

A Visitor's Guide to Navigating US/EU Merger Remedies

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Transactions increasingly are subject to simultaneous antitrust review in several jurisdictions, often including the US and the EU. One of the challenges that parties, counsel and agencies face is ensuring that a remedy or settlement achieved in one jurisdiction is compatible with remedies achieved in other jurisdictions. This challenge can be mitigated by regular communication among reviewing agencies, parties and counsel; meeting that challenge is easier if agencies, parties and counsel have a shared understanding of the relevant jurisdictions' processes and vocabulary.

Recognising this need, in 2014 officials from the US Department of Justice Antitrust Division (DOJ), US Federal Trade Commission (FTC) (together, 'the US Agencies'), and European Commission (EC) (hereafter referred to as 'the Agencies') held a series of calls to further aid the understanding of each other's remedies procedures and policies. During these calls, many common elements were identified, but also some differences in the approaches, including differences in terminology, were found.¹ Remedy descriptions may mean something different, depending on the jurisdiction. For example, the FTC and DOJ 'upfront buyer' process is the EC's 'fix-it-first' process (a process the EC has rarely used in

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1 For more information on the Agencies' approach to cooperation on merger reviews, see USEU Merger Working Group, *Best Practices on Cooperation in Merger Investigations*, revised and issued in 2011, available at: www.justice.gov/sites/default/files/atr/legacy/2011/10/27/276276.pdf.

practice). Although some differences in procedures and terminology do exist, a common understanding and common solutions may well be found if agencies and stakeholders are aware of the differences. Despite any differences in terminology, it is important that all stakeholders understand that the Agencies share the same goals when it comes to merger remedies: ensuring that remedies are effective in maintaining competition post-merger.²

As with any international journey, a guidebook can come in handy – providing the traveller with basic vocabulary, helpful tips and a sense of the rules of the road governing a particular culture. This article offers a comparative understanding of terminology and practices used by the EC, the FTC and DOJ regarding important aspects of merger remedies. We begin by describing the process of achieving negotiated divestiture³ remedies at DOJ, the FTC and the EC, and then discuss the various types of divestiture remedies that an agency might require, including remedies with an identified buyer, remedies with no identified buyer but with assets held separate, and remedies where closing the merger is delayed. In addition, this article discusses the types of trustees, monitors and managers that remedies may require, and the role played by each.

Negotiated remedies (settlements)

Most mergers reviewed by the Agencies do not raise competitive concerns. When transactions do pose competitive problems, and structural relief will maintain premerger competition, there is the potential to resolve the competitive issues through agreements by the parties to divest certain assets.⁴ To effectuate an agreed-upon merger remedy, all three agencies discussed here typically enter into formal and legally binding orders, decrees or commitments. There are some transactions, however, that give rise to such significant competitive problems that they cannot be remedied.

2 For more information about the Agencies' approaches to merger remedies, see, for example, *Antitrust Division Policy Guide to Merger Remedies* (June 2011), available at: www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf; FTC 'Frequently Asked Questions about Merger Consent Order Provisions', available at: www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq; and FTC 'Negotiating Merger Remedies', available at: www.ftc.gov/tips-advice/competition-guidance/merger-remedies, FTC *A Study of the Commission's Divestiture Process* (1999), available at: www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf; Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (adopted 22 October 2008), available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1022\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1022(01)&from=EN).

3 Many of these processes (and terms) apply equally in remedies imposed after trial. When describing US processes, this article, however, is confined to the negotiation of settlements.

4 In very limited circumstances, primarily in vertical transactions, the Agencies will consider non-divestiture remedies, in particular remedies that require parties to engage in or refrain from certain activities. This article focuses primarily on horizontal merger remedies.

FTC

At the FTC, settlements take the form of an order, agreed to by the parties and issued by vote of the FTC Commissioners. The order is first accepted as a 'proposed order', released to the public along with a draft Complaint and an Analysis to Aid Public Comment (much like the DOJ Competitive Impact Statement, discussed below). At the same time, in appropriate cases, the FTC will issue an Order to Hold Separate, or Order to Maintain Assets. Hold Separate and Asset Maintenance orders become final and binding immediately – that is, before the comment period – but can be adjusted, if warranted, when the FTC makes the 'proposed order' a Final Decision and Order. There is usually a 30-day public comment period, after which the Commissioners vote whether to issue the proposed order as a Final Order, or to take other action (eg, close the matter, renegotiate or reject the settlement and begin litigation). After the Final Order is issued, it is enforceable by the FTC via a lawsuit in an appropriate federal court seeking penalties and/or injunctive relief. The FTC oversees the parties' obligations and has discretion whether to approve any proposed divestitures.

EC

At the EC, commitments are first proposed by the parties. The EC evaluates the proposed commitments, and generally conducts a 'market test' with interested third parties. A market test involves discussing the proposed commitments with customers and competitors to gauge whether the proposed relief will remedy the competitive harm in the market. The EC's remedies process typically involves two steps. In a first step, if the EC concludes that the proposed commitments will eliminate the competitive concerns identified, it will issue a clearance decision conditioned upon the commitments, making the commitments binding. In a second step, once a purchaser has been proposed, the EC will assess the proposed purchaser and the sale and purchase agreement in a further decision.

DOJ

At DOJ, settlements take the form of a proposed Final Judgment, which describes in detail the divestiture and/or other relief agreed upon by the parties and DOJ, and which is filed with a federal district court. Along with the proposed Final Judgment, DOJ files a Complaint, a Competitive Impact Statement and, typically, a stipulated Hold Separate or Asset Preservation Order. The Competitive Impact Statement describes the competitive harm expected from the proposed transaction and how the proposed Final Judgment remedies this harm. The Hold Separate or Asset Preservation Order requires the parties to maintain independence and not

degrade in any way the assets to be divested prior to the divestiture. Pursuant to statute (the ‘Tunney Act’), following a 60-day public comment period, the court makes a finding as to whether the Final Judgment is in the public interest, and if so, the Final Judgment becomes a court order, enforceable by DOJ via a filing seeking penalties and/or injunctive relief.

All three Agencies have a procedure for reviewing and approving proposed divestitures submitted after the remedy is imposed. In the EC, once the parties (or the divestiture trustee) propose a purchaser, the EC then assesses (1) whether the proposed purchaser is suitable and (2) whether the transaction agreements between the parties and the proposed purchaser are in line with the commitments. A decision approving or rejecting the proposed purchaser is then adopted in this second step of the remedies process. At the FTC, the parties must file an application for divestiture approval, which is notified for public comment before the FTC decides whether to approve the divestiture. At DOJ, parties or the divestiture trustee propose a divestiture buyer and DOJ assesses the fitness of that buyer and has sole discretion to approve or disapprove it.

Divestitures with an identified buyer

In many instances, settlements entered into by the FTC or DOJ require a buyer that is identified at the time of settlement, to help ensure the effectiveness of the divestiture. Given the fixed deadlines for merger review in the EC, parties find it challenging to reach an agreement with a buyer within the prescribed time-frame, even in an EC phase-II procedure. Therefore, divestitures with an identified buyer are rare in practice in the EC.

DOJ and the FTC often require identified buyers. Identified buyers are particularly important in the following situations: (1) where parties are proposing a divestiture of assets that do not constitute a stand-alone business; (2) where the agency is uncertain that the divested business will remain competitive; (3) where there is a risk of competitive harm *during* the search for a divestiture buyer; or (4) where there is a risk that the proposed divestiture might not attract qualified buyers. Identifying the buyer in the remedy greatly reduces these risks and provides more certainty that the buyer is capable of success, that the right group of assets has been identified for divestiture, and that the divestiture will happen quickly. The EC also considers that such concerns can be addressed by a remedy with an identified buyer, but an ‘up front’ buyer according to the EC’s terminology may also be appropriate in such situations to reduce the risks and to provide the requisite degree of certainty that the remedy is being implemented.

In cases before the US Agencies where a buyer is identified, the sales contract typically has been entered into with the specific 'upfront buyer' and the divestiture assets will usually be sold immediately after the merger is consummated.

Settlements with an identified buyer give rise to the first language difference between the Agencies: the US Agencies refer to the prior identification of the purchaser as an 'upfront buyer'; the EC refers to this as a 'fix-it-first'. In an EC fix-it-first, the parties identify a purchaser in their commitments and enter into a contractual arrangement with the purchaser outlining the essentials of the purchase during the review procedure, before the EC makes a conditional clearance decision. If the EC approves the purchaser, it makes the commitments binding in the conditional clearance decision. While in these situations no second decision for the approval of the purchaser may be required, it may still be necessary for the EC to approve the final agreement between the purchaser and the parties to ensure that it is consistent with the prior commitments. The sale of the divested assets will typically occur shortly after adoption of the conditional clearance decision. The EC fix-it-first solution seeks to address situations where the identity of the purchaser is crucial for the effectiveness of the proposed remedy. For example, a fix-it-first may provide a solution where the divested business is not a viable business in itself but its viability can only be ensured if purchased by a named buyer who already owns specific assets or where the market test indicates that there are very few suitable potential purchasers.

DOJ has required an identified upfront buyer in a number of recent matters. For example, when the US's largest beer producer, Anheuser-Busch InBev, sought to acquire the share it did not already own in Grupo Modelo, the US's third largest beer producer, DOJ required that the parties divest certain assets to a named buyer, Constellation. Constellation bought Modelo's entire US business, including its most advanced brewery and licences to Modelo brands. To ensure that Constellation could compete effectively, DOJ also required that Constellation make a number of improvements to the divested brewery, and required ABI to provide transition services and interim supply to Constellation, pending the expansion of the brewery. The required expansion of the brewery and the transition services and interim supply enhanced Constellation's ability to compete with the combined firm.⁵

The FTC frequently requires upfront buyers. For example, in 2012, Johnson & Johnson's proposed acquisition of Synthes, Inc raised concerns that the merger would lessen competition in the market for volar distal radius plates, used to treat wrist fractures. To resolve those concerns, J&J agreed to an order that required it to divest its own volar distal radius plate business to upfront buyer Biomet, Inc,

5 Press Release, *Justice Department Reaches Settlement with Anheuser-Busch InBev and Grupo Modelo in Beer Case* (19 April 2013), available at: www.justice.gov/atr/public/press_releases/2013/296018.htm.

a successful orthopedics company with a recognised brand name, an extensive nationwide sales force, and existing service relationships with surgeons and hospitals. Biomet had no meaningful presence in the volar distal radius plating or trauma product markets and was well positioned to replace the competition that would have been eliminated as a result of the acquisition.⁶ (J&J decided to sell its entire trauma products business, including the volar distal radius plating systems.) The requirement of an upfront divestiture was consistent with the FTC's strong preference for such remedies in mergers involving medical device products and pharmaceuticals (among others), where the ability to obtain government (FDA) approvals is a critical aspect of a successful divestiture and must be resolved before settlement.

Another FTC remedy requiring an upfront buyer that is also illustrative of FTC practice involved a divestiture to a buyer identified at the time of the remedy, but in a transaction that had already been consummated. In 2013, the FTC accepted a settlement with Solera Holdings, Inc, to resolve competitive concerns raised by Solera's 2012 acquisition of Actual Systems of America, Inc. The merger eliminated direct competition between the two parties in yard management systems, which are specialised software products used by automotive parts recyclers and resellers. To address the FTC's competitive concerns and preserve competition, the order required Solera to sell Actual Systems's US assets to ASA Holdings, which was formed by former Actual Systems managers to acquire the divested business. The order contained several provisions to ensure the divestiture to ASA Holdings would be successful, including the obligation to provide ASA Holdings with a licence to Solera's Hollander Interchange, an auto parts database that Hollander maintains and licences to third parties, for ten years. Although the acquisition had already occurred, the FTC required an upfront divestiture to be in place before it accepted the settlement, to ensure that an effective remedy would be achieved.⁷

The EC accepted a divestiture with an identified buyer (EC 'fix-it-first') in the case concerning the acquisition of mobile phone operator, tele.ring, by T-Mobile.⁸ The EC found that the proposed acquisition, in its original form, would have removed from the Austrian market the operator that had offered consumers the most advantageous prices in the years preceding the transaction.

6 Press Release, *FTC Puts Conditions on Johnson & Johnson's Proposed Acquisition of Synthes, Inc* (11 June 2012), available at: www.ftc.gov/news-events/press-releases/2012/06/ftc-puts-conditions-johnson-johnsons-proposed-acquisition-synthes.

7 Press Release, *FTC Order Restores Competition in Market for Software Used in Automotive Recycling* (22 July 2013), available at: www.ftc.gov/news-events/press-releases/2013/07/ftc-order-restores-competition-market-software-used-automotive.

8 Press release, *Commission clears acquisition of Austrian mobile phone operator tele.ring by T-Mobile, subject to conditions* (26 April 2006), available at: http://europa.eu/rapid/press-release_IP-06-535_en.htm.

In order to resolve the EC's concerns, the merging parties committed to divest two UMTS frequency blocks as well as mobile communication sites to the competitor Hutchison 3G (H3G), which did not have a nationwide network in Austria and was the only recent entrant in the Austrian mobile telephony market. In the conditional clearance decision, the EC assessed the suitability of the purchaser as well as the provisions of a framework agreement which had been signed by T-Mobile and H3G and found that, with establishing a nationwide network on the basis of the remedies, H3G had sufficient incentives to continuously offer low tariffs to gain additional customers and thereby increase its network utilisation and realise economies of scale. In short: due to the remedies H3G was considered to be able to replace the competitive constraints exercised by tele.ring pre-merger.

In some cases, the same buyer is identified in a US Agency 'upfront buyer' remedy and an EC 'fix-it-first'. This was the case in the remedies DOJ and EC required in connection with General Electric's (GE) proposed acquisition of Alstom.⁹ GE and Alstom competed in the market for aftermarket parts and services for GE gas turbines in the US; in Europe, the parties also competed as producers of heavy duty gas turbines. As originally proposed, the US\$13.8bn acquisition would have eliminated GE's primary competitor, leading to a loss of competition and higher prices. Only three competitors, including GE and Alstom's subsidiary, Power Systems Mfg (PSM), competed in the market for development, manufacturing and selling new aftermarket parts to repair and service certain GE gas turbines in the US. DOJ required GE to divest Alstom's subsidiary PSM to Ansaldo Energia SPA. To restore competition that would be lost by the combination of two of the four largest producers of heavy duty gas turbines in Europe, the EC also required GE to divest to Ansaldo a package of Alstom assets, including PSM, related to the development and manufacture of large gas turbines widely used in Europe. While GE had proposed Ansaldo to the EC already in the commitments, GE could only implement the acquisition of Alstom once the EC had formally assessed and approved the finalised divestiture to Ansaldo in a second step. Close cooperation between DOJ and EC enabled the two agencies to arrive upon overlapping, non-conflicting divestiture packages and to assess and approve Ansaldo as the buyer of the divested assets in both the US and the EU.

9 Press Release, *Justice Department Requires General Electric to Divest Aftermarket Business in Order to Complete Alstom Purchase* (8 September 2015), available at : www.justice.gov/opa/pr/justice-department-requires-general-electric-divest-aftermarket-business-order-complete; Press Release, *Commission clear GE's acquisition of Alstom's power generation and transmission assets, subject to conditions* (8 September 2015), available at: http://europa.eu/rapid/press-release_IP-15-5606_en.htm.

Divestitures without an identified buyer and where assets are held separate

In some cases, the remedy does not identify a buyer and the parties are allowed to close their transaction, holding separate certain assets. The assets to be held separate may include just the divestiture assets or a broader set of assets if necessary to maintain the integrity of the divestiture assets. The Agencies then approve the divestiture buyer at a later stage. This approach of a post-order or post-decree divestiture is sometimes used by DOJ and FTC, although both agencies are increasingly requiring an identified buyer (upfront buyer). In the EC, commitments without an identified buyer are the most common approach to remedies. In such situations, the decision on the purchaser is made in a second step of the commitment process, after the conditional clearance decision has been adopted. Once the parties (or the divestiture trustee, if applicable) have reached a final agreement with a purchaser of the divestiture assets, the EC adopts a second decision to approve or reject the proposed purchaser. At that time, the proposed purchaser is identified and it becomes possible, under the EC process, to adapt the scope of the divestment assets via the EC's purchaser approval decision, taking into account the resources of the purchaser.¹⁰

In contrast to the Agencies' 'fix-it-first' and 'upfront buyer' remedies, the Agencies already use common language when addressing divestitures without an identified buyer.

An example of an EC decision involving a divestiture without an identified buyer and where assets are held separate is the set of commitments accepted by the EC in the *Munksjö/Ahlstrom* case.¹¹ The EC had concerns that the proposed transaction, as initially notified, would have allowed the merged entity to raise prices in heavy weight abrasive paper backings and PRIP décor paper. To address these concerns, the parties committed to divest all Ahlstrom's heavy weight abrasive paper backings and PRIP business. The commitments provided that until closing of the sale to the purchaser of the divestment business, that business would be managed as a distinct and saleable entity separate from the retained businesses. Similarly, the commitments also provided that key personnel of the divestment business would have no involvement in any retained business and vice versa. The commitments also established the criteria on the basis of which the purchaser's suitability would be assessed by the EC. The commitments were made binding in the EC's conditional clearance decision. Approval of the proposed purchaser took place as a second step through a separate, buyer-approval decision.

¹⁰ DOJ and FTC also have procedures available to modify the scope of the divestiture if circumstances warrant.

¹¹ Press release, *Commission approves merger of Munksjö and Ahlstrom's label and processing paper business* (24 May 2013), subject to conditions, available at: http://europa.eu/rapid/press-release_IP-13-461_en.htm.

In 2014, the FTC resolved concerns regarding a merger between two large chains of general acute care hospitals with an order that required the divestiture of two hospitals, to take place after the acquisition, to FTC-approved buyers. The proposed acquisition by Community Health Systems, Inc of Health Management Associates, Inc raised competitive concerns in two separate geographic markets, Gadsden, Alabama, and Darlington County, South Carolina. The parties agreed to divest one hospital in each market to resolve the FTC's concerns. Those hospitals were held separate, pursuant to an FTC order, and were divested to separate buyers, following a search and request for FTC approval of those divestitures.¹²

Also in 2014, DOJ entered into a settlement with Martin Marietta and Texas Industries in connection with their proposed merger. In that case, the divestitures agreed upon did not include an identified buyer and assets were held separate.¹³ The merging parties both produce aggregate, which is crushed stone produced at quarries or mines and used in road construction and in concrete and asphalt production. DOJ determined that Martin Marietta's acquisition of Texas Industries would likely lead to higher prices for aggregate in parts of the Dallas, Texas metro area, and required the divestiture of one quarry and two rail yards, assets that predominantly served parts of the Dallas metro area. DOJ required the assets to be held separate pending sale to a buyer to be approved by DOJ in order to maintain their independence and economic viability during the pendency of the ordered divestiture.

'Fix-it-first' remedies in the US

Under the US system, the agency may agree to allow the parties to 'fix-it-first' (that is, restructure their transaction to attempt to remedy competitive concerns). If the agency determines that the remedy proposed will not diminish the competitiveness of the divested business and that no further commitments are necessary, the investigation may be closed without the filing of a Final Judgment or Final Order. Fix-it-first remedies in the US are unusual. They are generally disfavoured by the FTC and DOJ, and the circumstances in which they can effectively remedy competitive harm are very rare. If parties attempt to 'fix' their problematic transactions without agreement by the US Agency reviewing the transaction, they do so at their own risk and there is no guarantee that the proposed 'fix' will be accepted.¹⁴

12 Press Release, *FTC Requires Community Health Systems, Inc to Divest Two Hospitals as a Condition of Acquiring Rival Hospital Operator* (22 January 2014), available at: www.ftc.gov/news-events/press-releases/2014/01/ftc-requires-community-health-systems-inc-divest-two-hospitals.

13 Press Release, *US Dep't of Justice, Justice Department and State of Texas Require Martin Marietta to Divest a Quarry and Two Rail Yards to Proceed with Acquisition of Texas Industries* (26 June 2014), available at: www.justice.gov/atr/public/press_releases/2014/306733.htm.

14 Most recently, in *Reynolds American Inc, et al*, where the parties brought a proposed spin-off of cigarette brands and assets to a third party, the FTC still required a consent order; available at: www.ftc.gov/enforcement/cases-proceedings/141-0168/reynolds-american-inc-lorillard-inc-matter.

A US-style 'fix-it-first' is generally not possible under EU rules as the EC is under an obligation to adopt a decision which assesses the transaction and the remedies and which makes those remedies (if accepted) binding and enforceable.

Divestitures with delayed closing of the main transaction

In some situations, no specific buyer is identified before remedies are made binding, but the parties agree not to close the main transaction until they have the agencies' approval for the proposed purchaser. While such divestitures with delayed closing of the main transaction are common in the EC, the US Agencies do not follow this practice.

In the EC, the purchaser in divestitures with delayed closing is referred to as an 'upfront buyer'. This gives rise to the Agencies' second language difference. In these cases, the 'upfront buyer' is assessed and accepted or rejected in a decision adopted during the remedy implementation phase, following the conditional clearance decision. Under EU rules, this 'upfront buyer' scenario is generally proposed by the parties as a solution in cases where there are considerable obstacles to a divestiture, such as third-party rights, or uncertainties as to finding a suitable purchaser. An 'upfront buyer' may also be necessary in cases that raise considerable risks to preserving the competitiveness and saleability of the divestiture business in the interim period until the divestiture. In these situations, the use of an upfront buyer may allow the EC to conclude with the requisite degree of certainty that the risks are limited and the commitments will be implemented effectively. The situations in which an 'up front buyer' may be required in the EC are therefore similar to the situations in which an identified buyer is likely to be required by the US Agencies, as explained above.

The *Western Digital/Viviti Technologies* case is a good illustration of the EC 'upfront buyer' solution and the circumstances in which it is normally accepted.¹⁵ The EC found that the merged entity would face competition from only one other competitor in the markets for 3.5-inch Desktop, Business Critical and Consumer Electronics HDDs, where most customers multi-source for security of supply reasons. As the number of potential suitable purchasers for the proposed divestment business was limited and the identity of the purchaser was crucial to ensure the effectiveness of the commitments, specific suitable purchaser criteria as well as an 'upfront buyer' commitment were provided to ensure the effectiveness of the commitments. Indeed, Western Digital committed not to close the main transaction before concluding a binding agreement for the sale of the divestment business to a suitable purchaser approved by the EC.

¹⁵ Press release, *Commission clears Western Digital's acquisition of Hitachi's hard disk drive business subject to conditions* (23 November 2011), available at: http://europa.eu/rapid/press-release_IP-11-1395_en.htm.

The *Western Digital/Viviti Technologies* case also shows how the EC's 'up front buyer' commitment can work together with the divestiture to an identified buyer according to a US settlement, that is, the US 'up front buyer'. The EC and the FTC cooperated closely in this case, allowing the two agencies to come to consistent remedies packages. Given the statutory deadlines under the EU Merger Regulation, the EC adopted first the clearance decision with the above-mentioned 'up front buyer' clause. The EC's purchaser approval decision was then adopted in parallel to the FTC's proposed settlement order, both identifying Toshiba as a suitable purchaser for the hard disk drive business to be divested.¹⁶

Trustees/monitors

When navigating a different culture, it can be helpful to know people with special responsibilities in that culture. In the world of merger remedies, these people include trustees and monitors, who may have differing roles, depending on the jurisdiction.

Monitoring trustee

At the EC, the parties generally propose the appointment of a Monitoring Trustee to oversee the parties' compliance with any divestiture or other commitments. In addition to overseeing the parties' obligations to keep the business viable prior to the sale of the assets, the Monitoring Trustee also oversees the divestiture process and submits a report to the EC on the suitability of the proposed purchaser.

By contrast, the US Agencies do not require a Monitoring Trustee (or simply 'Monitor') in all Final Judgments and Orders. The US Agencies generally use Monitors in two kinds of situations: (1) where there are post-divestiture requirements such as transitional supply agreements, technology transfers, and other temporary support provisions; and (2) where oversight of a hold separate order or other obligations may help keep the divestiture assets operating effectively. In the US, Monitors' responsibilities vary depending on the type of monitoring task and the parties' obligations. Also, unlike at the EC, Monitors are not typically involved in overseeing the search for a buyer of the assets, whether handled by the parties or by a Divestiture Trustee, discussed below. Likewise, Monitors do not find or vet proposed buyers. Monitors may oversee the actual transfer of assets (and technology) once a divestiture has been approved. A hold separate Monitor usually starts their duties once an Asset Preservation Order or Hold Separate Order has been entered.

¹⁶ Statement of the Federal Trade Commission Concerning Western Digital Corporation/Viviti Technologies Ltd and Seagate Technology LLC/Hard Disk Drive Assets of Samsung Electronics Co Ltd (12 March 2012), available at: www.ftc.gov/sites/default/files/documents/cases/2013/05/120305westerndigitalstmt.pdf.

DOJ required a Monitoring Trustee to be appointed in connection with Anheuser-Busch InBev's acquisition of the share it did not already own in Grupo Modelo.¹⁷ As described above, in connection with this acquisition, DOJ required ABI and Grupo Modelo to divest Modelo's entire US business to a named acquirer, Constellation Brands. DOJ required a Monitoring Trustee because of the complex nature of the commitments made by the parties and Constellation. The Monitoring Trustee was charged with monitoring and reporting on the parties' and Constellation's compliance with the terms of the Final Judgment, including attainment by Constellation of milestones regarding the improvement of the acquired brewery and adherence to the terms of the transition services and interim supply agreements provided for in the Final Judgment.

The FTC routinely requires Monitors when the divestiture involves complicated transactions (such as the transfer of critical intellectual property).¹⁸ Monitors are also routinely used whenever there is an order to maintain assets, even without an order to hold separate.¹⁹

Divestiture trustee

Under both EU and US practice, if the parties fail to find a suitable purchaser within the divestiture period, then a Divestiture Trustee can be appointed. The Divestiture Trustee has, for a specified period of time, an exclusive mandate to find a suitable purchaser for the divestiture assets, under the supervision of the agency, at no minimum price, and to complete the divestiture upon agency approval. While the obligation to appoint a Divestiture Trustee is an essential element of the EC divestiture process, the appointment is only mandatory if the parties have not proposed a purchaser towards the end of their divestiture deadline. The DOJ and FTC have discretion to appoint a Divestiture Trustee as soon as the parties miss their deadline. DOJ Divestiture Trustees are appointed by the court after nomination by DOJ. FTC Divestiture Trustees are appointed by the FTC after recommendation by the staff.

Hold separate monitors and manager

Under both EU and US practice, a Hold Separate Manager is generally appointed to operate any business to be held separate. This person is appointed

17 Final Judgment, *US v Anheuser-Busch InBev SA/NV, et al*, 13-cv-00127-RWR (DDC 24 October 2014), available at: www.justice.gov/atr/cases/f301300/301335.pdf.

18 The FTC's pharmaceutical merger remedies are good examples of such cases.

19 For a recent example, see Press Release, FTC Puts Conditions on Sun Pharmaceutical's Proposed Acquisition of Ranbaxy (30 January 2015), available at: www.ftc.gov/news-events/press-releases/2015/01/ftc-puts-conditions-sun-pharmaceuticals-proposed-acquisition (upfront divestiture in a generic pharmaceutical product, including order to maintain assets).

immediately after the adoption of the conditional clearance decision and is responsible for managing the day-to-day business of the divestiture assets and for ensuring compliance with the hold separate order. The Hold Separate Manager usually comes from within the company and is initially selected by the parties but approved by the agency. If a Monitor has been appointed, his or her responsibility is to ensure that the held separate business is being operated by the Manager (and management team) in an appropriate manner, separate from the merged firm, and that the merged firm provides support (including working capital) as needed and does not otherwise interfere with the held separate business. The Hold Separate Manager reports to and acts under the supervision of the Monitoring Trustee, in situations where one is appointed, and the Monitoring Trustee reports to the agency frequently.

Conclusion

As noted earlier, when seeking remedies, all three agencies seek to preserve competition potentially lost by a merger transaction. While differences in the remedy processes and terminology used by DOJ, the FTC and the EC exist, effective and compatible remedies can be achieved nonetheless when the agencies, parties, and counsel are aware of these differences, have a mutual understanding of the processes and vocabulary used by each agency and allow for the necessary communication and close cooperation between all concerned.

Appendix: Remedies at the US DOJ, the US FTC, and the EC

	DOJ	FTC	EC
Remedy Type	Final Judgment	Final Order	Commitments
Resolution w/o Formal Remedy	Fix-it-first	Fix-it-First	Not applicable
Divestitures w/o identified buyer and where assets are held separate	Common type of divestiture commitment	Common type of divestiture commitment	Most common type of divestiture commitment
Divestiture w/Identified Buyer	Upfront Buyer	Upfront Buyer	Fix-it-first; Rare
Divestiture w/Delayed Closing of main transaction	Rare	Rare	Upfront Buyer

About the authors

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