Organisation for Economic Co-operation and Development

DAF/COMP/WP3/WD(2018)35

Unclassified

English - Or. English

23 May 2018

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

Roundtable on designing and testing effective consumer-facing remedies - Note by the United States

5 June 2018

This document reproduces a written contribution from the United States submitted for Item 4 at the 127th Meeting of the Working Party No 3 on Co-operation and Enforcement on 5 June 2018.

More documentation related to this discussion can be found at www.oecd.org/daf/competition/consumer-facing-remedies.htm

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JT03432292

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1. Introduction

1. Competition law enforcement benefits consumer welfare by preventing mergers or anticompetitive conduct that deny consumers or customers the benefits of competition. The Federal Trade Commission and Department of Justice ("the Agencies") are the federal agencies in the United States responsible for enforcing the federal antitrust laws. If the Agencies conclude that a merger is likely to lessen competition, the agencies may enter into a binding settlement[1] with the merging parties, designed to remedy or mitigate any anticompetitive effects of a proposed merger. Similarly, if the Agencies conclude that certain conduct violates the antitrust laws, they may enter into a settlement with the violators prohibiting them from continuing the conduct.

2. Certain features of competition remedies address demand-side dynamics to ensure the remedy effectively maintains competition in the market going forward. The remedy may address consumer-facing market practices,[2] such as long-term contracts or reputational barriers that affect competition. In addition, the remedy may include provisions that maintain customer relationships, or conversely, facilitate or encourage customer switching.

3. The goal of a merger remedy is to restore or maintain competition lost as a result of the merger. The Agencies prefer structural remedies, which often include divestitures of tangible and intangible assets. The remedy may, for example, include provisions that facilitate the transfer of knowledgeable employees of the divested business to the buyer, or provisions that mandate the transfer of customers or customer contracts from the merging parties to the buyer. In some cases, remedies will also include behavioural relief to support the effectiveness of the structural relief, but the Agencies very rarely will approve behavioural remedies, standing alone, to resolve a merger. Thus, a remedy may include requirements that the merging parties supply finished product or technical assistance to the buyer of the divested assets, or facilitate customers' ability to switch from the merging parties to another supplier, or address the harm to customers or competition from the merging parties' contract terms and their enforcement.

4. The goal of non-merger remedies is to stop or prevent behaviour that lessens or restricts competition, primarily by means of "cease and desist" or injunctive requirements. The Agencies also seek to remedy harm from anticompetitive conduct, and prevent recurrence of behaviour that reduces consumer choices, increases prices, or slows innovation.

[1] Alternatively, the Agencies may seek an injunction order from a court to stop the merger or the behaviour. These contested cases may later result in a negotiated settlement, which would reflect the same principles discussed here, or the court may impose an order consistent with legal precedent.

[2] Where the goods or services in a relevant market are sold by the merging parties to other businesses, rather than directly to end-use consumers, consumer-facing may mean a business that provides an input to a good that is ultimately purchased by an end-user.

2. Merger Remedies Seek to Maintain the Level of Competition for Consumers

5. Understanding market dynamics is important to designing effective remedies that prevent harm from anticompetitive mergers or conduct. In merger cases, the investigation may show that the parties' proposed package of divested assets would likely not permit a buyer to replace the competitive effectiveness of the acquired firm. Discussions with affected customers help the Agency assess the assets that are necessary for a buyer[3] to maintain or restore competition at pre-merger levels. Staff routinely interview prospective customers of the buyer to determine whether the buyer will have customers and long-term profitability, and thus, replace the acquired company as a viable competitor in the relevant product market. In addition, staff will speak with, and request information from, the proposed buyer to determine whether the buyer is viable and has the resources and assets necessary to replace the acquired company.

6. Customer input helps inform the Agencies' evaluation of a proposed remedy in two important ways. First, customers may point to deficiencies in the proposed asset package that may prevent the buyer from replacing the competitive effectiveness of the acquired firm. Second, customers may be sceptical of the proposed buyer, which puts the remedy at risk of failing.[4]

7. The Agencies routinely market test the asset package to determine whether the assets being transferred to the proposed buyer will allow the buyer to effectively compete in the relevant product and geographic markets. This is an informal process that includes internal Agency evaluation of materials received from the buyer, including financial documents and business plans, as well as discussions with customers and other market participants.

8. In some situations, the proposed asset package is insufficient to allow the buyer to replace the competitive effectiveness of the acquired firm. Typically, this situation arises when parties propose divesting only selected assets, not an entire, ongoing business or business unit, to resolve the competitive problem. Such instances might include a merger for which the affected relevant geographic market is the United States, but the proposed asset package includes only selected parts of a business that do not give the buyer sufficient coverage across the entire United States.[5]

9. For example, in *FTC v. Sysco Corporation*, the merging parties offered to divest 11 strategically located distribution centres of the acquired firm, US Foods, to PFG, the proposed buyer, arguing that such divestiture would replace the competition lost as a result of the merger.[6] The proposed divestiture of 11 distribution centres did not include US Foods' entire US broadline foodservice distribution business. During the investigation

[3] An upfront buyer is selected and approved prior to finalizing the settlement; a post-order buyer is selected and approved after the settlement is finalized as a consent order or decree.

[4] The Agencies may find a buyer unacceptable on other grounds. *See* STATEMENT OF THE FEDERAL TRADE COMMISSION'S BUREAU OF COMPETITION ON NEGOTIATING MERGER REMEDIES (2012) at 10-12. https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remedi esstmt.pdf; ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES, U.S. DEPARTMENT OF JUSTICE (2004) at 30-33.

[5] FTC v. Sysco Corporation, 83 F.Supp.3d 1 (2015).

[6] *Id.* at 74.

phase of the case, Commission staff learned that the proposed assets to be divested would not be adequate for PFG to compete across the entire United States. The Commission's market test revealed that there would be geographic areas where PFG would not be able to compete with the merged firm, and therefore, that the 11 distribution centres would not be enough for PFG to replace the competitive impact of US Foods. In February 2015, the Commission rejected the proposed divestiture and sought to block the merger in federal court.

10. After a trial on the Commission's preliminary injunction motion, the district court agreed that the proposed divestiture would not allow PFG to meet the demands of national customers on the same premerger scale as US Foods. "Having only one-third of the merged company's distribution centres will put PFG at a significant disadvantage in competing for national customers…. The court is not convinced that these large national customers will consider a post-merger PFG to be as capable of meeting their needs as USF is today."[7] Both the Commission and district court partly relied on customer testimony to reject the remedy as adequate to restore competition.

11. The viability of the buyer is also key to a successful remedy. In *FTC v. Sysco Corporation*, the court found that the business plans and financial documents of the buyer, along with other evidence, did not support the parties' claim that PFG would replace US Foods for national foodservice customers. The district court found that "PFG's five-year business plan shows that post-merger PFG will not be nearly as competitive as USF is today."[8] PFG's internal business plan projected that it would grow to 20 percent of the national broadline market over the course of five years.[9] The Court stated, "the fact that PFG only expects to achieve less than *half* of USF's current national customer sales in five years — assuming that its planned expansion efforts are successful — does not demonstrate that PFG will be sufficiently able to "discipline a merger-generated increase in market power."[10]

12. Another recent case in which a judge rejected the remedial divestiture offered by the merging parties was the proposed merger of health insurers Aetna Inc. and Humana Inc.[11] Aetna and Humana are two of the largest providers of individual Medicare Advantage plans, and the combination was presumptively anticompetitive under the Horizontal Merger Guidelines[12] in 364 counties across 21 states. The parties proposed to divest 290,000 members, with at least some of these members coming from all 364 of the complaint counties, to Molina Healthcare, another insurer.

13. As in *Sysco*, the court had significant concerns regarding Molina's ability to replace the competition lost as a result of the proposed merger. Molina's business focused on Medicaid plans, and Molina had no Medicare Advantage business at the time of the proposed divestiture. Molina was also less of a national player than either Aetna or

[7] *Id.*

[8] *Id.* at 73.

[9] *Id.*

[10] *Id.*

[11] U.S. v. Aetna Inc., 240 F.Supp.3d 1 (D.D.C. 2017).

[12] *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Horizontal Merger Guidelines (2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

Humana, offering its Medicaid plans in only 12 states and Puerto Rico. In order to continue to operate the divested Medicare Advantage plans, Molina would need to develop provider networks and contracts—assets that were not included in the divestiture—for a product in which it lacked experience and across a broader geographic range than Molina had ever attempted. To make matters worse, the "'fire sale' price" at which Molina purchased the assets meant that Molina could make a "low risk" investment even if it had "serious doubts about its own ability to manage all the divestiture plans."[13]

14. The court rejected this proposed remedy, noting that there was no divestiture of an existing business entity, including no divestiture of personnel, information systems, or management infrastructure. The drawbacks of such a limited divestiture were illustrated by an exchange between a Molina board member and Molina's CEO. As the board member noted, "[Medicare Advantage] is a very different business from what we do . . . . Unless we can acquire some talent as part of the deal, I think we are woefully under-resourced to be able to take this on." The CEO responded "Agree wholeheartedly."[14] Rather than divest a complete business unit, the parties proposed to provide administrative services for a period of six to eighteen months as Molina developed its internal capabilities. But a continuing relationship with Aetna and Humana, which planned to continue competing for individual Medicare Advantage business, would have left Molina susceptible to an uncooperative vendor; as the judge stated, "Aetna and Humana have no incentive to provide any assistance beyond the bare minimum during this period, lest they create too powerful a competitor."[15] In summary, the court concluded that the divestiture would be an inadequate remedy because the purchaser would not be a viable competitor and would not restore the competition lost by the proposed merger.

3. The 2017 FTC Merger Remedies Study

15. FTC staff recently conducted a retrospective study to evaluate the success of each remedy the Commission obtained from 2006 to 2012,[16] and examined the remedy process more generally. The staff used three methods to conduct the study. For the majority of the orders, staff used the case study method.[17] For 15 orders affecting supermarkets, drug stores, funeral homes, dialysis clinics, and other health care facilities, staff examined

[13] *Id.* at 72.

[14] *Id.* at 69.

[15] *Id.* at 71.

[16] THE FTC'S MERGER REMEDIES 2006-2012, A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS (2017) (FTC staff report), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

[17] Commission staff interviewed the buyers of the divestiture assets, respondents, competitors and customers, and also analysed sales data.

buyer responses to a questionnaire.[18] For 24 pharmaceutical orders, staff evaluated internal and publicly available information.[19]

16. For the 50 orders examined as case studies, staff's interviews with market participants suggested that attracting and retaining customers could be difficult.[20] The study pointed to a misunderstanding of customer buying behaviour as the underlying problem. The misunderstanding could relate to the customers' buying cycle, underestimating customer loyalty to a brand, or underestimating the difficulties of switching suppliers.

17. In one case, the customers evaluated suppliers every few years, leaving the buyer of the divestiture assets little opportunity to meet with customers.[21] Meanwhile, the respondent, with a broader portfolio of products to market to customers, had an opportunity to meet with customers more frequently. Another buyer attributed its slow growth to the customer buying cycle that opened only every few years. In another divestiture, the buyer missed the seasonal buying cycle and had difficulty achieving sales for almost a year.[22]

18. The remedy study confirmed that customer qualification requirements may delay a divestiture buyer's efforts to win customers.[23] When staff has determined that customer qualification can impact a supplier's success in the market, order provisions are often included to make the customer transition to the divestiture buyer easier.

19. The remedies study includes recommended best practices that describe what respondent and proposed buyers can expect during the remedy process to facilitate buyers' ability to win customers.[24] Specifically, the buyer should review and understand customer relationships, including customers' buying patterns, customer brand and product loyalty, and customer switching costs. The buyer should also take advantage of its access to customers. If the order enables customers to terminate their contracts with the respondent early, then the buyer should provide input into any communication the respondent is obligated to provide customers about their ability to terminate their contracts.

20. The remedies study's recommended best practices describe the various ways respondents should be prepared to facilitate a buyer's ability to win customers.[25] Specifically, respondents should be prepared to provide buyers access to customers early in the process. When contracts are assignable, respondents should be prepared to assign

[18] The questionnaire asked about the due diligence process, the scope of the asset package, transition services, and post-divestiture operations. It also asked for suggestions for improving the process. Remedies Study at 29.

[19] These orders remedied mergers of generic drug competitors. Staff considered whether the technology transferred, and whether the buyer sold the product on the market post-divestiture.

[20] Remedies Study at 25-26.

[21] *Id.* at 25.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 35.

[25] Remedies Study at 35.

contracts to the buyers. When customer consent is required to assign a contract, respondents should assist the buyers in obtaining the consents. Respondents should be prepared to waive contractual restrictions that prohibit the customers from switching to the divestiture buyer and should allow customers to terminate their contracts early and without penalty. Respondents should be prepared to inform customers of the divestiture and, if applicable, of their rights to terminate their contract with respondents. Buyers should have the ability to provide input into any such communication.

4. Provisions in Merger Remedies May Address Customer Relationships Associated with the Divested Assets

21. In certain circumstances, the remedy requires the merging parties to transfer customer contracts to the buyer. This enables the buyer to immediately make sales and compete in the relevant markets. A buyer's ability to sell to an adequate customer base as soon as it acquires the divestiture assets decreases the risk that the buyer will struggle to be viable and competitive.

22. Contracts, including customer contracts, are often included in the scope of the assets to be divested. For example, in a merger settlement involving the makers of glass containers, the respondents were required to divest all agreements and contracts with customers.[26] The customer contracts were part of the ongoing business that was divested. The ongoing business divested included manufacturing facilities, the corporate headquarters, molds and the molds facility, engineering, intellectual property, know-how, inventory, and accounts receivable, among other assets. Customer contracts serviced by the facilities that were divested transferred to a government-approved buyer as well.[27]

23. The Agencies' merger remedies may require the merging parties to allow customers to terminate contracts early and without penalty or prohibit the merging parties from enforcing certain terms in customer contracts. Remedies are crafted to help customers switch from the merged firm to the divestiture buyer, notwithstanding existing contractual restrictions. This gives the divestiture buyer an opportunity to immediately compete for customers.

24. Remedies may require respondents to allow customers to terminate their contracts early. For example, in *Talx*, the remedy required, with some limitations, that the respondent allow customers under contracts with longer than a one-year term to terminate their contracts if those customers were moving to a competitor.[28] It further required respondent to transfer certain customer information to the customer, upon its request. The transfer of this customer information aimed to facilitate a seamless and inexpensive

[26] In re Ardagh/Saint-Gobain, Dkt. 9356 (Jul. 1, 2013), https://www.ftc.gov/system/files/documents/cases/140618ardaghdo_0.pdf.

[27] *See also* In re Sherwin-Williams/Valspar, C-4621 (May 26, 2017), https://www.ftc.gov/system/files/documents/cases/161_0116_c4621_sherwin_williams_decision_and_order.pdf; *Ball/Rexam* https://www.ftc.gov/system/files/documents/cases/160816ball-rexamdo.pdf.

[28] In re Talx C-4228 (Apr. 28, 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/08/080808decision.pdf; *See also* In re CoreLogic, C-4458 (Mar. 24, 2014) **Error! Hyperlink reference not valid.**.

transition to another competitor. In addition, the remedy required the respondent to give certain long-term customers notice of their rights.

25. In one consummated transaction, the remedy required the respondent to transfer customer contracts along with the divestiture of the ongoing business.[29] In addition, certain customers who entered into contracts with respondent after the illegal acquisition were able to terminate their contracts early. In another consummated transaction, the respondent was barred from imposing exclusivity on its distributors, thereby enabling them to carry or service competing products.[30]

26. The Agencies' merger remedies also take into account unique businesses or customer situations to facilitate entry and support the divestiture buyer. There may be situations where the post-merger entity will be prohibited from soliciting customers of the divestiture buyer for some period of time. For example, in *Service Corporation International*, the Commission entered into an Order that, among other things, prohibited Respondent from soliciting or inducing any consumer to terminate a pre-need contract[31] for funeral or cemetery services that was divested to the buyer.[32] In addition, the Order required Respondent to assist the buyer in the fulfilment of any pre-need contract.[33]

27. In *U.S. v. Bazaarvoice, Inc.*, the Department challenged a consummated merger in the market for ratings and reviews platforms. After trial and a finding that the merger violated Section 7 of the Clayton Act, Bazaarvoice was ordered to divest the PowerReviews business it had unlawfully acquired in 2012. To ensure that the acquirer would be a viable, ongoing business able to compete effectively in a seamless transition of assets, Bazaarvoice was also required to license certain services and to provide transition services. To ensure that the acquirer had an opportunity to effectively solicit Bazaarvoice's customers, Bazaarvoice was required to waive breach of contract claims against customers that switched to the acquirer for a limited period of time; the acquirer received a list of all customers that either renewed their contracts or became new customers after the merger. The Order also prohibited Bazaarvoice from soliciting any customers transferred as part of the divestiture for a six-month period, "to allow the acquirer time to develop plans to retain its customers without interference from Bazaarvoice."[34]

[29] In re Polypore, Dkt. 9327 (Commission Order Dec. 13, 2010), https://www.ftc.gov/sites/default/files/documents/cases/2010/12/101213polyporeorder.pdf.

[30] In re Graco, C-4399 (Apr. 18, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/04/130418gracodo.pdf.

[31] "Pre-Need Contract" was defined as, "any type of contract or other agreement entered into by a person for the purchase of Funeral Services or Cemetery Services at a future time, regardless of whether such agreement is revocable or how payment for such services is arranged." In re SCI/Stewart Enterprises, Inc., C-4423 (Dec. 23, 2013), ¶ I.AA, https://www.ftc.gov/system/files/documents/cases/140506scido.pdf .

[32] "Respondents shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce a consumer who has a Pre-Need Contract (included in the Divestiture Assets) to terminate such contract and enter into a Pre-Need Contract with Respondents." Id. ¶ II.I, https://www.ftc.gov/system/files/documents/cases/140506scido.pdf.

[33] Id., ¶ II.G, https://www.ftc.gov/system/files/documents/cases/140506scido.pdf.

[34] *U.S. v. Bazaarvoice, Inc.*, Competitive Impact Statement, at 11.

28. Another group of merger cases where divestitures often include customer accounts, information, and supporting assets are mergers involving retail banking and other consumer loan products. For example, in *U.S. v. Springleaf Holdings Inc*., a merger involving the two largest providers of personal instalment loans to subprime borrowers in the United States, the settlement required a divestiture of 127 branches, including "all active loans originated or serviced at those branches, including all historical performance information (including account level payment histories) and all customers' credit scores and other credit metrics with respect to loans that are active, closed, paid-off, or defaulted that have been originated or serviced at the Divestiture Branches at any point since January 1, 2010."[35] The Competitive Impact Statement filed by the Department added that "the historical performance information will allow a lender to gain an understanding of local market conditions and to perform risk analytics essential to making personal instalment loans to subprime borrowers."

5. Customer-Facing Remedies in Non-merger Cases

29. Non-merger remedies may address demand-side factors in order to promote competition that is free of anticompetitive restraints or conduct. In non-merger cases, agency remedies seek to enjoin the law violators from continuing to engage in anticompetitive conduct that reduces consumer choice and/or increases the price of a good or service. In these circumstances, remedies are tailored to mitigate the harm that arises from the illegal conduct and prevent its recurrence.

30. Non-merger remedies may require conduct that mitigates the competitive harm and provides consumers with benefits that the illegal conduct denied to them. For example, in *Detroit Auto Dealers Association, Inc.*, the Commission alleged that the Detroit Auto Dealers Association and a large number of its member automobile dealers violated federal antitrust laws by illegally conspiring to limit competition in the sale of new cars in the Detroit area. The anticompetitive conduct included an alleged agreement among auto dealers to close dealerships on most weeknights and eliminate Saturday hours completely. The Order lifted restrictions on dealership hours and required dealers to maintain weekend hours so that customers of respondents (e.g., car buyers) had more of an opportunity to shop.[36]

31. In addition, non-merger remedies may expand the breadth of information available to consumers. For example, in *Realcomp*, an association of real estate brokers refused to transmit real estate listings from non-traditional discount brokers to its own and other publicly available websites, and excluded such listings from the default searches within its database. The Commission concluded that these practices restricted consumer access to information, and thus harmed competition. The remedy barred Realcomp from

[35] *U.S. v. Springleaf Holdings Inc*., Competitive Impact Statement, https://www.justice.gov/opa/file/793141/download, at 10.

[36] *See* In re Detroit Automobile Dealers Ass'n, Inc. ,Dkt. 9189 Proposed Consent Agreement With Analysis to Aid Public Comment, 59 Fed. Reg. 6263 (Feb. 10, 1994); Final Order, 5 Trade Reg. Rep. (CCH) ¶ 23,532 (Apr. 24, 1994); Proposed Consent Agreement With Analysis to Aid Public Comment, 59 Fed. Reg. 23861 (May 9, 1994); Final Order, 5 Trade Reg. Rep. (CCH) ¶ 23,587 (July 20, 1994). *See also* https://www.ftc.gov/enforcement/cases-proceedings/detroit-auto-dealers-association-inc.

interfering with the ability of any of its broker members to enter into non-traditional listings, and removed barriers for the transmittal of that information to consumers.[37]

32. Similarly, *in U.S. v. National Association of Realtors*,[38] the Department sued to prohibit policies of the National Association of Realtors (NAR) that obstructed brokers using innovative Internet-based tools from offering better services and lower costs to consumers. Under a settlement adopted by the court, NAR agreed to abandon rules that allow NAR-affiliated brokers to withhold their property listings from brokers operating "Virtual Office Websites" (VOWs). NAR also agreed that brokers using VOWs could compete against incumbent real estate brokers including by educating consumers, making referrals, and conducting brokerage services. The result of the settlement was to open up new and innovative services for consumers in U.S. real estate markets.

33. Non-merger remedies may also remove barriers to customer switching. In *American Guild of Organists* (AGO), staff's investigation revealed that the AGO had guidelines in place that limited consumers from choosing an organist other than the incumbent organist for a service at a place of worship. The AGO also issued compensation schedules that required a consumer wishing to use a different organist to pay both the incumbent and the consumer's chosen musician. The Commission alleged that the AGO code of ethics restricted its members from competing for opportunities to perform. The Order prevented AGO from adopting and circulating any policy or guidelines that would limit a consumer's choice when selecting an organist, including guidelines that prevented a consumer from selecting an organist other than an incumbent organist.[39]

34. Non-merger remedies also may address harm caused to consumers by requiring violators to notify consumers of competitive options in order to reset competitive dynamics.[40] For example, in *Professional Skaters Association, Inc*., the membership rules of a trade association of ice skating coaches prevented members from soliciting students that were already training with another member. In addition to the non-solicitation provisions, the association prevented direct, indirect, third-party, and social media contacts with skaters and parents. The Commission's Order prevents the association from interfering with the solicitation of teaching work and requires the association for three years to publish news about the Commission settlement in two leading skating magazines,

[37] In re RealComp II Ltd., Dkt. 9320 (Commission Order Nov. 2, 2009); *upheld* 635 F.3d 815 (6th Cir. 2011); *cert. denied* 132 S.Ct. 400 (2011), https://www.ftc.gov/enforcement/cases-proceedings/061-0088/realcomp-ii-ltd-matter

[38] *See* case filings at https://www.justice.gov/atr/case/us-v-national-association-realtors.

[39] In re American Guild of Organists, C-4617 (Mar. 31, 2017) https://www.ftc.gov/enforcement/cases-proceedings/151-0159/american-guild-organists. *See also* In re Music Teachers National Association, Inc., C-4448 (Dec. 16, 2013) (https://www.ftc.gov/enforcement/cases-proceedings/131-0118/music-teachers-national-association-inc-matter).

[40] American Guild of Organists, https://www.ftc.gov/enforcement/cases-proceedings/151-0159/american-guild-organists; Music Teachers National Association, Inc., https://www.ftc.gov/enforcement/cases-proceedings/131-0118/music-teachers-national-association-inc-matter; Professional Skaters Association, Inc., https://www.ftc.gov/enforcement/cases-proceedings/131-0168/professional-skaters-association-inc-matter.

and to include a statement in education materials directed at non-Members (including parents) that restrictions on solicitation no longer apply.[41]

6. Conclusion

35. The Agencies craft competition remedies to address demand-side dynamics. To complement structural relief, a merger remedy may include behavioural requirements that support the structural divestiture, often by including customer-facing provisions. This often means that remedies include provisions requiring customer contracts to transfer to the buyer. Short of customer contracts transferring, the remedy may include a provision that enables customers to terminate contracts early and without penalty, to enable customer switching to the divestiture buyer. Such provisions are critical in certain circumstances, as the FTC's Remedies Study confirmed the difficulty in divestiture buyers attracting and retaining customers. In remedies, the Agencies often craft relief that provides customers with more choices, more information, or a greater ability to switch suppliers.

[41] In re Professional Skaters Association, Inc., C-4509 (Dec. 23, 2014) https://www.ftc.gov/enforcement/cases-proceedings/131-0168/professional-skaters-association-inc-matter.