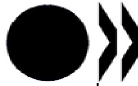
For Official Use **DAF/COMP/WP3/WD(2011)58**

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development **24-Jun-2011**



English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP3/WD(2011)58
For Official Use

Working Party No. 3 on Co-operation and Enforcement

REMEDIES IN MERGER CASES

-- United States --

28 June 2011

The attached document is submitted to Working Party No.3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on the 28 June 2011.

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- Email address: antonio.capobianco@oecd.org]

JT03304519

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

English - Or. English

1. This paper is intended to articulate the principles and practices employed by the United States competition enforcement agencies—the Antitrust Division of the United States Department of Justice ("Antitrust Division")[1] and the United States Federal Trade Commission ("Federal Trade Commission) (together, the "Agencies")—in analyzing, implementing, and enforcing merger remedies.

1. Background

2. Understanding the United States' approach to merger[2] remedies requires an appreciation of how the United States' premerger notification system functions. The United States has two key substantive merger control statutes, the Sherman Act[3] and the Clayton Act.[4] The Hart-Scott-Rodino Act[5] governs premerger notification and requires merging parties whose mergers meet certain dollar thresholds to notify the Government and observe waiting periods before consummating their merger. One of the Agencies will then review the merger and determine whether it is anticompetitive.

3. If the reviewing Agency determines that a proposed merger is anticompetitive, it may seek a preliminary injunction in federal court before the merger takes place. The purpose of the preliminary injunction is to halt the merger until the Agency can fully litigate the likely competitive effects of the proposed merger. If the court issues a preliminary injunction, there will subsequently be a full trial to determine whether the injunction should be made permanent or whether the merger should be allowed to proceed.[6]

4. In practice, however, most parties propose and negotiate a settlement with the Government before litigation, usually by offering to eliminate the anticompetitive aspects of the merger by making a divestiture, proposing limits on their post-consummation conduct, or both.[7] However, while the issues posed by most anticompetitive mergers are resolved through negotiation rather than litigation, the possibility that the reviewing Agency will seek to block the merger drives the negotiation process, including the remedy policies discussed in this paper.

5. This paper discusses mainly settlements and orders that are entered before a merger is consummated. The Agencies apply a similar analysis when seeking to remedy anticompetitive mergers that already have been consummated. The law in the United States is clear that a merger may be challenged after it occurs, whether or not it had been subject to the premerger reporting laws. The same

---

[1] The Antitrust Division has recently released an updated version of its Policy Guide to Merger Remedies. See http://www.justice.gov/atr/public/guidelines/272350.pdf.

[2] The term "merger" is used throughout this paper to include acquisitions and any other similar transactions subject to the statutes enforced by the Agencies.

[3] 15 U.S.C. §§ 1-2.

[4] 15 U.S.C. § 18.

[5] 15 U.S.C. § 18a.

[6] The Federal Trade Commission generally conducts such full trials under its own rules for administrative adjudication, and the result is an order from the Commission, either allowing the merger to go forward, or prohibiting it. The Department of Justice conducts such trials before the court that issued the injunction.

[7] As described below, the Antitrust Division's remedies are embodied in "decrees" (and "consent decrees"), which are issued by a federal court; the Federal Trade Commission's remedies are in "consent orders," which the Commission itself issues. We will use both terms interchangeably throughout this paper.

law and analysis applies to both consummated and unconsummated mergers. The expiration of waiting periods does not create any legal "safe harbor" for an anticompetitive merger.[8]

2. Key Principles of Merger Remedies Policy

6. Because mergers can vary significantly, effective merger remedies also vary from case to case. However, the Agencies apply certain basic principles to all their merger remedies. First, effectively preserving (or restoring) competition is the key to an appropriate merger remedy. The Agencies will consider only remedies that resolve the competitive problems posed by a merger. Second, the Agencies' central goal is preserving competition, not determining market outcomes. Therefore, the Agencies' remedy provisions are designed to preserve competition generally, rather than protect or favor particular competitors. The Agencies will seek merger remedies that protect the competitive landscape by effectively preserving competition without reducing the incentive for individual firms to compete. Third, a remedy closely tailored to the theory of the violation in a particular case is the best way to ensure that the relief obtained cures the competitive harm. The Agencies will accept a proposed remedy only if they are satisfied that there is a close, logical nexus between the proposed remedy and the alleged violation—that the remedy fits the violation and flows from the theory of competitive harm. Effective merger remedies also preserve the efficiencies created by the merger, to the extent possible, without compromising the benefits that result from maintaining competitive markets.[9]

7. The Agencies' focus is on identifying effective relief for the particular merger presented. In certain factual circumstances, structural relief may be the best choice to protect consumers. In different circumstances, conduct relief may be the best choice. And, in still other circumstances, a combination of structural and conduct relief may be the most effective approach.[10]

8. The Agencies' remedies analysis is fact-intensive, as is the case analysis itself. The Agencies typically will determine what competitive harm the merger has caused or likely will cause and what kind of relief, if any, will remedy that particular competitive harm.

3. Types of Remedies

9. The Agencies' merger remedies typically include structural or conduct provisions, or a combination of both, depending on the factual circumstances presented. Structural remedies generally involve the sale of physical assets by the merging firms or, in some instances, the sale or licensing of intangible assets, such as intellectual property, or a combination of both. The Agencies rely on structural remedies to preserve competition in the vast majority of cases when a competitive problem results from a horizontal merger. The Agencies sometimes use structural remedies in the vertical merger context as well. Conduct remedies usually entail provisions that restrain the merged firm's post-consummation business conduct. Conduct remedies can be particularly effective for dealing with competitive problems raised by vertical mergers and also are sometimes used to address issues raised by horizontal mergers (usually in

[8] In *Chicago Bridge and Iron*, at http://www.ftc.gov/os/adjpro/d9300/050106finalorder9300.pdf, the FTC challenged a consummated merger in several markets for high pressure storage tanks, and ordered the firm to split up and divest half. The FTC's order was affirmed by the court of appeals, 534 F.3d 410 (5th Cir. 2008).

[9] A remedy is not effective simply because it preserves a proposed transaction's claimed efficiencies. Rather, a remedy's effectiveness depends fundamentally on its impact on consumers and competition.

[10] In appropriate circumstances, the Agencies also may consider seeking disgorgement in consummated merger challenges, either instead of or in addition to unwinding the transaction. *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.

conjunction with a structural remedy). In cases in which neither structural nor conduct relief, nor a combination of the two, would effectively preserve competition, the Agencies will seek to block the merger (or unwind a consummated merger).

3.1. Structural Remedies

10. For a structural remedy to be effective, the purchaser of the divested assets must possess both the means and the incentive to preserve competition in the affected market(s). Therefore, any divestiture must include all the assets, physical and intangible, necessary for the purchaser to effectively compete with the merged entity. This often requires the divestiture of an existing business entity that already has demonstrated its ability to compete in the relevant market. An existing business entity typically possesses not only all the physical assets, but also the personnel, intangible assets, and management infrastructure necessary for the efficient production and distribution of the relevant product, and it already has succeeded in competing in the market.

11. The Agencies sometimes will accept divestiture of less than an existing business entity, if circumstances warrant. For example, the Agencies may consider such a divestiture if there is no relevant business entity smaller than either of the merging firms, a set of acceptable assets can be assembled from the merging firms, and the Agencies are persuaded that these assets will create a viable entity that will effectively preserve competition. The Agencies also may consider divestiture of less than an existing business entity when certain of the entity's assets already are in the possession of, or readily obtainable in a competitive market by, the purchaser. In those circumstances, the Agencies typically would need to know the purchaser's identity in advance.

12. The Agencies also may consider divestiture of more than an existing business entity, where that is necessary to preserve competition. For example, in some industries, it is difficult to compete without offering a "full line" of products. In those circumstances, the Agencies may seek to include a full line of products in the divestiture package, even if their antitrust concern relates to only a subset of those products, so that the purchaser has similar "scope" economies as the merged firms.

13. In some situations, the assets necessary for the purchaser to compete effectively are intangible assets—for example, when firms with alternative patent rights for producing the same final product are merging. In those cases, structural relief must provide one or more purchasers with rights to those assets, either by sale to a different owner or through licensing.

3.2. Conduct Remedies

14. Conduct remedies can be particularly effective for dealing with competition issues raised by vertical mergers and sometimes are used to address issues raised by horizontal mergers, usually in conjunction with a structural remedy. There is a range of conduct remedies that may be effective in preventing consumer harm.

15. The most common forms of conduct relief are firewalls, non-discrimination, mandatory licensing, transparency, and anti-retaliation provisions, and prohibitions on certain contracting practices.

16. Firewalls are designed to prevent the dissemination of information within a firm.[11] Monitoring is required to ensure that the firewall provision is adhered to and is effective.

[11] For example, if an upstream dominant firm proposes to merge with one of three downstream firms competing in the same relevant market, the Agencies may be concerned that the upstream firm will share information with its acquired downstream firm (and perhaps with the two other downstream firms) that will

17. Non-discrimination provisions incorporate the concepts of equal access, equal efforts, and equal terms.[12] When including a non-discrimination clause in a remedy, the Agencies may insist on an arbitration provision that will allow complainants to resolve controversies regarding the merged entity's conduct under the clause without direct Agency involvement. The Agencies will monitor the implementation of the arbitration provision and in all cases retain responsibility for enforcement.

18. In certain circumstances, parties may propose, as part of a settlement, to license certain technology or other assets on terms that would prevent harm to competition. 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 competition.[13] Licensing agreements of this type can be enforced through mandatory arbitration provisions.

19. The Agencies sometimes employ transparency provisions as a form of relief in vertical merger cases.[14] These 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.[15]

---

facilitate anticompetitive conduct. A firewall could prevent that. *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). Similarly, in *PepsiCo, Inc.*, PepsiCo, which manufactures soft drink concentrates but sells through independent bottlers, was acquiring the major national third-party bottlers who handle both PepsiCo and Dr Pepper/SevenUp brands. The FTC was concerned that PepsiCo would be able to obtain competitively sensitive information about the marketing plans of concentrate-manufacturer Dr Pepper/SevenUp (separate from distribution plans of the bottler); the Commission's order establishes firewalls that prevent such information flowing up to the concentrate portion of PepsiCo's business. *See* http://www.ftc.gov/os/caselist/0910133/100928pepscodo.pdf (2010).

12 *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. If, for example, an upstream monopolist proposes to merge with one of three downstream firms competing in the same relevant market, the Agencies 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 the information available regarding competitive prices in the relevant market, the Agencies will consider employing a non-discrimination clause requiring the upstream firm to offer the same terms to all three downstream competitors. The Agencies 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.

13 *See* 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.

14 *See, e.g.*, United States v. MCI Commc'ns Corp., 1994-2 Trade Cas. ¶70,730, *1-7 (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). Similarly, in *Entergy and Entergy-Koch* (2001), the FTC was concerned that the vertical combination would allow the merged firm to avoid certain rate regulation by the Louisiana or Mississippi (state) Public Service Commissions; the FTC's order requires Entergy to post certain pricing information, in the form of requests for proposals, in a public manner, so that the state regulatory agencies can see and monitor them. *See*, http://www.ftc.gov/os/2001/01/entergydo.pdf. In considering requiring a transparency provision, the Agencies are alert to the possibility that increased transparency could, under some conditions, facilitate coordination in certain industry settings.

15 For example, a consent order may require a telecommunications firm 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

20. Anti-retaliation provisions also may prove effective in preserving competition. Such provisions 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.[16] They also may prohibit the merged entity from discriminating or retaliating against an entity for providing information to the Agencies 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.[17]

21. In some circumstances, the Agencies 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 a competitor's 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.[18] 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.

22. No matter what form a conduct remedy takes, clear and careful drafting is especially important. Remedial provisions that are too vague to be effectively enforced or that could be misconstrued and thereby fail to achieve their intended purpose risk rendering useless the effort devoted to investigating the merger and obtaining the decree, leaving the competitive harm unchecked. Conduct remedies must 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 crafted can be an invitation for a defendant to try to evade the intent of the decree.

3.3. Hybrid Remedies

23. In some circumstances, the most effective remedy will include both 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 merging firms to divest certain customers' contracts (structural relief) and also preventing abusive contracting practices (conduct relief).

24. In other circumstances, temporary conduct relief will be necessary to help strengthen structural relief. For example, the Agencies 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, product mixes are altered, or the purchaser obtains government approvals or customer qualification).[19] In

---

telecommunications equipment clients with which it competes for provision of telecommunications services higher prices than it charges its other telecommunications equipment customers.

[16] *See, e.g.*, *Ticketmaster*, 2010-2 Trade Cas. at *25-26.

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

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

[19] The Agencies pay 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 Agencies 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

those circumstances, a supply agreement can help prevent the loss of a competitor from the market, even temporarily. Similarly, temporary limits on the merged firm's ability to reacquire personnel may at times be appropriate as part of a divestiture to ensure that the purchaser will be a viable competitor.[20] The Agencies may also require the merged firm to provide certain interim technical assistance to a purchaser, especially in cases involving highly technical and complex production markets.

4. Implementing Effective Remedies

25. Merger remedies are effective only when properly implemented. Proper implementation involves determining the timing of the remedy and the steps necessary to ensure that the remedy is effectively executed.

4.1. Timing

26. The timing of merger remedies in the United States varies depending on the factual circumstances of particular mergers. In some cases, the merging parties may choose to pursue a pre-consummation remedy that may resolve the Agencies' competitive concerns without requiring the Agencies to bring suit. In other cases, the parties will propose the divestiture of a specific package of assets to a particular buyer ("upfront buyer"). In many other instances, the parties, or a selling trustee, will have a deadline to find a buyer for a specific package of assets.

27. A fix-it-first remedy is used at times at the Antitrust Division; it is a structural solution that the parties implement and the Division accepts before a merger is consummated. To accept a fix-it-first proposal, the Division must be satisfied that the remedy will effectively preserve competition. An acceptable fix-it-first remedy contains no less substantive relief than the Division would seek if it filed a case in court. The Division, therefore, will conduct 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. In certain circumstances, a fix-it-first remedy may preserve competition in the market more immediately and effectively than would a decree, allowing the Division to use its resources more efficiently. However, if the competitive harm from a particular merger requires remedial provisions that entail continuing, post-consummation obligations on the part of the merged firm, the Division will reject a fix-it-first remedy because an order will be necessary to enforce and monitor the ongoing obligations. The FTC does not have a formal policy of using fix-it-first remedies. Nevertheless, parties in rare instances (after it becomes clear where the FTC staff's concerns lie) have unilaterally sold off the relevant assets in an acceptable manner, at which point the FTC has decided that no further relief is required. In those rare instances, the FTC has not required a formal order.

---

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 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 Agency decrees generally will be short-term and used as a transitional mechanism until the purchaser is able to secure another source of supply.

[20] *See, e.g.*, United States v. AlliedSignal, 2000-2 Trade Cas., ¶ 73,023 *21-23 (D.D.C. 2000); United States v. Aetna, 1999-2 Trade Cas., ¶ 72,730 *15-16 (N.D. Tex. 1999). And *see, e.g.*, *BASF SE*, at paragraph VII.B. for a typical such provision in an FTC order. http://www.ftc.gov/os/caselist/0810265/090526basfdo.pdf (2009).

28. In some cases the parties may propose an upfront buyer for a specific package of divestiture assets. The Agencies may enter into a consent order agreeing to this type of proposal if they determine that the proposed sale will effectively preserve competition in the relevant market post-merger. This type of arrangement can benefit both the merging parties and the Agencies. The parties benefit because the divestiture process is generally shorter and more certain than if they shopped a broader package of assets to a number of potential purchasers for a post-consummation sale. The Agencies and consumers benefit from avoiding any loss of competition during the search for purchasers, and avoiding costs arising in a longer investigation and post-consummation sale process. The Agencies also gain the certainty that the divestiture will occur, and thus effectively preserve competition. The FTC generally requires upfront buyers if there is any real risk that approvable purchasers might not exist for a divestiture package, or if there is concern about the viability of the divestiture package during the divestiture period. For example, the FTC routinely requires upfront buyers in mergers involving pharmaceutical products, because a successful divestiture requires finding an approvable and interested purchaser from a very small group of candidates (other pharmaceuticals manufacturers who do not have overlapping products). The FTC also routinely requires upfront buyers in food retailing mergers, because retailing assets are particularly susceptible to competitive diminishment (loss of consumer interest or "franchise") during the divestiture period.

29. In all merger cases with divestiture orders, the Agencies will require identification of a package of assets to be divested pursuant to the order or decree (even for upfront buyers). In the absence of an upfront buyer, the Agencies must be satisfied that the asset package will be sufficiently broad to attract a purchaser in whose hands the assets will help preserve competition – that is, that the package contains everything a competitor would need. The Agencies also will need to confirm, in their investigation, that there will be at least one acceptable potential purchaser for the specified asset package. The Agencies do this by interviewing likely interested purchasers.

30. When parties dispute what assets must be included in the divestiture package, the Agencies may agree to the parties' proposed package on the condition that, if an acceptable purchaser cannot be found for that package, the parties must include additional valuable assets – "crown jewels" – to increase the likelihood that an appropriate purchaser will emerge.[21] The Agencies must approve any proposed purchaser. Generally, the Agencies will allow the parties an opportunity to find a purchaser on their own within sixty to ninety days. The Agencies will reserve the right to appoint a selling trustee to complete the sale if the parties are unable to do so in that timeframe.

4.2. Implementation

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

32. Consent decrees or orders mandating post-consummation divestiture will require the merged firms to take all steps necessary to ensure that the assets to be divested are maintained as separate, distinct, and saleable. A hold separate agreement or order is designed to maintain the independence and viability of the divested assets and to preserve competition in the market during the pendency of the divestiture. The remedy also often includes an asset preservation clause, which requires the defendant to preserve and maintain the value and goodwill of the divestiture assets during the divestiture process. Because hold

[21] The use of crown jewels and upfront buyers are related: if there is doubt that the offered package is viable or sellable, the Agencies can insist on an upfront buyer (to test the offer before a settlement is reached), or may instead agree to a crown jewel provision.

separate and asset preservation provisions will not in all cases entirely preserve competition, these provisions do not eliminate the need for a speedy divestiture.

33. If the Agencies are concerned that a defendant has the ability and incentive to mismanage the divestiture assets during the typical divestiture period, thereby reducing the likelihood that the divestiture will effectively preserve competition, the Agencies will consider appointing an operating trustee or manager to oversee day-to-day management of the assets and to assure that they will be operated competitively. The Agencies also may appoint a monitoring trustee to review a defendant's compliance with its 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 the defendant's other business operations. Similarly, the Agencies may 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.

34. The Agencies must have the ability to seek appointment of a selling or divestiture trustee to sell the divestiture assets if a defendant fails to complete the ordered sale by the ordered deadline. Therefore, the Agencies' divestiture decrees always include a provision for the appointment of a selling trustee. In most cases, the Agencies will allow the defendant a reasonable opportunity to divest the assets to an acceptable purchaser before they ask the court to appoint a trustee to complete the sale.[22] However, in rare circumstances, in which the Agencies have reason to believe that the defendant will not complete the ordered divestiture within a reasonable time, the Agencies may require the immediate appointment of a selling trustee.

35. The Agencies must approve any proposed purchaser. The Agencies condition their approval on the satisfaction of three fundamental tests. First, divestiture of the assets to the proposed purchaser must restore the lost competition and must not itself cause competitive harm. Second, the Agencies must be certain that the purchaser has the incentive to use the divestiture assets to compete in the relevant market. The Agencies will not approve a divestiture if the divested assets will be redeployed elsewhere. Third, the Agencies will determine whether the proposed purchaser has sufficient acumen, experience, and financial capability to complete the acquisition and to compete effectively in the market over the long term.

5. Public Comments and Judicial Review

36. The Antitrust Division and the Federal Trade Commission have different procedures for seeking public comment and final approval of a proposed remedy, but they serve the same goal of announcing the settlement and inviting public comment.

37. The Antitrust Division must file suit in federal court to block or otherwise challenge a merger. When the parties and the Antitrust Division agree on a remedy that will cure the merger's anticompetitive impact, the Division must file a proposed consent decree embodying the remedy with the relevant court. Under the Antitrust Procedures and Penalties Act ("APPA"),[23] proposed consent judgments in antitrust cases brought by the United States are subject to a sixty-day comment period, after which the court must determine whether entry of the proposed final judgment "is in the public interest." Third parties and the public have the opportunity, during the sixty-day comment period, to file public comments on the proposed final judgment. In determining whether to approve the proposed remedy, the reviewing court generally will consider, among other factors, the relationship between the remedy secured and the specific allegations set forth in the Government's complaint, whether the decree is sufficiently clear, whether

---

[22] The FTC's orders allow the Commission itself to appoint the divestiture trustee (as well as monitors), if the Commission decides it is necessary.

[23] 15 U.S.C. §16(b)-(h).

enforcement mechanisms are sufficient, and whether the decree may cause harm to third parties. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public."[24]

38. The Federal Trade Commission must also ask a court to block a proposed merger. In other respects, however the Commission uses its own administrative procedures to settle cases. When the parties reach a settlement agreement with the Commission's staff, the Commission must vote to accept the agreement for public comment. During the 30-day public comment period (which begins with a Commission press release and publication of the proposed complaint and consent order), anyone may file comments concerning the case. Following the public comment period, the Commission will determine whether to issue the proposed order as final. The Commission may renegotiate terms, if information indicates that that is appropriate. Or (very rarely), the Commission may decide to close the investigation and not issue an order at all. None of these decisions require approval of the courts.[25]

6. Compliance

39. The Agencies devote significant resources to ensuring that their decrees and orders are fully implemented. When an order requires a divestiture, the responsible Agency will closely monitor the sale, including reviewing (a) the sales process, (b) the competitive, 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 relationships will inhibit the purchaser's ability or incentive to compete vigorously. For a decree that requires affirmative acts, the responsible Agency will determine whether the required acts have occurred and evaluate the sufficiency of compliance. When a decree prohibits certain actions, the responsible Agency or a monitoring trustee will conduct periodic or ongoing inquiries to determine whether defendants are observing the prohibitions.

40. Merger orders and decrees must include provisions allowing the Agencies to monitor compliance. These decrees may require defendants to submit written reports and permit the Agencies to inspect and copy all relevant books and records and to interview defendants' officers, directors, employees, and agents, as necessary, to investigate any possible decree violations. Agency orders also may require firms to regularly provide to the relevant Agency certain data useful for decree oversight or to self-report decree violations or allegations of violations. Although the Agencies may issue civil investigative demands (and otherwise use their full investigative authority) to investigate compliance, the Agencies will also require that access terms be included in the decree, both to monitor compliance and to examine possible decree modification or termination.

41. If the Agencies conclude that a consent decree has been violated, they will institute an enforcement action. Both the Antitrust Division and the Federal Trade Commission will bring their enforcement actions in federal court. The Antitrust Division can pursue either or both civil and criminal contempt actions. Civil contempt has a remedial purpose—compelling compliance with the court's order or compensating the complainant for losses sustained. The Antitrust Division may consider seeking both injunctive relief and fines that accumulate on a daily basis until compliance is achieved. 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. The penalty may be a fine, or imprisonment, or both. The Division must prove any criminal case beyond a reasonable doubt, which is a higher burden than the burden for civil actions.

---

[24] United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988).

[25] The Commission might also determine that more relief is required, and if the parties do not consent the Commission will begin administrative litigation to obtain that relief. Parties may appeal any resulting order to the federal appeals courts.

42. The Federal Trade Commission may seek daily civil penalties and injunctive relief, both to obtain compliance and to punish past or ongoing non-compliance. The civil penalty proceeding is similar to a civil contempt proceeding but is a separate proceeding established by statute. The Commission may bring an enforcement action either in its own name, or, with the help of the Department of Justice, in the name of the United States.

7. Guidance

43. The remedies principles described in this paper are addressed in more detail in publicly available guidelines documents issues by the Agencies. The Antitrust Division has recently released an updated version of its Policy Guide to Merger Remedies.[26] The Federal Trade Commission's Bureau of Competition has released two related guides: a statement on negotiating merger remedies,[27] and frequently asked questions about merger remedies.[28] Both Agencies also at times discuss these issues during speeches and at bar and other public meetings.

8. International Consultation and Cooperation

44. Increasingly, the Agencies review mergers that also are reviewed by other competition agencies around the world. For example, in early 2010, the Antitrust Division took into account the commitments that the parties in the *Cisco/Tandberg* merger gave to the European Commission regarding interoperability in concluding that the proposed merger was not likely to be anticompetitive.[29] The Division and the European Commission worked together very closely on their investigations and closed them on the same day. The Division also worked closely with the German Federal Cartel Office (FCO) on the acquisition of certain patents and patent applications from Novell Inc. by CPTN Holdings LLC.[30] At the request of the two agencies, CPTN – a holding company owned originally by Microsoft Inc., Oracle Corp., Apple Inc. and EMC Corp. – made revisions to the transaction agreements that were necessary to protect competition and innovation in the open source software community. The close cooperation between the agencies was aided by waivers from the parties that allowed the sharing of information and assessments of likely competitive effects and coordination on potential revisions to the parties' agreements. Finally, in May 2011, the Division entered into a consent decree with Unilever and Alberto-Culver requiring the parties to divest two hair care brands in order to proceed with Unilever's $3.7 billion acquisition of Alberto-Culver.[31] The Division communicated with the UK Office of Fair Trading, the Mexican Federal Competition Commission and South Africa's Competition Commission – although the differences in products and markets were such that the outcomes in the various jurisdictions were not identical. Both Unilever and Alberto-Culver provided waivers, in a timely way, to facilitate the international cooperation in this case. Some recent FTC enforcement actions that involved cooperation with the European Union include *BASF SE*, cited earlier,[32] which involved divestitures in high performance pigments markets, and *Agilent Technologies*, which involved world-wide divestitures in mass spectrometry and gas chromatography

---

26 See press release at http://www.justice.gov/atr/public/press_releases/2011/272365.htm.

27 http://www.ftc.gov/bc/bestpractices/bestpractices030401.shtm.

28 http://www.ftc.gov/bc/mergerfaq.shtm.

29 See press release at http://www.justice.gov/atr/public/press_releases/2010/257173.htm.

30 See press release at http://www.justice.gov/atr/public/press_releases/2011/270086.htm.

31 See press release at http://www.justice.gov/atr/public/press_releases/2011/270854.htm.

32 See press release at http://www.ftc.gov/opa/2009/04/basf.shtm.

markets.[33] In such investigations, the agencies seek to coordinate and cooperate as much as possible with their sister agencies in other jurisdictions.

33 See press release at http://www.ftc.gov/opa/2010/05/agilent.shtm, noting the FTC's cooperation with Australia's Competition and Consumer Commission, the European Commission, and the Japan Fair Trade Commission.