Merger Remedies: The Fix is In (Again)

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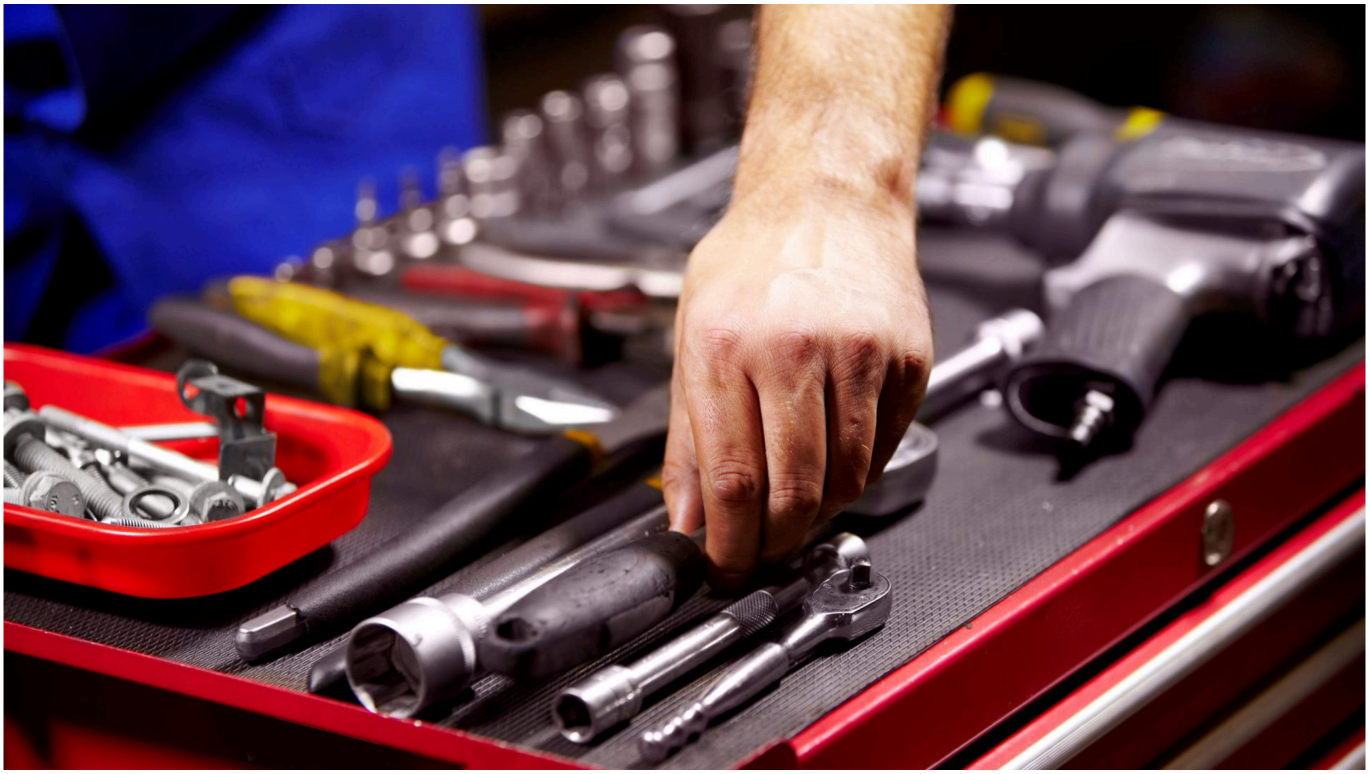

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The antitrust enforcement regimes in the United States, the United Kingdom, and the European Union are in various stages of political turnover. Fortunately for merging parties, one of the emerging priorities for antitrust enforcers in these jurisdictions has been merger remedies.

Background on Merger Remedies

Remedies allow merger parties to proceed with a transaction by “fixing” any aspects of the transaction that could allegedly harm competition. Proposing a successful remedy can be critical to minimizing delays for the deal timeline.

Structural or Behavioral? Remedies can be structural or behavioral. Structural remedies typically divest overlapping assets to a third party (“divestiture buyer”) and aim to maintain competition in the market. Regulators historically favor structural remedies that

are relatively easy to implement and require limited oversight from the regulator post-transaction. In judging potential remedies, regulators may look for (1) divestiture of a standalone business or business line, (2) limited entanglements or ongoing reliance between the divestiture buyer and the merging parties, (3) a divestiture buyer with the incentive and ability to compete, and (4) no new competitive concerns arising because of the divestiture. By contrast, a behavioral remedy (sometimes called a "conduct remedy") is a promise to engage in or to refrain from engaging in certain conduct to mitigate anticompetitive concerns. Generally, an effective behavioral remedy will be well-defined, enforceable, and require minimal long-term agency oversight.
When to offer a remedy? When to offer a remedy is a strategic call, as proposing a remedy implicitly acknowledges that the transaction is likely to raise questions with regulators. In the U.S., there are three main paths to a merger remedy: the agency consent decree process, a fix-it-first proposal, and litigating the fix. In the consent decree process, the merging parties and the reviewing agency negotiate a formal settlement that typically identifies the assets to be divested or the behavioral remedy, and often identifies a suitable buyer where assets will be divested. Historically, the U.S. antitrust agencies have required the consent process to be complete before the merging parties' main transaction can close.

In some instances, merging parties may choose to build in a remedy or modify their transaction before the U.S. antitrust agencies begin their investigation. This approach, known as "fix-it-first", is most often used when the merging parties can anticipate a competition concern and want to avoid a drawn-out consent decree process.

Whether from a consent decree negotiation that does not progress or a fix-it-first that is rejected, if the reviewing agency does not think a proposed remedy is sufficient to resolve competition concerns, the agency may sue to block the transaction with the proposed remedy, known as "litigating the fix." Although this is expensive and time-consuming for the merging parties, the agency similarly expends substantial resources and takes on a meaningful risk in making its case to a court as to why a transaction should be blocked in spite of the merging parties' remedy proposal.

In Europe, remedies are negotiated with the competition authorities as part of either the Phase 1 or Phase 2 review processes. In clear-cut divestiture cases, the parties are typically able to close the main deal following receipt of the clearance decision, with the divesture process (including approval of the remedy buyer) following thereafter. In some more complex cases, an 'upfront buyer' may be required, meaning that a remedy buyer must be identified and approved by the authorities prior to the merging parties being able to close their main transaction. To the extent "fix-it-first" remedies occur in Europe, they typically entail a front-loaded process where the merging parties enter into an agreement with a divestiture buyer that is approved by the authorities during the review process.

Recent Trends in U.S. Remedies

The U.S. antitrust agencies historically preferred to resolve competitive concerns through negotiated consent decrees whenever possible. However, during the Biden Administration, the agencies took a strong stance against this approach, favoring litigation to block potentially anticompetitive mergers in lieu of negotiating remedies. For decades, nearly 60% of challenged transactions in a given year were resolved with a consent decree. During the Biden Administration, that number dropped to 39% per year. [1]

Under the second Trump Administration, both FTC and DOJ leadership have voiced their support for putting remedies back on the table. For example, DOJ AAG Gail Slater stated, "I expect we may take a different approach than the prior Antitrust Division on settlements in merger cases where effective and robust structural remedies can be implemented without excessively burdening the Antitrust Division's resources."

The return to resolving agency merger concerns with negotiated remedies has already been put into action, with multiple transactions closing in 2025 following FTC or DOJ settlements, including *Synopsys/Ansys*, *Keysight/Spirent*, *Safran/Collins Aerospace*, *Hewlett Packard Enterprise/Juniper Networks, Inc.*, *Omnicon/IPG*, *ACT/Giant Eagle*, and *UnitedHealth/Amedisys*. In all but the *Omnicon/IPG* transaction, the U.S. agencies approved divestitures, which required the merging parties to sell parts of their businesses. *Omnicon/IPG*, which involved a remedy commitment by the merging parties not to discriminate against political viewpoints, suggests that there may be appetite by the U.S. agencies to accept behavioral remedies under the right circumstances. FTC Chairman Andrew Ferguson said the theory in *Omnicon/IPG* was "a rare instance where the imposition of a behavioral remedy is appropriate." It remains to be seen whether such remedies are unique to the theory of harm in *Omnicon/IPG* or signal a greater appetite for behavioral remedies in horizontal merger cases.

The resurgence of remedies from the U.S. antitrust enforcers is a positive development for dealmakers who are looking to pursue transactions that present some measure of antitrust risk. With consent decrees back on the table, there is the potential for greater leeway to speed up investigations, avoid costly litigation, and bring back more predictability to the U.S. merger landscape.

Recent Trends in Remedies in the UK and EU

The UK Competition and Markets Authority ("CMA") historically preferred structural measures to resolve competition concerns. In recent months, however, the CMA has signaled that it will be more flexible in considering different solutions put forward by merging parties. This follows the CMA's commitment to reform its merger investigation work based on the "4Ps" framework (*pace*, *predictability*, *proportionality* and *process*), which has begun to take shape through a number of substantive policy outputs and operational changes, including in connection with remedies.

After formally launching a review of its approach to merger remedies in March 2025, the CMA published its draft updated Merger Remedies Guidance in October, which seeks to deliver on the CMA's earlier promise that less-straightforward deals should be cleared conditionally (and not unduly pushed into protracted Phase 2 processes or prohibition) whenever effective remedies are possible.

The CMA is looking to achieve this, in particular, by clarifying and broadening the circumstances in which behavioral remedies and more complex divestitures may be accepted, including at Phase 1. In this respect, the revised Guidance builds on the approach taken in connection with the *Vodafone/Three UK* joint venture, a 4-to-3 mobile merger which was cleared in December 2024 subject to a novel "investment remedy," whereby the merging parties committed to roll out a joint network plan that sets out the network upgrade, integration and improvements the parties will make to their combined network across the UK over the next eight years. Moreover, the *Vodafone/Three UK* case is noteworthy since, as part of its assessment, the CMA took account of a pre-agreed divestment of spectrum to a competitor. This marked a departure from the CMA's historical reluctance in relying on agreements entered into by the merging parties. Finally, the draft Guidance provides more clarity on the evidentiary requirements that merging parties will need to meet to have such remedies approved.

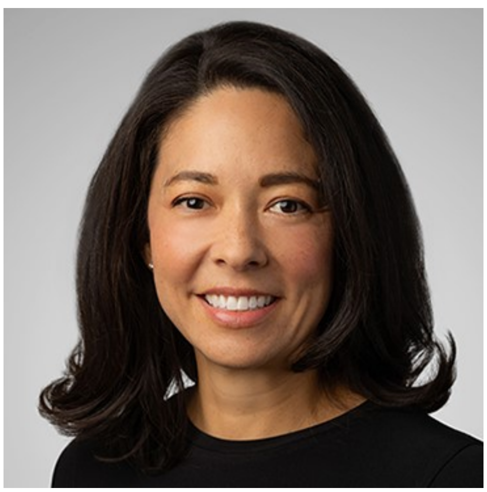
Whilst the standard remedy requirements (effectiveness, monitorability and enforceability) will continue to apply, the new direction of travel is towards more pragmatic outcomes and sooner, whenever credible packages are on offer. To this end, however, the draft Guidance stresses that early, in-depth engagement with the CMA, ideally with support from independent experts (e.g., trustees) in more complex cases, will be key in ensuring successful outcomes. Without such engagement, the CMA's traditional skepticism towards complex remedies may continue. A case in point is *Shutterstock/Getty*, which was recently referred to Phase 2. In that context, the CMA emphasized that the parties had "offered a complex package of remedies at a late stage in the Phase 1 process," which failed to address its concerns.

A more open stance towards behavioral remedies would bring the CMA's approach more in line with that of the European Commission ("EC"), which has in recent years showed more willingness to accept behavioral or 'quasi-behavioral' solutions, particularly involving licensing commitments. Currently, the EC is not publicly planning any reforms to its remedies toolkit, and is instead undertaking a review of its substantive merger guidelines with the aim of ensuring, among other things, that “innovation, resilience and the investment intensity of competition in certain strategic sectors are given adequate weight in light of the European economy’s acute needs.” Whilst it is still early days to judge, we may witness a shift of merger remedies in practice, should the EC look to flex its remedies toolkit to achieve those political objectives.

Endnotes

1. Percentages calculated based on the number of merger consent agreements over the total number of merger complaints filed by FTC and DOJ based on the annual HSR reports.

Authors



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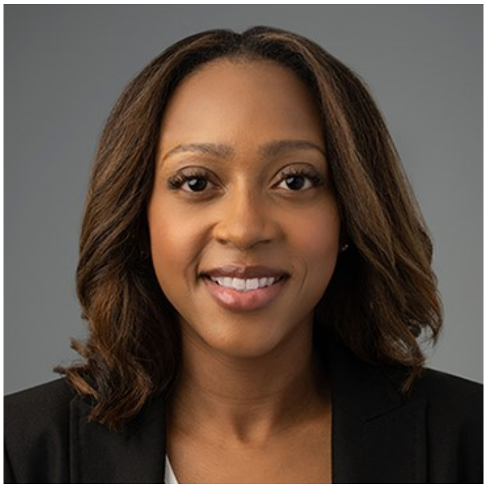

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