ANTITRUST DIVISION POLICY GUIDE

TO

MERGER REMEDIES

U. S. DEPARTMENT OF JUSTICE

Antitrust Division

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Introduction

This Policy Guide to Merger Remedies is intended to provide guidance to Antitrust Division staff in their work analyzing proposed remedies for mergers. This Policy Guide updates the Division's 2004 guidance.[1] The merger landscape has evolved since 2004—globalization has reshaped the face of many modern markets. The Division increasingly reviews complex international and vertical transactions. To carry out our mission effectively and efficiently, the Division's Office of the General Counsel now has principal responsibility for enforcing Division decrees.

As an agency charged with enforcing the antitrust laws, including Section 7 of the Clayton Act, it is the Antitrust Division's mission to protect consumers from anticompetitive mergers. Most mergers are not anticompetitive, and many benefit consumers. However, certain mergers can lessen competition and harm consumers by resulting in a firm's acquisition of market power or increasing the likelihood of anticompetitive coordination. The U.S. antitrust laws are intended to prevent that lessening of competition, and the Division enforces those laws accordingly.

Parties frequently seek to avoid litigation by offering to cure the Division's concerns when the Division determines that a proposed merger is illegal, and the Division considers a broad range of potential remedies in ensuring appropriate and effective remedial relief. The touchstone principle for the Division in analyzing remedies is that a successful merger remedy must effectively preserve competition in the relevant market.[2] That is the appropriate goal of merger enforcement.

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[1] The Division may update this Guide from time to time to ensure it continues to reflect actual Division practice.

[2] For simplicity of exposition, this Policy Guide uses the phrase "preserving competition" throughout, which should be understood to include the concept of restoring competition or enhancing consumer welfare, depending on the specific facts of the transaction and its proposed remedy. For example, in the case of consummated mergers, the Division will seek a remedy that will effectively restore competition to the relevant market, including, when appropriate, completely unwinding a transaction.

Successful merger enforcement is defined by obtaining effective remedies, whether that means blocking a transaction or settling under terms that avoid or resolve a contested litigation while protecting consumer welfare.[3] In situations where a merger remedy can protect consumers while otherwise allowing the merger to proceed, appropriate remedies may include a divestiture of assets (to limit the merged firm's ability to use the combined assets to harm competition) or limitations on the firm's conduct (to ensure that consumers will not be harmed by anticompetitive behavior).

In horizontal merger matters, structural remedies often effectively preserve competition, including when used in conjunction with certain conduct provisions. Structural remedies may be appropriate in vertical merger matters as well, but conduct remedies often can effectively address anticompetitive issues raised by vertical mergers. In all cases, the key is finding a remedy that works, thereby effectively preserving competition in order to promote innovation and consumer welfare. The Division's approach to evaluating the effectiveness of any proposed remedy is discussed below.

I. Tailoring Effective Remedies

A. Key Principles

Mergers come in a wide variety of shapes and sizes. As a consequence, effective merger remedies also come in a wide variety of shapes and sizes. Regardless of the form a particular merger remedy takes, there are certain basic principles that apply to all effective merger remedies.

First, effectively preserving competition is the key to an appropriate merger remedy. Second, the remedy should focus on preserving competition, not protecting individual competitors. Third, a remedy needs to be based on a careful application of legal and economic principles to the particular facts of a specific case.

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[3] Some have interpreted the Division's 2004 guidance on remedies to mean that if a structural remedy is not available in a particular merger matter, or would be ineffective, the Division must let the transaction proceed. That interpretation does not accurately reflect the policy or practice of the Antitrust Division.

Once the Division has determined that a merger is anticompetitive, the Division only considers remedies that resolve the competitive problem and effectively preserve competition. As the Supreme Court has stated, restoring competition is the "key to the whole question of an antitrust remedy."[4] Where a remedy that would effectively preserve competition is unavailable, the Division will seek to block the merger.

The Division's central goal is preserving competition, not determining outcomes or picking winners and losers. Thus, decree provisions should preserve competition generally rather than protect or favor particular competitors.[5] The Division will accept merger remedies that protect the competitive landscape by effectively preserving competition without removing the incentive for individual firms to compete.

A remedy carefully tailored to the competitive harm is the best way to ensure effective relief.[6] Before the Division will conclude that a proposed remedy is acceptable, the relief must effectively address each of the

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[4] United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961); *see also* Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972).

[5] *See, e.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458-59 (1993); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 337-38 (1990); Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 116-17 (1986); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977); Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962); Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1211, 1230 (D.C. Cir. 2004); United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001).

[6] *Ford Motor Co.*, 405 U.S. at 575 (In a Section 7 action, relief "necessarily must 'fit the exigencies of the particular case.'"); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 133 (1969); United States v. U.S. Gypsum Co., 340 U.S. 76, 89 (1950) ("In resolving doubts as to the desirability of including provisions designed to restore future freedom of trade, courts should give weight to . . . the circumstances under which the illegal acts occur."); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 726 (1944) ("The test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions."); *Microsoft*, 373 F.3d at 1228 ("[T]he court carefully considered the 'causal connection' between Microsoft's anticompetitive conduct and its dominance of the market . . . ."); *Microsoft*, 253 F.3d at 107 (Relief "should be tailored to fit the wrong creating the occasion for the remedy.").

Division's competitive concerns. There should be a close, logical nexus between the proposed remedy and the alleged violation—and the remedy should fit the violation and flow from the theory or theories of competitive harm. Effective remedies preserve the efficiencies created by a merger, to the extent possible, without compromising the benefits that result from maintaining competitive markets.

The Division's focus is on effective relief for the particular merger presented. In certain factual circumstances, structural relief may be the best choice to preserve competition. In a different set of circumstances, conduct relief may be the best choice. In still other circumstances, a combination of both conduct and structural relief may be appropriate.

Any remedy assessment is fact-intensive. It normally will require determining (a) what competitive harm the violation has caused or likely will cause and (b) how the proposed relief will remedy that particular competitive harm. Only after these determinations are made does the Division decide whether the proposed remedy will effectively redress the violation. Basing remedies on the application of economic and legal analysis to the particular facts of each case avoids merely copying past relief proposals and is most likely to result in relief effectively protecting consumers.

B. Types of Mergers

Horizontal mergers, vertical mergers, and mergers with both horizontal and vertical dimensions typically present different competitive issues and, as a result, different remedial challenges. In cases in which neither conduct nor structural relief, nor a combination of the two, would effectively preserve competition, the Division will seek to block the transaction.

1. Horizontal Mergers

Horizontal mergers involve firms that are actual or potential competitors. Horizontal mergers can enhance market power by eliminating actual or potential competition between the merging parties, by increasing the risk of coordination among rivals, or both.[7] In the case of horizontal mergers, enhanced market power is the result of combining similar sets of assets that otherwise would be used to compete. Consequently, if a competitive problem exists with a horizontal merger, the typical remedy is to prevent common control over some or all of the assets, thereby effectively preserving competition. Thus, the Division will pursue a divestiture remedy in the vast majority of cases involving horizontal mergers. Divestiture of overlapping assets, usually an existing business entity, can effectively preserve competition that the merger otherwise would eliminate.

2. Vertical Mergers

Vertical mergers involve firms that do not operate in the same markets, and may not result in an overlap between the assets of the purchaser and the acquired entity. A purely vertical merger does not itself change the number of firms competing to produce a particular product or service. Nevertheless, vertical mergers can create changed incentives and enhance the ability of the merged firm to impair the competitive process. In such situations, a remedy that counteracts these changed incentives or eliminates the merged firm's ability to act on them may be appropriate. Accordingly, in appropriate vertical merger matters the Division will consider tailored conduct remedies designed to prevent conduct that might harm consumers while still allowing the efficiencies that may come from the merger to be realized. The Division also will consider structural remedies in vertical merger matters—they may be particularly effective when the vertical integration is a small part of a larger deal.

3. Mergers with Both Horizontal and Vertical Dimensions

Mergers sometimes have both horizontal and vertical dimensions. These types of mergers can present combinations of the challenges

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[7] *See* UNITED STATES DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (2010). Enhanced market power resulting from a horizontal merger can result in a variety of harms to consumers, including higher prices and reduced product quality and variety. Enhanced market power also can make it more likely that the merged entity profitably and effectively can engage in exclusionary conduct. *Id.*

mentioned above. Effective remedies in these situations may require a combination of structural and conduct provisions affecting multiple markets.[8]

II. Types of Remedies

Effective merger remedies typically include structural or conduct provisions.[9] Each can be used to preserve competition in the appropriate factual circumstances. As discussed below, in some cases an effective remedy may call for a combination of different types of relief. In other cases, an effective remedy may be unavailable. In that circumstance, the Division will seek to block the merger.

Structural remedies generally will involve the sale of physical assets by the merging firms or requiring that the merged firm create new competitors through the sale or licensing of intellectual property rights.[10] Structural remedies in many cases can be "simple, relatively easy to administer, and sure" to preserve competition.[11]

A conduct remedy usually entails provisions that prescribe certain aspects of the merged firm's post-consummation business conduct. Conduct remedies are a valuable tool for the Division. They can preserve a merger's potential efficiencies, and, at the same time, remedy the competitive harm

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[8] The transaction combining Comcast Corp. and NBC Universal, Inc. is a recent example of a merger presenting both horizontal and vertical issues. *See* United States v. Comcast Corp., No. 1:11-cv-00106, Complaint (D.D.C. 2011), *available at* http://www.justice.gov/atr/cases/f266100/266164.htm.

[9] Recently, the Division sought and obtained disgorgement in an action brought under Section 1 of the Sherman Act. United States v. Keyspan Corp., 2011 WL 338037 (S.D.N.Y. 2011). In appropriate circumstances, the Division also may consider seeking disgorgement in consummated merger challenges either instead of or in addition to unwinding the transaction. In particular, where available remedies are limited such that the defendant otherwise would be able to retain its unlawful profits, the Division may seek disgorgement of those profits. *See also* FED. TRADE COMM'N, POLICY STATEMENT ON MONETARY EQUITABLE REMEDIES IN COMPETITION CASES (July 25, 2003), *available at* http://www.ftc.gov/os/2003/07/disgorgementfrn.shtm.

[10] United States v. 3D Systems Corp., 2002-2 Trade Cas. ¶ 73,738 (D.D.C. 2001).

[11] United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 331 (1961).

that otherwise would result from the merger.[12] Conduct relief can be a particularly effective option when a structural remedy would eliminate the merger's potential efficiencies, but, absent a remedy, the merger would harm competition.

A. Structural Remedies

In reviewing a structural remedy and determining whether it will effectively preserve competition, the Division considers a number of factors regarding the assets to be divested. First and foremost, to ensure an effective structural remedy, any divestiture must include all the assets, physical and intangible, necessary for the purchaser to compete effectively with the merged entity. This often will require divestiture of an existing business entity.

1. Divestiture of All Assets Necessary for the Purchaser to Be an Effective, Long-Term Competitor

The goal of a divestiture is to ensure that the purchaser[13] possesses both the means and the incentive to effectively preserve competition.[14]

A structural remedy typically requires clear identification of the assets a competitor needs to compete effectively in a timely fashion and over the long-term. The necessary assets may be tangible (factories capable of

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[12] In determining appropriate conduct remedies, the Division appreciates that displacing the competitive decision-making process widely in an industry, or even for a firm, is undesirable. The Division is not a regulatory agency charged with determining how competition should occur in a particular industry. As a consequence, effective conduct remedies are tailored as precisely as possible to the competitive harms associated with the merger to avoid unnecessary entanglements with the competitive process.

[13] The use of "purchaser" in this Guide refers to the third-party purchaser of the divested tangible or intangible assets from the merging firms.

[14] *See* Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972) ("The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.' . . . Complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws." (citation omitted)).

producing a product or raw materials used in the production of some other final good), intangible (patents, copyrights, trademarks, or rights to facilities such as airport gates or landing slots), or a combination. An effective divestiture addresses whatever obstacles (for example, lack of a distribution system or necessary know-how) led to the conclusion that a competitor, absent the divestiture, would not be able to discipline a merger-generated increase in market power.[15] The divestiture assets must be substantial enough to enable the purchaser to effectively preserve competition, and should be sufficiently comprehensive that the purchaser will use them in the relevant market and be unlikely to liquidate or redeploy them.[16] Moreover, the purchaser should have the ability to compete effectively in the relevant market.[17]

2. Divestiture of an Existing Business Entity

Any divestiture must contain the set of assets necessary to ensure the efficient current and future production and distribution of the relevant product, thereby effectively preserving the competition that would have been lost through the merger. To best achieve this goal, the Division often will insist on the divestiture of an existing business entity that already has demonstrated its ability to compete in the relevant market.[18] The Federal Trade Commission Divestiture Study found that divestitures of on-going

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[15] S*ee, e.g.*, White Consol. Indust., Inc. v. Whirlpool Corp., 612 F. Supp. 1009 (N.D. Ohio 1985), *vacated on other grounds*, 619 F. Supp. 1022 (N.D. Ohio 1985), *aff'd*, 781 F.2d 1224 (6th Cir. 1986) (analyzing sufficiency of a proposed divestiture package to effectively preserve competition).

[16] *See* Chemetron Corp. v. Crane Co., 1977-2 Trade Cas. ¶ 61,717 at 72,930 (N.D. Ill. 1977). In a merger between firm A and firm B, the Division generally would be indifferent as to which firm's assets are divested, despite possible qualitative differences between the firms' assets, so long as the divestiture effectively preserves competition. However, if the divestiture of one firm's assets would not preserve competition, then the other firm's assets must be divested. For example, if firm A's productive assets can operate efficiently only in combination with other assets of the firm, while firm B's productive assets are free-standing, the Division likely would require the divestiture of firm B's assets.

[17] *See infra* Part IV.B.4.

[18] In some cases, an existing business entity may be a single plant that produces and sells the relevant product; in other cases, it may be an entire division.

businesses succeeded at a higher rate than divestitures of selected assets.[19] A major reason for this is that an existing business entity typically possesses not only all the physical assets, but also the personnel, customer lists, information systems, intangible assets, and management infrastructure necessary for the efficient production and distribution of the relevant product, and it has already succeeded in competing in the market. That typically is a good basis for concluding that its divestiture could be an effective remedy.

In structural remedies, the general preference is for the divestiture of an existing business. The Division recognizes that the merging firm may have an incentive to divest fewer assets than are required for the purchaser to compete effectively going forward. A purchaser's interests are not necessarily identical to those of the public, and so long as the divested assets produce something of value to the purchaser (possibly providing it with the ability to earn profits in some other market or to produce weak competition in the relevant market), it may be willing to buy them at a fire-sale price regardless of whether they cure the competitive concerns.

While the foregoing conditions support the Division's preference for divestiture of existing, intact businesses, the Division may consider accepting divestiture of less than an existing business when a set of acceptable assets can be assembled from both of the merging firms. However, the Division must be persuaded that these assets will create a viable entity that will effectively preserve competition. The Division may require either an upfront buyer or a "crown jewel" provision in such circumstances to ensure that the package results in a buyer that will preserve competition in the market.[20]

In addition, the Division may approve divestiture of less than an existing business entity when certain of the entity's assets are already in the possession of, or readily obtainable in a competitive market by, the purchaser. For example, if the purchaser already has its own distribution system, then insisting that a comparable distribution system be included in

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[19] FED. TRADE COMM'N, STAFF OF THE BUREAU OF COMPETITION, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS § II.B.3 (1999).

[20] *See infra* Parts IV.A.2.a and IV.A.2.b.

the divestiture package may create an unwanted and costly redundancy. In such a case, divesting the assets required efficiently to design and build the relevant product may be sufficient. Of course, in those circumstances, the Division would need to know the purchaser's identity in advance.[21]

The Division also may consider divestiture of more than an existing business entity when necessary to effectively preserve competition. Even if an existing business entity includes all of the production and marketing assets necessary for producing and selling the relevant product, that will not always enable the purchaser to preserve the competition threatened by the merger. Where divestiture of an existing business entity is insufficient to resolve the competitive issues raised by the proposed merger, additional assets from the merging firms will need to be included in the divestiture package. For example, in some industries, it is difficult to compete without offering a "full line" of products. In such cases, the Division may seek to include a full line of products in the divestiture package, even when its antitrust concern relates to only a subset of those products.[22] Similarly, although the merger creates a competitive problem in a United States market, divestiture of a world-wide

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[21] In unusual circumstances, in which there are many potential purchasers that possess or could acquire in a competitive market the assets necessary to effectively preserve competition despite purchasing less than an existing business entity, the Division may not need to know the identity of the specific purchaser in advance. *See, e.g.*, United States v. Unilever N.V., 1:11-cv-00858, Competitive Impact Statement 12 (D.D.C. 2011) (explaining that the proposed final judgment does not require divestiture of any manufacturing plants or real property "because many contract manufacturers have the available capacity, plants, and ability to manufacture" the divested products). The Division also might approve divestiture of less than an existing business entity in matters involving industries where there has been a substantial history of success with divestitures of this kind.

[22] *See, e.g.*, United States v. Cookson Group plc, 1-08-cv-00389, Competitive Impact Statement, 8 n.1 (D.D.C. 2008), *available at* http://www.justice.gov/atr/cases/f230700/230742.pdf (in addition to allowing purchaser to produce products in relevant markets, proposed remedy would allow purchaser "to offer the 'full line' of" products offered by one of the merging parties, ensuring that "the purchaser would have the incentive and all the assets necessary to be an effective, long-term competitor in these products"); United States v. Mittal Steel Co. N.V., 1:06-cv-01360, Competitive Impact Statement 10 (D.D.C. 2006), *available at* http://www.justice.gov/atr/cases/f217400/217491.htm (proposed remedy would require divestiture of entire plant, which made multiple flat-rolled steel products, where there was a competitive problem with only one of those products).

business may be necessary to effectively preserve competition. More generally, integrated firms can provide scale and scope economies that a purchaser may not be able to achieve by obtaining only those assets related to the relevant product(s).

3. Divesting Rights to Critical Intangible Assets

Where a critical asset is an intangible one—e.g., where firms with alternative patent rights for producing the same final product are merging—structural relief must provide one or more purchasers with rights to that asset.[23] Such rights can be provided either by sale to a different owner or through licensing.[24] There also may be circumstances when licensing the intangible assets to multiple firms—or perhaps even to "all comers"—is necessary to effectively preserve the competition threatened by the merger.[25]

When the remedy requires divestiture of intangible assets, often an issue arises as to whether the merged firm should retain rights to those assets, such as the right to operate under a divested patent. Permitting the merged firm to retain access to critical intangible assets may present a significant competitive risk. Because the purchaser of the intangible assets will not have the right to exclude all others (specifically, the merged firm), it may be more difficult for it to differentiate its product from its rivals' and therefore it may

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[23] A critical asset is one that is necessary for the purchaser to compete effectively in the market in question. When a patent covers the right to compete in multiple product or geographic markets, yet the merger adversely affects competition in only a subset of these markets, the Division will insist on the sale or license of rights necessary to effectively preserve competition in the affected markets. In some cases, this may require that the purchaser or licensee obtain the rights to produce and sell only the relevant product. In other circumstances, it may be necessary to give the purchaser or licensee the right to produce and sell other products (or use other processes), where doing so permits the realization of scale and scope economies necessary to compete effectively in the relevant market.

[24] United States v. National Lead Co., 332 U.S. 319, 348 (1947) (courts may order mandatory patent licensing as relief in antitrust cases where necessary to restore competition). When the divestiture involves licensing, the Division generally will insist on fully paid-up licenses rather than running royalties.

[25] *See, e.g.,* United States v. Miller Industries, Inc., 2001-1 Trade Cas. ¶ 73,132 (D.D.C. 2000); United States v. Cookson Group plc, 1994-1 Trade Cas. ¶ 70,666 (D.D.C. 1993).

be a lesser competitive force in the market. Also, if the purchaser is required to share rights to an intangible asset (like a patent or a brand name), it may not engage in competitive conduct (including investments and marketing) that it might have engaged in otherwise. In these circumstances, the Division is likely to conclude that permitting the merged firm to retain rights to critical intangible assets will prevent the purchaser from effectively preserving competition and, accordingly, the Division will require that the merged firm relinquish all rights to the intangible assets.[26]

However, there may be other circumstances when the merged firm needs to retain rights to the intangible assets to achieve demonstrable efficiencies—which are not otherwise obtainable through an efficient licensing agreement with the purchaser following divestiture—and a non-exclusive license is sufficient to preserve competition and assure the purchaser's future viability and competitiveness.[27] Under these circumstances, the merged firm likely will be permitted to retain certain rights to the critical intangible assets and may be required only to provide the purchaser with a non-exclusive license.[28]

B. Conduct Remedies

Conduct remedies can be an effective method for dealing with competition concerns raised by vertical mergers and also are sometimes used to address concerns raised by horizontal mergers (usually in conjunction with a structural remedy).

As with horizontal mergers, crafting an appropriate remedy for anticompetitive vertical mergers requires identifying the particular

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[26] For example, the Division required the divestiture of rights to trade dress and other intellectual property relating to certain brands of hair care products in United States v. Unilever N.V., 1:11-cv-00858, Competitive Impact Statement 11 (D.D.C. 2011).

[27] These conditions are more likely to be satisfied in, for example, the case of production process patents than with final product patents, copyrights, or trademarks because the purchaser is more likely to rely on the latter to distinguish its products from incumbent products.

[28] *See, e.g.*, United States v. 3D Systems Corp., 2002-2 Trade Cas. ¶ 73,738 (D.D.C. 2001).

competitive concerns raised by a specific transaction. Tailoring a conduct remedy to the particular competitive concern(s) raised by a vertical merger can effectively prevent harmful conduct while preserving the beneficial aspects of the merger.

There is a panoply of conduct remedies that may be effective in preserving competition. No matter what type of conduct remedy is considered, however, a remedy is not effective if it cannot be enforced.[29] Remedial provisions that are too vague to be enforced, or that can easily be misconstrued or evaded, fall short of their intended purpose and may leave the competitive harm unchecked.

Clear and careful drafting is especially important for conduct remedies. Decrees should precisely and unambiguously spell out a defendant's obligations, so that it is clear what must or must not be done to satisfy the terms. A decree that is not clearly and carefully drafted can be an invitation for a defendant to try to evade the intent of the decree. For that reason, decrees should avoid vague language or potential loopholes that might lead to circumvention of the decree.

The most common forms of conduct relief are firewall, non-discrimination, mandatory licensing, transparency, and anti-retaliation provisions, as well as prohibitions on certain contracting practices. When considering using these remedies, and other types of conduct remedies, the Division carefully analyzes the particular factual context to ensure that their use will effectively preserve competition.

1. Firewall Provisions

Firewalls are designed to prevent the dissemination of information within a firm. For example, if an upstream monopolist proposes to merge with one of three downstream firms that compete against one another, the

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[29] *See, e.g.*, New York v. Microsoft Corp., 224 F. Supp. 2d 76, 137 (D.D.C. 2002) ("Plaintiffs' definition is vague and ambiguous, rendering compliance with the terms of Plaintiffs' remedy which are reliant upon this definition to be largely unenforceable."), *aff'd sub nom.* Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004).

Division may be concerned that the upstream firm will share information with its acquired downstream firm (and perhaps with the two other downstream firms) to facilitate anticompetitive behavior.[30] The Division also may be concerned that information shared by an upstream firm with its downstream subsidiary will be communicated to competing upstream firms with which the downstream subsidiary deals. Such communications may in some instances facilitate coordination between upstream competitors. A firewall could prevent these problems. The Division has used firewalls in certain defense industry mergers and in vertical and other non-horizontal mergers when both the loss of efficiencies from blocking the merger outright and the harm to competition from allowing the transaction to go unchallenged are high.[31]

In designing a firewall, the Division is careful to ensure that the provision prevents the targeted information from being disseminated. Time and effort are devoted to carefully identifying potentially problematic types of information and to considering how to effectively cordon off that information. Effective monitoring also is required to ensure that the firewall provision is adhered to and is effective.

2. Non-Discrimination Provisions

Non-discrimination provisions incorporate the concepts of equal

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[30] While coordination is perhaps the chief concern in these instances, information sharing also could lead rivals concerned about misappropriation of their proprietary information to under-invest in product development and thus stifle innovation. Further, information sharing could lead to unilateral anticompetitive effects.

[31] *See, e.g.*, United States v. Northrop Grumman Corp., 1:02-cv-02432, Competitive Impact Statement 18-19 (D.D.C. 2002) (establishing firewall between Northrop's payload and satellite prime businesses); United States v. Lehman Bros. Holdings, Inc., 1:98-cv-00796, Competitive Impact Statement (D.D.C. 1998) (establishing certain firewalls between L3 Communications and Lockheed Martin regarding certain defense technologies). *See also*, United States v. Ticketmaster Entm't, Inc., 2010-2 Trade Cas. ¶ 77,113 (D.D.C. 2010) (prohibiting disclosure of client ticketing data to employees whose principal job responsibilities involve the operation or day-to-day management of defendant's venues, concert promotions, or artist management services).

access, equal efforts, and equal terms.[32] If, for example, an upstream monopolist proposes to merge with one of three downstream firms competing in the same relevant market, the Division may be concerned that the upstream firm will have an incentive to favor the acquired downstream firm by offering less attractive terms to, or refusing to deal with, the acquired firm's competitors.

In certain circumstances, depending on what information is available regarding competitive prices in the relevant market, the Division will consider employing a non-discrimination clause requiring the upstream firm to offer the same terms to all three downstream competitors. The Division will be careful to ensure that any such provision will effectively protect against the independent downstream firms getting lesser quality product, slower delivery times, reduced service, or unequal access to the upstream firm's products.

When including a non-discrimination clause in a decree, the Division may insist on an arbitration provision that will allow complainants to resolve controversies regarding the merged entity's conduct under the clause without direct Division involvement. The Division will monitor the implementation of the arbitration provision and in all cases retains responsibility for decree enforcement.

3. Mandatory Licensing Provisions

In certain circumstances, parties may propose to settle under terms whereby they would license certain technology or other assets on fair and reasonable terms that would prevent harm to competition. Mandatory licensing of this kind raises issues that are related to the issues discussed above regarding divestiture of intangible assets.[33] Licensing terms of this sort may alleviate competitive concerns by enabling competitors to adjust to the change in ownership of a key input necessary to effectively preserve

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[32] *See, e.g.*, United States v. Comcast Corp., 1:11-cv-00106, Competitive Impact Statement 30-33 (D.D.C 2011), *available at* http://www.justice.gov/atr/cases/f266100/266158.pdf.

[33] *See supra* Part II.A.3.

competition.[34] Licensing agreements of this type can be enforced through mandatory arbitration provisions.

4. Transparency Provisions

The Division on occasion has used so-called transparency provisions as a form of relief in vertical merger cases.[35] Such provisions usually require the merged firm to make certain information available to a regulatory authority that the firm otherwise would not be required to provide. For example, a telecommunications firm may be required to inform a regulatory agency of the prices the firm is charging customers for telecommunications equipment, even though the regulatory agency may not have the authority to regulate those prices. The additional information can aid the regulatory agency in preventing the firm from engaging in regulatory evasion by, for example, charging telecommunications equipment clients with which it competes for telecommunications services higher prices than it charges its other telecommunications equipment customers.

5. Anti-Retaliation Provisions

Another type of conduct remedy that may prove effective in preserving competition is an anti-retaliation provision. These provisions can take different forms. For example, they may bar the merged entity from retaliating against customers or other parties who enter into (or contemplate entering into) contracts or who do business with the merged entity's competitors.[36] These kinds of provisions are designed to prevent the merged

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[34] *See, e.g.*, United States v. Google, 1:11-cv-00688, Competitive Impact Statement 9-13 (D.D.C. 2011); *Comcast*, 1:11-cv-00106 at 30-33.

[35] *See, e.g.*, United States v. MCI Commc'ns Corp., 1994-2 Trade Cas. ¶70,730 (D.D.C. 1994) (requiring disclosure of various data, including prices, terms, and conditions of telecommunications services, volumes of telecommunications services traffic, and average time between order and delivery of circuits between certain entities). In considering requiring a transparency provision the Division will be alert to the possibility that increased transparency could, under some conditions, facilitate coordination in certain industry settings.

[36] *See, e.g.*, United States v. Ticketmaster Entm't, Inc., 2010-2 Trade Cas. ¶ 77,113 (D.D.C. 2010).

entity from unreasonably restricting competition. An anti-retaliation provision also may prohibit the merged entity from discriminating or retaliating against an entity for providing information to the Division about alleged non-compliance with a decree or for invoking any of the provisions of a decree or a regulatory agency's rule or order.[37] This type of provision helps ensure that potential complainants are not reluctant to step forward and that appropriate decree enforcement is not frustrated by the merged entity.

6. Prohibitions on Certain Contracting Practices

In some circumstances, the Division may require prohibitions on restrictive contracting practices by the merged entity. Restrictive or exclusive contracts can be competitively neutral, procompetitive, or anticompetitive, depending on a number of factors. In some situations a merged entity might use restrictive or exclusive contracting anticompetitively to block competitors' access to a vital input. Or, a merged entity might enter into short-term contracts with key customers that include automatic renewal provisions to foreclose or slow entry. In these types of situations, it may be appropriate to impose limits on the merged entity's ability to enter into restrictive or exclusive contracts.[38] Prohibitions on restrictive contracting may be particularly appropriate in vertical mergers in which the merged entity will control an input that its competitors must access to remain viable.

7. Other Types of Conduct Remedies

While the above provisions are the most common forms of conduct relief, other conduct remedies are also possible. These other types of conduct remedies include notice of otherwise non-reportable mergers,[39] supply contracts, and restrictions on reacquisition of scarce personnel assets.[40] Other

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[37] *See, e.g.*, *Comcast*, 1:11-cv-00106, Competitive Impact Statement 34, 40.

[38] S*ee, e.g.*, *id.* at 34-37.

[39] *See, e.g.*, United States v. Chancellor Media Corp., 1999-1 Trade Cas. ¶72,536 (D.D.C. 1999).

[40] *See, e.g.*, United States v. AlliedSignal, Inc., 2000-2 Trade Cas. ¶ 73,023 (D.D.C. 2000); United States v. Aetna, Inc., 1999-2 Trade Cas. ¶ 72,730 (N.D. Tex. 1999); *see also infra* Part II.C. Another type of conduct remedy the Division has used is a so-called competitive-rule joint

forms of arbitration provisions may be employed as well.

C. Hybrid Remedies

In some circumstances, the most effective remedy will include a combination of structural and conduct provisions. This may be the case, for example, when a merger involves multiple markets or products and competition is best preserved by structural relief in some relevant markets and by conduct relief in others. Or, a merger involving one type of market may require both structural and conduct relief. For example, for certain kinds of mergers an effective remedy might involve requiring the merged firm to divest certain customers' contracts (structural relief) and also preventing abusive contracting practices (conduct relief).

In other circumstances, conduct relief will be necessary to help perfect structural relief. For example, the Division might require a supply agreement to accompany a divestiture if the purchaser is unable to manufacture the product for a transitional period (perhaps as plants are reconfigured or product mixes are altered).[41] In those circumstances, a supply agreement can

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venture ("CRJV"). A CRJV operates under a set of structural and conduct rules designed to maintain the independence of multiple selling entities by ensuring that they will obtain the relevant product (or key input) at or near true marginal cost. Though theoretically appealing, the technical requirements for a CRJV to perform as advertised are many and subtle, and there are several potential pitfalls. Owners have an incentive to classify some fixed costs as variable costs, thereby increasing participants' marginal cost of production and reducing output, and there would be concerns about information sharing that would facilitate collusion. The Division has used a CRJV only once, in United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619 (W.D. Ky. 1985).

[41] The Division pays close attention to determining the appropriate duration of these types of supply agreements: agreements that are too short may not give a purchaser sufficient time to establish a viable operation, while agreements that are too long may reduce a purchaser's incentives to compete effectively as an independent entity. Long-term supply agreements between the merged firm and third parties on terms imposed by the Division can raise serious competitive issues. Given the merged firm's incentive not to promote competition with itself, competitors reliant upon the merged firm for product or key inputs may be disadvantaged in the long term. Contractual terms can be difficult to define and specify with the requisite foresight and precision, and a firm compelled to help another compete against it is unlikely to exert much effort to ensure the products or inputs it supplies are of high quality, arrive as scheduled, match the order specifications, and satisfy other conditions that are necessary to effectively preserve

help prevent the loss of a competitor from the market, even temporarily. Similarly, limits on the merged firm's ability to reacquire personnel assets as part of a divestiture may be appropriate to ensure that the purchaser will be able to effectively preserve competition. The divestiture of any portion of a business unit normally involves the transfer of personnel from the merging firms to the purchaser of the assets. Incumbent employees often are essential to the productive operation of divested assets, particularly in the period immediately following the divestiture. As a consequence, it may be appropriate to prohibit the merged firm from re-hiring these employees for some limited period.[42]

Finally, continuing conduct relief may be needed to effectuate or bolster a structural remedy. Examples include instances under the Capper-Volstead Act[43] and other statutes where antitrust exemptions could be triggered if the divested assets were to be owned by persons having certain characteristics. In those rare situations, a conduct provision prohibiting the merged firm and the purchaser of the divested assets from selling the divested assets to a person having those characteristics might be appropriate.[44]

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competition. Moreover, close and persistent ties between two or more competitors (as created by such agreements) can serve to enhance the flow of information or align incentives that may facilitate collusion or cause the loss of a competitive advantage. Therefore, supply agreements in Division decrees generally will be short-term and used as a transitional mechanism until the purchaser is able to secure another source of supply. *See, e.g.*, United States v. Bemis Co., Inc., 2010-2 Trade Cas. ¶ 77,096 (D.D.C. 2010) (at purchaser's option, defendant must enter into a supply contract with purchaser for certain products sufficient to satisfy purchaser's obligations under any customer contract for a period of up to one year).

[42] *See, e.g.*, *AlliedSignal*, 2000-2 Trade Cas. ¶ 73,023; *Aetna*, 1999-2 Trade Cas. ¶ 72,730. When there are a limited number of key employees who are essential to any purchaser competing effectively in the relevant market, the Division will scrutinize whether divestiture is an appropriate remedy. If the Division cannot be satisfied that the key personnel are likely to become and remain employees of the purchaser, it may be appropriate to block the entire transaction.

[43] 7 U.S.C. §§ 291-92.

[44] An example of such a provision is found in the Final Judgment in United States v. Dairy Farmers of America, 2001-1 Trade Cas. ¶ 73,136 (E.D. Pa. 2000).

III. Additional Considerations in Choosing A Remedy

When determining an appropriate remedy for a particular merger, the Division must be aware of the impact of other entities reviewing the merger, such as regulatory agencies and other antitrust enforcers. The existence of industry regulation can have significant impact on crafting an effective remedy. The same is true regarding other antitrust enforcement agencies.

A. Regulated Industries

When mergers involve firms in regulated industries, the Division considers the impact of applicable regulations. However, the existence of regulation typically does not eliminate the need for an antitrust remedy to effectively preserve competition. Just as in unregulated markets, when the Division determines that an antitrust remedy is necessary to eliminate a merger's potential competitive harm in a regulated market, it seeks that remedy.

Whenever the Division is considering a remedy for a merger in a regulated industry, collaboration with the regulatory agency is a best practice. By working together, the Division and the relevant agency can avoid decrees with inconsistent provisions and can ensure that their remedies work together efficiently and effectively to preserve competition and protect consumers.

The existence of a regulatory regime and agency can have a practical effect on Division remedies in a number of ways. For example, the Division may not need to include certain provisions in its remedial decree if the regulatory agency's order contains those provisions.[45] A regulatory regime also can make monitoring a Division decree easier and more efficient. For instance, the regime may require that regulated companies report information

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[45] *See, e.g.*, Remarks as Prepared for Delivery by Assistant Attorney General Christine Varney at Briefing on Comcast/NBCU Joint Venture (Jan. 18, 2011), *available at* http://www.justice.gov/atr/public/speeches/266156.htm ("I really want to highlight the great cooperation and unprecedented coordination with the FCC. The FCC's order made it unnecessary for the division to impose similar requirements on certain issues. This approach resulted in effective, efficient and consistent remedies.").

to the regulator that the Division can use to monitor the decree. More generally, the regulatory regime often can require a level of transparency that can make Division monitoring more efficient.

B. Other Considerations

In addition to working collaboratively with regulatory agencies, the Division often interacts with international and state antitrust authorities in merger matters. These interactions require the Division to be aware of other jurisdictions' approaches to specific mergers so that, to the extent possible, the Division's remedies do not conflict unnecessarily with the remedies of other jurisdictions. In many cases, the Division may be able to work collaboratively with other antitrust agencies to craft remedies that are effective across jurisdictions. Where possible, the Division welcomes opportunities to cooperate with international and state antitrust authorities to enact more efficient and effective merger remedies.

IV. Implementing Effective Remedies: Practical Considerations

Merger remedies are effective only when properly implemented. Proper implementation can raise a number of practical issues, including the timing of the remedy and the steps that may be necessary to ensure that the remedy is executed in a way that effectively preserves competition in the relevant market(s).

A. Timing

Timing can be a critical factor in determining the parameters of an effective remedy. In some cases, the parties may pursue a pre-consummation "fix-it-first" remedy that may resolve the Division's competitive concerns without requiring the Division to bring suit. In other cases, the parties may propose an upfront buyer for a specific package of divestiture assets. In many other instances, the parties (or a selling trustee) will shop a specific package of assets in an effort to find a buyer. Each of these scenarios raises practical issues for the Division to consider.

1. Fix-It-First Remedies

A fix-it-first remedy is a structural solution implemented by the parties that the Division accepts before a merger is consummated.[46] A successful fix-it-first remedy eliminates the Division's competitive concerns and therefore the need to file a case.[47] A fix-it-first remedy is unacceptable if the remedy must be monitored.

If parties express an interest in pursuing a fix-it-first remedy that satisfies the conditions discussed below, the Division will consider the proposal. Indeed, in certain circumstances, a fix-it-first remedy may effectively preserve competition in the market more quickly and effectively than a decree, allowing the Division to use its resources efficiently. Moreover, a fix-it-first remedy may provide the parties with the maximum flexibility in fashioning the appropriate divestiture. Different purchasers may require different sets of assets to be competitive—a fix-it-first remedy allows the assets to be tailored to a specific proposed purchaser. A consent decree, in contrast, must identify all of the assets necessary for any potentially acceptable purchaser to effectively preserve competition.

Before deciding not to file a case, the Division must be satisfied that the fix-it-first remedy will effectively preserve competition. As part of this process, Division attorneys reviewing fix-it-first remedies carefully screen the proposed divestiture for any relationships between the seller and the purchaser, since the parties have, in essence, self-selected the purchaser. An acceptable fix-it-first remedy contains no less substantive relief than would

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[46] The parties always may *unilaterally* decide to restructure their transaction to eliminate any potential competitive harm. While this may obviate the need for the Division to further investigate the transaction, it is not considered a fix-it-first remedy for the purposes of this Guide.

[47] A fix-it-first remedy usually involves the sale to a third party of a subsidiary or division or of specific assets from one or both of the merging parties.

be sought if a case were filed.[48] The Division, therefore, conducts an investigation sufficient to determine both the nature and extent of the likely competitive harm and whether the proposed fix-it-first remedy will resolve it.[49]

If the competitive harm requires remedial provisions that entail some continuing, post-consummation obligations on the part of the merged firm (e.g., the use of firewalls or other conduct relief), a fix-it-first solution is unacceptable. In such situations, a consent decree is necessary to enforce and monitor any ongoing obligations. For example, a fix-it-first remedy would be unacceptable if, as part of the solution, the merged firm is required to provide the purchaser with a necessary input pursuant to a supply agreement. The Division would insist upon having recourse to a court's contempt power in such circumstances to ensure the merged firm's complete compliance with the agreement.

2. Post-Consummation Sale

a. Upfront Buyers

In some cases the parties will propose the divestiture of a specific package of assets to a particular buyer. The Division may enter into a consent decree agreeing to this type of upfront buyer proposal in cases where it determines that the proposed sale will effectively preserve competition in the

[48] The parties should provide a written agreement regarding the fix-it-first remedy. The agreement should specify which assets will be sold, detail any conditions on those sales (e.g., regulatory approval), provide that the Division be notified when the assets are sold, and state that the agreement constitutes the entire understanding with the Division concerning the divested assets. Unless the parties also enter into a timing agreement, a signed stipulation and consent decree (i.e., a "pocket decree") should be obtained that will be filed if the parties fail to timely comply with the written agreement.

[49] Although the parties may propose a fix-it-first remedy because they face substantial time pressures, the Division must allow itself adequate time to conduct the necessary investigation, including an evaluation of the proposed purchaser. *See* discussion *infra* Part IV.B.4.

relevant market post-merger.[50] This type of arrangement can be beneficial for both the merging parties and the Division. For the parties, resolving a merger's competitive issues with an upfront buyer can shorten the divestiture process, provide more certainty about the transaction than if they (or a selling trustee) must seek a buyer for a package of assets post-consummation, and avoid the possibility of a sale dictated by the Division in which the parties might have to give up a larger package of assets. The Division benefits from avoiding the costs that might be incurred in a longer investigation and post-consummation sale process and gains certainty that the divestiture will be effective in preserving competition. An upfront buyer consent decree also must include an alternative relief proposal, in the event that the pre-approved buyer decides to back out of the arrangement.[51]

b. Standard Consent Decree Post-Consummation Sales

In most merger cases, the Division will require identification of a package of assets to be divested pursuant to a consent decree. The Division typically will seek to ensure that there will be at least one acceptable potential purchaser for the specified asset package. In the absence of an upfront buyer, the Division must be satisfied that the package will be sufficient to attract a purchaser in whose hands the assets will effectively preserve competition.

Parties sometimes dispute what assets are necessary for a divestiture package. To resolve such a dispute, the Division may agree to the parties' proposed package on the condition that, if an acceptable purchaser cannot be found for that package, the parties include additional valuable assets—"crown jewels"—to increase the likelihood that an appropriate purchaser will emerge. Similarly, the parties may proffer a creative solution, but one which may not ultimately result in a successful divestiture. A crown jewel

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[50] *See, e.g.*, United States v. UnitedHealth Grp., Inc., Final Judgment 10 (D.D.C. 2008), *available at* http://home.atrnet.gov/subdocs/237613.pdf (requiring defendants to first attempt to sell the divestiture assets to a specified buyer).

[51] The composition of the alternative asset package will reflect the fact that different assets may appeal to different purchasers.

provision may be necessary in those cases to ensure that the remedy will effectively preserve competition.

As discussed below, the Division must approve any proposed purchaser. Generally, the Division will allow the parties an opportunity to find a purchaser on their own within sixty to ninety days. But if the parties are unable to do so, the Division will reserve the right to appoint a selling trustee to complete the sale.[52]

B. Protecting Divestiture Remedies

Once a divestiture package has been identified, the Division will require certain measures to safeguard the effective implementation of the remedy, including hold separate provisions, provisions for operating, monitoring and selling trustees, and the right to disapprove a proposed purchaser.

1. Hold Separate Provisions

Consent decrees requiring divestiture after the transaction closes require defendants to take all steps necessary to ensure that the assets to be divested are maintained as separate, distinct, and saleable. A hold separate provision is designed to maintain the independence and viability of the divested assets and to effectively preserve competition in the market during the pendency of the divestiture. The Division also often requires the consent decree to include an asset preservation clause, in which the defendant agrees to preserve and maintain the value and goodwill of the divestiture assets during the divestiture process.

However, in some cases hold separate and asset preservation provisions will not entirely preserve competition. For example, managers operating entities kept apart by a hold separate provision may not engage in vigorous competition. Likewise, customers may be influenced in their purchasing decisions by the merger, even if the soon-to-be-divested assets are being

[52] For a more detailed discussion of selling trustees, see *infra* Part IV.B.3.

operated independently of the merged firm pursuant to a hold separate provision. Similarly, there may be some dissipation of the soon-to-be-divested assets during the period before divestiture, notwithstanding the presence of a hold separate or asset preservation provision—valuable employees may leave and certain investments may not be made. For these reasons, hold separate and asset preservation provisions do not eliminate the need for a speedy divestiture.

2. Operating and Monitoring Trustees

An operating trustee is responsible for day-to-day management of all or part of a business ordered to be divested pursuant to the terms of a decree and for assuring that the hold-separate business will be operated competitively. The Division will consider appointing an operating trustee if it believes that the defendant has the ability and incentive to mismanage the assets during the typical divestiture period and thereby reduce the likelihood that the divestiture will effectively preserve competition. Appointment of an operating trustee might be warranted, for example, when intangible property, such as computer software, has been ordered divested, and under-investment in the development and improvement of the software in a rapidly changing business environment may irreparably impair the value of the assets.

The Division also may opt to appoint a monitoring trustee to review a defendant's compliance with its decree obligations to sell the assets to an acceptable purchaser as a viable enterprise and to abide by injunctive provisions to hold separate certain assets from a defendant's other business operations. The Division also will consider appointing a monitoring trustee to oversee compliance with a conduct remedy involving ongoing obligations, especially when effective oversight requires technical expertise or industry-specific knowledge. A monitoring trustee with industry experience can reduce the burden on the Division and the parties while ensuring that the parties adhere to the decree. The monitoring trustee should provide frequent updates to the Division.

3. Selling Trustees

For divestiture to be an effective merger remedy, the Division will appoint a trustee to sell the assets if a defendant is unable to complete the ordered sale within the period prescribed by the decree.[53] A selling trustee provision provides a safeguard that ensures the decree is implemented in a timely and effective manner. In addition, to the extent that defendants desire to control to whom the decree assets are sold and at what price, the potential for a selling trustee to assume that responsibility provides an incentive for defendants to divest the assets promptly and appropriately. Thus, every decree in a Division merger case must include provisions for the appointment of a selling trustee.

In the vast majority of cases, the defendant will have a reasonable opportunity to divest the decree assets to an acceptable purchaser before the Division asks the court to appoint a trustee to complete the sale. The assumption is that the defendant, at least initially, is best positioned to have complete information about the operation and value of the assets to be divested and to communicate that information quickly to prospective buyers, thereby facilitating a speedy divestiture to an acceptable purchaser. However, because a divestiture would introduce a viable new competitor into the market, the defendant also has incentives to delay or otherwise frustrate the ordered divestiture. Therefore, the Division will permit the defendant only a limited time to effect the ordered divestiture before seeking appointment of a trustee.

Effective divestiture decrees typically provide that whenever a divestiture has not been completed by the prescribed deadline for any reason, the Division may promptly nominate, and move the court to appoint, a trustee with responsibility for completing the divestiture to a purchaser acceptable to the Division as soon as possible. In addition, when the proposed remedy is

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[53] Indeed, even in cases in which a defendant has been ordered to divest the assets to a designated buyer, a trustee is necessary in the event that the ordered sale is not completed for some unforeseen reason. *See* United States v. Mittal Steel Co. N.V., 2007-1 Trade Cas. ¶ 75,719 (D.D.C. 2007); United States v. Cargill, Inc., 1997-2 Trade Cas. ¶ 71,893 (W.D.N.Y. 1997).

contingent on the approval of a third party, such as a government permitting agency, and that approval will not be obtained prior to the entry of the decree, the decree should include a contingency provision setting forth alternative relief in the event that the required approval ultimately is not forthcoming.

In rare circumstances, in which the Division has reason to believe at the outset that a defendant will not complete an ordered divestiture within a reasonable time, the Division may require the immediate appointment of a selling trustee. For example, immediate appointment may be appropriate if the assets will deteriorate quickly, such that the seller has an especially strong incentive to delay divestiture, or when a defendant has taken too long a time to complete an ordered divestiture in a previous case.

4. Proposed Purchaser Approval

The Division must approve any proposed purchaser. Its approval will be conditioned on three fundamental tests. First, divestiture of the assets to the proposed purchaser must not itself cause competitive harm. For example, if the concern is that the merger will enhance an already dominant firm's ability unilaterally to exercise market power, divestiture to another large competitor in the market is not likely to be acceptable, although divestiture to a fringe incumbent might. If the concern is one of coordinated effects among a small set of post-merger competitors, divestiture to any firm in that set would itself raise competitive issues. In that situation, the Division likely would approve divestiture only to a firm outside that set.[54]

Second, the Division must be certain that the purchaser has the incentive to use the divestiture assets to compete in the relevant market. The seller has an incentive not to sell to a purchaser that will compete effectively. A seller may wish to sacrifice a higher price for the assets in return for selling to a rival that will not be especially competitive in the future. This is in contrast to a situation in which the firm selling the assets is itself exiting the

[54] Indeed, if harmful coordination is a concern because the merger is removing a uniquely positioned maverick, the divestiture likely would have to be to a firm with maverick-like interests and incentives.

market. The incentive of the latter firm is simply to identify and accept the highest offer.

Because the purpose of divestiture is to preserve competition in the relevant market, the Division will not approve a divestiture if the assets will be redeployed elsewhere.[55] Thus, there should be evidence of the purchaser's intention to compete in the relevant market. Such evidence might include business plans, prior efforts to enter the market, or status as a significant producer of a complementary product.[56]

Third, the Division will perform a "fitness" test to ensure that the purchaser has sufficient acumen, experience, and financial capability to compete effectively in the market over the long term. As part of this process, the Division will examine the purchaser's financing to ensure that the purchaser can fund the acquisition, satisfy any immediate capital needs, and operate the entity over the long term. Divestiture decrees state that it must be demonstrated to plaintiff's sole satisfaction that the purchaser has the "managerial, operational, technical and financial capability" to compete effectively with the divestiture assets.[57]

In determining whether a proposed purchaser is "fit," the Division will evaluate the purchaser strictly on its own merits. The Division will not compare the relative fitness of multiple potential purchasers and direct a sale to the purchaser that it deems the fittest. The appropriate remedial goal is to ensure that the selected purchaser will effectively preserve competition in the market.

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[55] *See supra* Part II.A.1.

[56] Complementary businesses often have a strong independent interest in effectively preserving competition in the relevant market because higher prices in that market would impact them adversely as sellers of complementary goods or services. Further, if others in the relevant market are not vertically integrated, creation of a vertically integrated rival may serve to disrupt post-merger coordinated conduct.

[57] *See, e.g.*, United States v. Amcor Ltd., 2010-2 Trade Cas. ¶ 77,186 (D.D.C. 2010).

If the divestiture assets have been widely shopped and the seller commits to selling to the highest paying, competitively acceptable bidder, then the review under the incentive/intention and fitness tests may be relatively simple.[58] Ideally, assets should be held by those who value them the most and, in general, the highest paying, competitively acceptable bidder will be the firm that can compete with the assets most effectively. However, if (a) the seller has proposed a specific purchaser, (b) the shop has been narrowly focused, or (c) the Division has any other reason to believe that the proposed purchaser may not have the incentive, intention, or resources to compete effectively, then a more rigorous review may be warranted or the Division may reject that purchaser.

C. Divestiture Contract Terms

1. Divestiture Assets

The Antitrust Division's interest in divestiture lies in the effective preservation of competition, not in whether the divesting firm or the proposed purchaser is getting the better of the deal. Therefore, the Division is not directly concerned with whether the price paid for the divestiture assets is "too low" or "too high." The divesting firm is being forced to dispose of assets within a limited time frame. Potential purchasers know this. If there are few potential purchasers to bid up the price, the divesting firm may fail to realize full competitive value. However, if there are many interested purchasers, the divesting firm actually may get a price above the appraised market value. In either event, the Division will not consider the price of the divestiture assets unless it raises concerns about the effectiveness or viability of the purchaser.

For example, in some cases, the Division will not approve a purchaser if the purchase price clearly indicates that the purchaser is unable or unwilling to compete in the relevant market. A purchase price that is "too

[58] The Division may identify specific firms that the seller should contact when the staff has learned of potential purchasers in the course of its original investigation.

low” may suggest that the purchaser does not intend to keep the assets in the market. In determining whether a price is “too low,” the Division will look at the assets’ liquidation value. Liquidation value is defined here as the highest value of the assets when redeployed to some use outside the relevant market. Liquidation value will be used as a constraint on minimum price only when (a) liquidation value reliably can be determined and (b) the constraint is needed as assurance that the proposed purchaser intends to use the divestiture assets to compete in the relevant market. In many cases, however, liquidation value is difficult to determine reliably. Also, sale at a price below liquidation value does not necessarily imply that the assets will be redeployed outside the relevant market. It may simply mean the purchaser is getting a bargain. Therefore, if the Division has other sufficient assurances that the proposed purchaser intends to compete in the relevant market, the Division will not require that the price exceed liquidation value.

A price that appears to be unusually high for the assets being sold could raise concerns for two reasons. First, it could indicate that the proposed purchaser is paying a premium for the acquisition of market power. However, this concern is adequately and more directly addressed by applying the fundamental test that the proposed purchaser must not itself raise competitive concerns. Second, a purchaser who pays too high a price might be handicapped by debt or lack of adequate working capital, increasing the chance of bankruptcy. Thus, the Division may take into account a price that is unusually high when evaluating the financial ability of the purchaser to compete.

2. Restraints on the Resale of Divestiture Assets

Although the Division will insist that the purchaser have both the intention and ability to compete in the market for the foreseeable future, the Division will not insist that the assets, once successfully divested, continue to be employed in the relevant market indefinitely. Conditions change over time, and the divested assets may in the future be employed more productively elsewhere.

However, in unusual circumstances, where the Division is confident that during the life of the consent decree the resale of the divestiture assets to a particular entity or type of entity would harm competition, it may seek to limit the purchaser's ability to sell those assets to such an entity.[59]

There also may be circumstances when the merging firm will be permitted to limit a licensee's further licensing of divested intangible assets. For example, if the remedy includes the right to use a particular brand name in the relevant market, but not elsewhere, and the value of the brand name elsewhere is both significant and reasonably dependent on how it is used in the relevant market, the merging firm may have a legitimate interest in limiting the licensee's ability to re-license the brand name rights.

3. Seller Financing of Divestiture Assets

Seller financing of divestiture assets, whether in the form of debt or equity, raises a number of potential problems.[60] First, the seller may retain some partial control over the assets, which could weaken the purchaser's competitiveness. Second, the seller's incentive to compete with the purchaser may be impeded because of the seller's concern that vigorous competition may jeopardize the purchaser's ability to repay the financing. Similarly, the purchaser may be disinclined to compete vigorously out of concern that it may cause the seller to exercise various rights under the loan. Third, the seller may have some legal claim on the divestiture assets in the event the purchaser goes bankrupt. Fourth, the seller may use the ongoing relationship as a conduit for exchanging competitively sensitive information.

[59] Division decrees also prohibit defendants from reacquiring the divested assets. This prohibition on reacquisition of assets is the key reason that the term of the decree in merger cases exceeds the completion of the divestiture.

[60] The Division may permit the purchaser to make staggered payments to the seller, such as disbursement out of an escrow account pending final due diligence. This is typically not considered seller financing. However, the Division is unlikely to approve any arrangement in which the purchaser's payments to the seller are conditioned on the purchaser hitting volume-based or other types of benchmarks. That kind of arrangement can adversely impact the competitive incentives of both the seller and the purchaser.

Finally, the purchaser's inability to obtain financing from banks or other lending institutions raises questions about the purchaser's viability.

For these reasons, the Division is unlikely to permit the seller to finance the sale of the divestiture assets. The Division will consider seller financing only when it is persuaded that none of the possible concerns discussed above exist. For example, in the relatively rare case where the information financial institutions need to evaluate the purchaser's business prospects is either unavailable or costly to obtain relative to the amount of the financing, very limited seller financing may be considered.

V. Compliance

A. Compliance Enforcement

To ensure that the enforcement of merger remedies is rigorous and benefits from learning across the Division, the evaluation of and oversight over all Division remedies has been placed in the Office of the General Counsel. The General Counsel's Office directly oversees the litigating sections' ongoing review of decree compliance and evaluation of potential decree violations and makes recommendations to the Assistant Attorney General. By concentrating remedy expertise in the General Counsel's Office, the Division can efficiently develop and disseminate remedy best practices and conduct ex post reviews of remedy effectiveness.

It is essential to the Division's mission that merger remedies, whether they are structural or conduct, are strictly enforced. Even the most appropriately tailored remedy is of little value if it is not enforced. The organization of the Division's enforcement efforts seeks to combine case- and industry-specific expertise with specialized remedy expertise. The Office of the General Counsel, as supported with appropriate assistance by lawyers and economists with industry expertise assigned to a particular matter, oversees the Division's decree compliance efforts.

The Division will devote appropriate resources, both before and after a decree is entered, to ensure that the decree is fully implemented. The specific steps necessary to ensure compliance with a decree will vary depending on its nature. For a divestiture decree, staff will closely monitor the sale, including reviewing (a) the sales process, (b) the financial and managerial viability of the purchaser, (c) any documents related to the sale, and (d) any relationships between the purchaser and defendants, to ensure that no such relationship will inhibit the purchaser's ability or incentive to compete effectively.

Where a decree requires affirmative acts, such as the submission of periodic reports, Division staff will determine whether the required acts have occurred and evaluate the sufficiency of compliance. With respect to decrees that prohibit certain actions, staff (or a monitoring trustee) also may need to conduct periodic inquiries to determine whether defendants are observing the prohibitions.

B. Reporting and Inspection Requirements

Consent decrees must include provisions allowing the Division to monitor compliance. For example, they may require defendants to submit written reports and permit the Division to inspect and copy all books and records and to interview defendants' officers, directors, employees, and agents, as necessary, to investigate any possible violation of the decree. Division decrees also may require firms to regularly provide to the Division certain data useful for the Division's decree oversight or to self-report decree violations or allegations of violations. Although civil investigative demands also may be issued to investigate compliance,[61] access terms should nonetheless be included in the decree, both to monitor compliance and to examine possible decree modification or termination.

C. Contempt

If the Division concludes that a consent decree has been violated, it will institute an enforcement action. There are two types of contempt proceedings, civil and criminal, and either or both may be used. Civil contempt has a remedial purpose—compelling compliance with the court's

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[61] 15 U.S.C. §§ 1311(c), 1312(a).

order or compensating the complainant for losses sustained.[62] Staff may consider seeking both injunctive relief and fines that accumulate on a daily basis until compliance is achieved.[63] Criminal contempt is not remedial—its purpose is to punish the violator, to vindicate the authority of the court, and to deter others from engaging in similar conduct in the future.[64] Criminal contempt is established under 18 U.S.C. § 401(3) by proving beyond a reasonable doubt that there is a clear and definite order, applicable to the person charged, which was knowingly and willfully disobeyed. The penalty may be a fine, or imprisonment, or both.

The Antitrust Division has instituted a number of contempt proceedings to enforce its judgments and will continue to do so where appropriate in the future.[65] In some situations, where the correct interpretation of a judgment is disputed, rather than seeking sanctions for contempt, it may be appropriate simply to obtain a court order compelling compliance with the judgment.[66]

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[62] *See* United Mine Workers v. Bagwell, 512 U.S. 821, 826-30 (1994); IBM v. United States, 493 F.2d 112, 115 (2d Cir. 1973).

[63] *See, e.g.*, United States v. United Mine Workers, 330 U.S. 258 (1947); United States v. Work Wear Corp., 602 F.2d 110 (6th Cir. 1979). Moreover, courts have recognized that, under appropriate circumstances, other equitable remedies also may be available (for example, disgorgement of profits as a proxy for harm). *In re* General Motors Corp., 110 F.3d 1003, 1019 n.16 (4th Cir. 1997).

[64] A criminal contempt proceeding may be instituted by indictment, *see* United States v. Snyder, 428 F.2d 520, 522 (9th Cir. 1970), or by petition following a grand jury investigation, *see* United States v. Gen. Dynamics Corp., 196 F. Supp. 611 (E.D.N.Y. 1961).

[65] *See, e.g.*, *Work Wear Corp.*, 602 F.2d 110; United States v. Morton Plant Health Sys., Inc., 2000 WL 33223244 (M.D. Fla. July 14, 2000); United States v. Smith Int'l, Inc., 2000-1 Trade Cas. ¶ 72,763 (D.D.C. 2000); United States v. FTD Corp., 1996-1 Trade Cas. ¶ 71,395 (E.D. Mich. 1995); United States v. N. Suburban Multi-List, Inc., 1981-2 Trade Cas. ¶ 64,261 (W.D. Pa. 1981); s*ee also* United States v. Microsoft Corp., 147 F.3d 935, 940 (D.C. Cir. 1998).

[66] *See, e.g.*, United States v. CBS Inc., 1981-2 Trade Cas. ¶ 64,227 (C.D. Cal. 1981).