties to rewrite the merger agreement itself to eliminate a restrictive covenant. In 2019, NEXUS Gas Transmission, LLC settled FTC charges that its acquisition of Generation Pipeline LLC from North Coast Gas Transmission LLC (North Coast) was anticompetitive because the sale agreement included a non-compete provision forbidding North Coast from competing to provide natural gas transportation within certain areas for a period of three years post-closing. The FTC’s order required the parties to eliminate the non-compete clause from the sales agreement and prohibited NEXUS and its member companies from entering any agreements that would restrict competition for natural gas pipeline transportation in the relevant areas.²⁴

20 id. at 2.

21 id. at 3.

22 As an example of this, the 2011 DOJ Policy Guide cites *United States v. Comcast Corp.*, Competitive Impact Statement 34–37 No. 1:11-cv-00106 (D.D.C. 2011), available at www.justice.gov/atr/cases/f266100/266158.pdf. The Modified Final Judgment was entered on 21 August 2013, available at www.justice.gov/atr/case-document/file/492176/download.

23 See, e.g., *Transitions Optical*, Docket No. C-4289, Decision and Order (22 April 2010), available at www.ftc.gov/os/caselist/0910062/100427transopticaldo.pdf (‘Paragraph II.B: exclusive agreements with Indirect Customers must: (1) be terminable without cause, and without penalty, on 30 days written notice; (2) be available on a partially exclusive basis, if requested by the customer; and (3) not offer flat payments of monies in exchange for exclusivity.’); *CoStar Group Inc.*, Docket No. C-4368, Decision and Order (29 August 2012), www.ftc.gov/sites/default/files/documents/cases/2012/08/120830costardo.pdf (requiring CoStar to allow customers in long-term contracts to terminate them early).

24 *DTE Energy Company*, Docket No. C-4691, Complaint (13 December 2019), available at www.ftc.gov/system/files/documents/cases/191_0068_c-4691_dte-enbridge_complaint.pdf. The FTC’s order also included a prior notification requirement.

Anti-retaliation provisions

Anti-retaliation provisions come in many forms and are designed to prevent the merged entity from unreasonably restricting competition. Terms may be imposed to prohibit the merged firm from retaliating against customers who conduct business (or consider conducting business) with its competitors.

For example, in 2016, three cable companies that distribute television programming merged to create New Charter. The DOJ was concerned that New Charter would have an incentive to restrict online video distributors' access to video programmers' content. Accordingly, the DOJ imposed anti-retaliation provisions that prohibited New Charter from entering into any agreement forbidding, limiting or creating incentives to retaliate against a video programmer for providing content to online video distributors.²⁵

Anti-retaliation provisions may also restrict the merged firm from retaliating against a party that complains or provides information to the relevant antitrust agency about alleged non-compliance with a consent decree.

Additional types of remedies

Hybrid remedies

Consent decrees will often impose non-structural remedies along with a divestiture requirement to ensure the divestiture is successful. These hybrid remedies are often required to allow the divestiture buyer to successfully integrate the divested assets and begin competing successfully in the relevant market. In its retrospective on merger remedies from 2006–2012, the FTC found that all divestitures of ongoing businesses succeeded.²⁶ The Commission stated that this finding confirmed its conclusion that 'divestiture of an ongoing business, which includes all assets necessary for the buyer to begin operations immediately, maximizes the chances that the market will maintain the same level of competition post-divestiture'.²⁷

Therefore, agencies will comprehensively assess the extent to which the acquirer may need short-term assistance or transitional services to operate and viably compete in the affected market.²⁸ They will often impose temporary support agreements such as administrative support or infrastructure services. They can also require the parties to sell or supply a product to the divestiture buyer for a limited period of time until it can produce or source the product independently.²⁹ Under such sale or supply agreements, the merged firm may be required to supply the divestiture buyer at cost or with priority over other purchasers.³⁰ In addition, the merged

25 See *US v. Charter Communications Inc, Time Warner Cable Inc, Advance/Newhouse Partnership and Bright House Networks LLC*, No. 1:16-cv-00759 (D.D.C., filed 25 April 2016), available at www.justice.gov/atr/file/891506/download.

26 2017 FTC Merger Study at 21.

27 *id.*

28 See 2020 DOJ Merger Remedies Manual at 14.

29 See, e.g., *Bristol-Myers Squibb Company and Celgene Corporation*, Docket No. C-4690, Decision and Order (9 January 2020), available at www.ftc.gov/system/files/documents/cases/191_0061_c4690_bms_celgene_decision_and_order.pdf (The FTC required Bristol-Myers Squibb and Celgene to supply the divestiture buyer, Amgen, with the divested product, Otezla, for a limited time while Amgen established its own manufacturing capability.).

30 See, e.g., *US v. Bayer AG, et al*, Docket No. 18-1241, Final Judgment at IV.G. (8 February 2019), available at www.justice.gov/atr/case-document/file/1165136/download.

firm may be required to use best efforts to facilitate the assignment of necessary contracts to the acquirer.³¹ The consent decree may also prohibit the merged firm from using a brand that gives it an advantage in the marketplace for a limited time as the competing firm establishes its own reputation.³²

Experienced employees are often paramount to the successful operation of divested assets. Therefore, agencies often require the transacting parties to incentivise critical employees to remain with the assets until divested or to accept employment from the acquirer.³³ Accordingly, the merged firm may then be prohibited from rehiring these employees for a specific period of time.³⁴ The parties may also be required to assist the buyer with hiring qualified employees.

Fair dealing provisions and non-discrimination provisions will often be included in these ancillary remedies, and the agencies commonly reserve the right to appoint an interim monitor to supervise the transition and ensure the parties provide adequate assistance to the acquirer.

Third-party consent and approval

Whether merger remedies contain structural remedies, non-structural remedies or both, the specific requirements of the agency-imposed order often involve third parties who must consent to or approve the transfer of certain assets. If such consents or approvals are necessary, then the transacting parties may be required to obtain all such third-party consents and approvals before the agencies will accept the proposed remedy.³⁵

Transparency provisions

Transparency provisions require a merged firm to provide a regulatory agency or agency-approved monitor with information it otherwise would not be legally required to provide. The purpose is to alert the agency to a party's noncompliance with certain remedy

31 id. See also 2012 FTC Remedy Guide at 15–16 ('The parties may be required to persuade customers to switch to the buyer and then remain with the buyer for some transitional period while the buyer establishes its own reputation.').

32 See, e.g., *Nevada v. UnitedHealth Group Inc.*, 2008 US Dist Lexis 109093 at *18 (D. Nev. 8 October 2008) (requiring the merged firm to divest its individual Medicare Advantage line of business in the Las Vegas area and prohibiting the divesting party from using the AARP brand in that area). This may become an increased area of focus because the FTC recently reported that '[s]everal buyers in the case study underestimated the strength of brand loyalty and the difficulty customers encountered in switching suppliers. In one case, the buyer did not receive the rights to either brand name from the merging parties and could not attract customers, even after lowering its price.'

33 See 2020 DOJ Merger Remedies Manual at 14–15; 2012 FTC Remedy Guide at 15, 17 ('[T]he parties may be required to encourage those key employees to transfer to the buyer, for example by providing financial and other incentives to those key employees to accept the buyer's employment offer.').; see also *US v. United Technologies Corp and Goodrich Corp*, Final Judgment, No. 1:12-CV-01230-KBJ (D.D.C. 2013, filed 29 May 2013), available at www.justice.gov/atr/case-document/file/514186/download (requiring the merged firm to provide information relating to important personnel and prohibiting it from interfering with employment offers or enforcing non-compete clauses).

34 id. See also *United States v. AlliedSignal Inc.*, 2000–2 Trade Cas para. 73,023 (D.D.C. 2000); *United States v. Aetna Inc.*, 1999–2 Trade Cas paras. 72,730 (N.D. Tex. 1999).

35 See 2012 FTC Remedy Guide at 14.

requirements.³⁶ For example, while a particular agency does not have the authority to regulate prices, it may still require the merged firm to report its pricing information. Price lists with differential pricing for certain customers could reveal a violation of discrimination provisions in a consent order. The agencies frequently require parties to a consent decree to submit periodic compliance reports describing their efforts to comply with the remedy requirements.

Prior notification and approval provisions

The FTC and DOJ may also require prior notice and prior approval provisions in consent decrees.³⁷ Prior notification provisions typically require the merged firm to notify the appropriate antitrust agency prior to future transactions in the relevant markets even if those transactions would not otherwise be subject to notification under the Hart-Scott-Rodino Act.³⁸ Prior approval clauses, in contrast, typically require the merged entity to obtain approval before closing future transactions for a designated period of time.

The agencies have varied their positions with respect to when such provisions should be imposed. In 1995, the FTC adopted a policy that settlement agreements would no longer have prior approval and notice clauses as a routine matter.³⁹ The FTC's current standard for including these provisions is whether there is 'a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger'.⁴⁰

For years, the DOJ's practice similarly only used these clauses for a relatively narrow and predictable category of transactions. However, a survey of more recent prior notice provisions has evidenced that the DOJ has been imposing these clauses with far greater frequency 'seemingly indiscriminately'.⁴¹

36 As an example of this, the 2011 DOJ Policy Guide cites *United States v. MCI Commc'ns Corp*, 1994-2 Trade Cas paras. 70,730 (D.D.C. 1994) (requiring disclosure of various data, including prices, terms and conditions of telecommunications services, volume of traffic, and average time between order and delivery of products between certain entities), US Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies at 16 (2011), www.justice.gov/atr/page/file/1098656/download.

37 See 2020 DOJ Merger Remedies Guide at 31; see also Fed Trade Comm'n, Statement Concerning Prior Approval and Prior Notice Provisions, 60 Fed Reg 39,745 (3 August 1995); available at www.ftc.gov/sites/default/files/documents/federal_register_notices/notice-and-request-comment-regarding-statement-policy-concerning-prior-approval-and-prior-notice/950803noticeandrequest.pdf (the 1995 FTC Statement).

38 See, e.g., *UnitedHealth Group/DaVita*, Docket No. C-4677, Decision and Order (22 August 2019), available at www.ftc.gov/system/files/documents/cases/181_0057_united_davita_aapc_6-19-19.pdf; *US v. Bayer AG, et al*, Docket No. 18-1241, Final Judgment (8 February 2019), available at www.justice.gov/atr/case-document/file/1165136/download; *Sycamore Partners II, LP, Staples, Inc and Essendant Inc*, Docket No. C-4667, Decision and Order (28 January 2019), available at www.ftc.gov/system/files/documents/cases/1810180_staples_essendant_do_and_apps_a-g-redacted_public_version.pdf.

39 See id.

40 Fed Trade Comm'n, frequently asked questions about merger consent order provisions Q 44-45, www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq.

41 Wm Randolph Smith and Megan Louise Wolf, 'Prior Notice: How a Merger Remedy Can Be Anticompetitive', *Bloomberg Law* (11 March 2013), available at <https://news.bloomberglaw.com/mergers-and-antitrust/prior-notice-how-a-merger-remedy-can-be-anticompetitive?context=search&index=8>.

Conduct remedy considerations

Advantages

Conduct remedies can be helpful remedial tools because they afford the flexibility to precisely design each remedy to the specific harm presented.⁴² Furthermore, they can mitigate the risk of anticompetitive harm without sacrificing valuable efficiencies that would be lost through a divestiture.⁴³

In addition to being an appropriate form of relief for vertical mergers, conduct remedies may be effective in circumstances where:

- the competitive harm will likely be temporary. For example, rapidly changing technological developments or other external factors may limit how long the remedies are necessary;
- the characteristics of the industry limit the viability of a divestiture. For example, there may be superseding public interest concerns, an absence of suitable buyers, or limited options to support or create an effective competitor. When the FTC investigated General Electric's (GE) proposed acquisition of Avio, it determined that the merger would substantially lessen competition in the sale of engines for a specific aircraft. GE and rival Pratt & Whitney (P&W) were the only two firms that manufactured the aircraft's engine, and Avio designed a critical component for it. P&W had no viable alternatives for designing this component, and the FTC believed the merger would give GE the ability and incentive to disrupt Avio's product development for P&W. The Department of Defense, however, identified potential non-economic benefits of the transaction and determined that a divestiture was impossible because of highly unusual national security circumstances. Instead, the FTC used conduct remedies to prohibit GE's interference with Avio's work for P&W and with Avio's staffing decisions for that project;⁴⁴ or
- the characteristics of the transaction preclude a straightforward divestiture.⁴⁵ In its consent order against Evanston Northwestern Healthcare, the Commission articulated that because of the length of time that had elapsed between the closing of the merger and the

42 See Deborah L Feinstein, Former Director, Bureau of Competition, Federal Trade Commission, The Significance of Consent Orders in the Federal Trade Commission's Competition Enforcement Efforts (17 September 2013), www.ftc.gov/speeches/dfeinstein/130917gcrspeech.pdf. ('[C]onsent orders are not boilerplate, one-size-fits-all documents . . . each transaction or proscribed conduct is different, the harm being addressed is different, and consequently the specific order provisions needed to address that harm will be different. The Commission uses the flexibility it has to craft each remedy to the specific situation before it in a given matter.')

43 See 2020 DOJ Merger Remedies Guide at 15–17; see, e.g., *United States v. Thomson Corp*, 2008 US Dist Lexis 58819 (D.D.C. 17 June 2008) (requiring licensing of intellectual property related to divested assets); *Ciba-Geigy Ltd*, 62 Fed. Reg. 409 (FTC 3 January 1997) (licensing of competitors ordered rather than divestiture).

44 *General Electric Company*, Docket No. C-4411, Decision and Order 6–10 (27 August 2013), available at www.ftc.gov/sites/default/files/documents/cases/2013/08/130830generalelectricdo.pdf.

45 2017 FTC Merger Study at 18 ('It may be particularly difficult to restore the pre-merger state of competition if the merging parties have commingled, sold, or closed assets; integrated or dismissed employees; transferred customers to the merged entity; or shared confidential information.');

see, e.g., *Graco Inc*, Docket No. C-4399, Decision and Order (18 April 2013), available at www.ftc.gov/sites/default/files/documents/cases/2013/04/130418gracodo.pdf (consummated merger where the transacting parties' assets were already integrated or discontinued, or both); *Keystone Orthopaedic Specialists LLC*, Docket No. C-4562, Decision and Order (14 December 2015), available at

conclusion of the litigation, divestiture was not an appropriate remedy even though structural remedies are the preferred relief in Section 7 cases.⁴⁶ In 2012, Renown Health, the largest provider of acute care hospital services in northern Nevada, acquired two local cardiology groups. The FTC charged that this reduced competition for the provision of adult cardiology services in the relevant area. However, because the 'assets' controlled by Renown were doctor-employees, the FTC determined that divestiture was not appropriate. It instead required Renown Health to temporarily suspend the non-compete provisions with its cardiologists. This allowed the physicians to seek other employment, including positions with other hospitals in the relevant area.⁴⁷

Criticisms

While non-structural relief can help agencies preserve the pro-competitive benefits of a transaction while protecting against the risk of potential competitive harm, conduct remedies are still vulnerable to criticism. In contrast to structural remedies, which are generally 'simple, relatively easy to administer, and sure' to preserve competition,⁴⁸ behavioural remedies raise various concerns,⁴⁹ including the following.

- They are difficult to draft and clearly define. The agencies acknowledge that '[c]onduct remedies substitute central decision making for the free market.'⁵⁰ Accordingly, conduct remedies should be tailored as precisely as possible to the competitive harms associated with the merger.⁵¹ This can be easier said than done, however, because 'the behavior that such remedies seek to prohibit or require is often difficult to fully specify'.⁵² It may also be challenging to determine the appropriate duration of a conduct remedy given the difficulty in assessing how long it will take new entry or expansion to occur.
- The outcomes are uncertain. It is no easy task to design a conduct remedy that will appropriately replicate the competitive dynamics of a particular market. Even when well-crafted, conduct remedies ultimately set static rules that do not fully account for changes in the

www.ftc.gov/system/files/documents/cases/151218keystonedo.pdf (merger of orthopaedic practice groups, several had already left the group to form their own practice). Nevertheless, the agencies have shown a willingness to unwind consummated mergers. See, e.g., *In re Otto Bock HealthCare NA, Inc*, Docket No. 9378 (6 November 2019), available at www.ftc.gov/enforcement/cases-proceedings/171-0231/otto-bock-healthcarefreedom-innovations.

46 *Evanston Northwestern Healthcare Corp.*, 2007 FTC Lexis 210, 248, 251, motion granted, 2007 FTC Lexis 209 (FTC 2007), judgment entered 2008 FTC Lexis 47, later proceeding, 2008 FTC Lexis 62 (FTC 2008).

47 *Renown Health*, Docket No. C-4366, Decision and Order (30 November 2012), available at www.ftc.gov/sites/default/files/documents/cases/2012/12/121204renownhealthdo.pdf.

48 See 2020 DOJ Merger Remedies Manual at 13.

49 American Bar Association, Section of Antitrust Law, Presidential Transition Report: The State of Antitrust Enforcement (24 January 2017) (calling behavioural remedies 'controversial').

50 See 2020 DOJ Merger Remedies Manual at 4.

51 *id.*, at 14.

52 John E Kwoka and Diana L Moss, 'Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement', American Antitrust Institute, available at www.antitrustinstitute.org/wp-content/uploads/2011/11/AAI_wp_behavioral-remedies_final.pdf.

market. Thus, conduct remedies may eventually distort the market because they may restrict the merged firm from engaging in conduct that would be pro-competitive as the market changes.⁵³

- They may incentivise circumvention. In addition to potentially being overly intrusive or burdensome, conduct remedies 'attempt[] to require a merged firm to operate in a manner inconsistent with its own profit-maximizing incentives'.⁵⁴ Imposing such restrictions does not eliminate the firm's incentive to pursue profit. Instead, such restrictions may introduce incentives for non-compliance, and conduct remedies are easier to circumvent than structural remedies.⁵⁵
- They are expensive and difficult to monitor or enforce. Conduct remedies 'tend to entangle the Division and the courts in the operation of a market on an ongoing basis'.⁵⁶ They require continued monitoring and are challenging to enforce, particularly requirements such as non-discrimination clauses and information firewalls.⁵⁷ Unfortunately, the agencies may not always have the tools or resources to do so effectively. Therefore, a prominent criticism of conduct relief is that it imposes direct and potentially substantial costs upon the government and the public.⁵⁸

Agency preferences and perspectives

Both the DOJ and FTC have consistently asserted that structural relief in the form of a divestiture is the most appropriate way to prevent the competitive harm threatened by an unlawful horizontal merger.⁵⁹ However, the agencies' view on whether conduct remedies effectively preserve competition has evolved over time.

For example, the guidance provided by the DOJ's 2004 Merger Remedy Policy Guide strongly characterised conduct remedies as relief of a last resort. The DOJ expressly instructed that 'conduct relief is appropriate only in limited circumstances' and specifically discussed the problems with such remedies.⁶⁰

In 2009–2010, the DOJ began to show a new willingness to use conduct remedies in merger enforcement.⁶¹ The 2011 Merger Policy Guide (now superseded) reflected a more flexible approach to merger remedies, suggesting that the agency no longer had an absolute prefer-

53 See 2004 DOJ Policy Guide ('For instance, a requirement that the merged firm not discriminate against its rivals in the provision of a necessary input can raise difficult questions of whether cost-based differences justify differential treatment and thus are not truly discriminatory.').

54 Kwoka at 5.

55 See 2004 DOJ Policy Guide at 8.

56 See *id.* at 17.

57 Delrahim 2017 Address.

58 See 2004 DOJ Policy Guide at 17–18.

59 See *In re ProMedica Health Sys Inc*, 2012 FTC Lexis 58 at 161–62 (FTC 2012), concurring opinion at 2012 FTC Lexis 60 (FTC 2012); 2012 FTC Remedy Guide at 4 ('Anticompetitive horizontal mergers are most often remedied by a divestiture'); see also 2011 DOJ Policy Guide at 2 ('In horizontal merger matters, structural remedies often effectively preserve competition, including when used in conjunction with certain conduct provisions.').

60 See 2004 DOJ Policy Guide at 8–9.

61 See Sharis A Pozen, Acting Assistant Att'y General, US Dept of Justice, Remarks at the Brookings Institution, Washington, DC (23 April 2012), available at www.justice.gov/atr/public/press_releases/2012/282517.htm ('[T]he past several years have shown a marked increase in complex vertical mergers

ence for structural relief over conduct remedies. The 2011 DOJ Policy Guide also provided an expanded list of conduct remedies and a greater sensitivity to the circumstances in which the agency may employ them.⁶²

The FTC similarly evidenced this shift toward wider endorsement of conduct remedies to preserve the competition lost from certain otherwise anticompetitive mergers. In 2012, the FTC published its Statement on Negotiating Merger Remedies, which stated that conduct provisions may be effective relief for vertical mergers and as ancillary relief with divestitures.⁶³

In late 2018, the DOJ withdrew the 2011 guidelines and reinstated the 2004 guidelines, suggesting a shift back to treating conduct remedies primarily as a last resort.⁶⁴ However, the DOJ's approach remained unclear, as a top DOJ official in 2019 indicated 'the DOJ would consider behavioural remedies when there is a vertical merger that's promoting economic efficiencies and those efficiencies can't be achieved without a merger or a structural remedy.'⁶⁵ The 2020 DOJ Merger Remedies Manual clarified the DOJ's current position of strongly favouring structural over behavioural remedies.

Moreover, various scholars and practitioners have been critical⁶⁶ of the conduct relief required to resolve vertical issues in certain notable cases during this time: *Google/ITA*,⁶⁷ *Comcast/NBCU*⁶⁸ and *Live Nation/TicketMaster*.⁶⁹ In these cases, the DOJ imposed a broader swath of conditions on the merged firms, including strict requirements about firewalls, mandatory licensing and contracting (on specified terms), modifications or nullifications of existing contracts, and prohibited terms in future contracts. These cases tend to generate debate on whether restrictive contracting is pro-competitive versus anticompetitive, and thus, whether these restrictions harm competition by hamstringing certain businesses.

and mergers with transnational impact, many of which have been in dynamic and innovative industries. We understood that we needed to employ remedies more flexibly to meet these new challenges.');

see also Jeremy J Calsyn and Patrick R Bock, 'Merger Control Remedies: A More Flexible Administration', *Antitrust*, Vol 24, No. 3 (Summer 2010) at 15-19.

62 See generally 2011 DOJ Policy Guide at 12-19.

63 See 2012 FTC Remedy Guide at 5.

64 Makan Delrahim, Assistant Attorney Gen, US Dep't of Justice, 'It Takes Two: Modernizing the Merger Review Process', Remarks at the 2018 Global Antitrust Enforcement Symposium (25 September 2018), available at www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust.

65 Barry Nigro, Deputy Assistant Attorney Gen, US Dep't of Justice, Question & Answer Session, 2019 Global Antitrust Enforcement Symposium (10 September 2019).

66 See Kwoka; Delrahim 2017 Address.

67 *US v. Google Inc and ITA Software Inc*, No. 1:11-cv-00688, Final Judgment (D.D.C., filed 5 October 2011), available at www.justice.gov/atr/cases/f275800/275897.pdf.

68 *US v. Comcast*.

69 *US v. Ticketmaster Entertainment Inc and Live Nation Inc*, No. 1:10-cv-00139, Final Judgment (filed 29 June 2010), available at www.justice.gov/atr/case-document/file/513331/download; see also Press Release, US Dep't of Justice, Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger with Live Nation Inc. (25 January 2010), available at www.justice.gov/atr/public/press_releases/2010/254540.pdf.

The debate resurged in light of the 2020 DOJ Merger Remedies Manual and remarks made by DOJ Assistant Attorney General Makan Delrahim and former FTC Bureau of Competition Director Bruce Hoffman.⁷⁰ Both expressed strong disfavour of conduct remedies because of the increasing difficulty of drafting and enforcing them.⁷¹ Further, each emphasised that the role of the DOJ and FTC is that of antitrust enforcer, not regulator.⁷² Their concerns regarding conduct remedies except in very narrow circumstances may have indicated the agencies' greater scepticism about using conduct remedies broadly in the future. In February 2020, however, the current FTC Bureau of Competition Director unequivocally stated that the agency will continue to use behavioural remedies for consummated and non-consummated mergers as needed to restore competition.⁷³ Thus, behavioural remedies remain one of the agencies' tools for remedying potentially anticompetitive mergers, but the scope of their use remains to be seen.

70 Delrahim 2017 Address; D Bruce Hoffman, Acting Director, FTC Bureau of Competition, Vertical Merger Enforcement at the FTC, Remarks as prepared for Credit Suisse 2018 Washington Perspectives Conference (10 January 2018), available at www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf.

71 *id.*

72 *id.*

73 Ian Conner, Director, Bureau of Competition, Fed Trade Comm'n, 'Fixer Upper: Using the FTC's Remedial Toolbox to Restore Competition', Remarks at the GCR Live 9th Annual Antitrust Law Leaders Forum (8 February 2020), available at www.ftc.gov/system/files/documents/public_statements/1565915/conner_gcr_live_conduct_remedies_2-8-20.pdf ('Behavioral relief may also have some role to play in re-establishing competition, particularly when the acquired assets are not viable However, behavioral relief required to stand up a new competitor may go beyond – and perhaps far beyond – simply requiring that the merged firm give up the power to enforce anticompetitive agreements These obligations are not unique to consummated mergers and are often included in non-consummated merger remedies The bottom line is that we can, and do, go beyond divestitures when that's what is needed to solve the competitive problem. We have often done so in the past, and you can expect us to continue to do so in future.').

Appendix 1

About the Authors

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Carrie C Mahan is a partner in Weil's Washington, DC, office, where her antitrust practice focuses on mergers, antitrust class actions and private litigation, as well as on government investigations. Ms Mahan has extensive experience representing clients in all of the major antitrust venues, including both state and federal courts and federal, state and international competition enforcement agencies. Her ability to develop unique arguments under complex antitrust theories has led her to play a leading role in the defence and overall strategy for many key clients, including large joint defence groups. She also provides general antitrust counselling, such as assisting clients in developing novel strategies for improving compliance programmes and mitigating risk.

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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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