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Merger Remedies: The DOJ's New Guide to Old Differences with the FTC

BY LOGAN M. BREED AND DAVID J. MICHNAL

MERGER REVIEWS THAT RAISE substantive concerns at the antitrust enforcement agencies often lead the parties down long, winding, expensive—and sometimes dimly lit—remedial roads. Antitrust practitioners (and their clients) understandably crave transparency and certainty in this process. But differences between the agencies' approaches to merger remedies may create confusion and uncertainty in the merger review process.

The Department of Justice Antitrust Division and the Federal Trade Commission have responded to concerns about these differences with a recent series of efforts to increase transparency and certainty in the merger review process. The latest example is the Division's Policy Guide to Merger Remedies,[1] issued on October 21, 2004 (DOJ Guide). This followed the April 2, 2003, issuance of the Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies (FTC Statement).[2]

With little fanfare or surprise, the DOJ Guide lays out detailed guidelines for the fashioning, implementation, and enforcement of merger remedies. The DOJ Guide openly acknowledges the continued inconsistency between the agencies' approach to certain remedies and provisions, but provides little explanation as to why these differences still exist. In light of the recent trend toward transparency, issuance of the new DOJ Guide is the right occasion to reassess the similarity and differences between the agencies' approaches to merger remedies.

Structural Remedies

The FTC and the Division strongly prefer structural remedies, i.e., divestiture, over conduct-based remedies in merger cases.[3] The DOJ Guide states that structural remedies are more effective because they are "relatively clean and certain, and generally avoid costly government entanglement in the market."[4]

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Closely following the DOJ's previous practices, the DOJ Guide establishes three broad principles for divestitures. First, the divestiture must include all assets necessary for the purchaser to become an "effective long-term competitor."[5] Second, the divestiture of a complete, existing business entity is strongly preferred. The Division will scrutinize carefully any proposals to divest less than a complete existing business entity because the merging parties have an "obvious incentive to sell fewer assets than are required for the purchaser to compete effectively going forward."[6] Third, the merged firm must divest rights to "critical" intangible assets, which are defined as intangible assets that are necessary for the purchaser to compete effectively in the relevant market.[7] In extreme cases, the DOJ Guide may require licensing intangible assets to multiple firms, or even "all comers."[8] If, however, the merged firm can show that intangible assets are necessary to achieve certain valuable efficiencies, the Division will allow the merged firm to retain rights to those assets.

The FTC also prefers divestitures of discrete business units. When the parties propose to divest something less, the FTC Statement indicates they must show either that the proposed asset package includes all the assets necessary for autonomous operation of a competitive business or that all the necessary assets are easily accessible elsewhere.[9] When the parties seek to divest a "mix and match" package of assets comprised of partial units from both firms, the FTC Statement indicates that the FTC requires that the assets be sufficient to maintain or restore the level of competition that existed before the merger.[10] Although the FTC may be somewhat more willing than the Division to accept mix and match packages, the FTC Statement attempts to dissuade practitioners from offering them. It warns that mix and match packages will "tend[] to slow the process down, requiring more extensive negotiations and more detailed and time-consuming evaluation."[11]

The DOJ Guide also lays out specific guidelines for implementing divestitures. These provisions largely codify existing Division practice but they provide more specific guidance than practitioners have enjoyed in the past. For example, the Division has always encouraged merging parties to execute any divestiture as quickly as possible to maintain the premerger level of competition and value of the divestiture assets. DOJ consent decrees have traditionally contained deadlines

for completion of any required divestiture, although the agency had never made an official policy statement requiring such deadlines. The DOJ Guide reaffirms this preference, stating that the Division usually will give the parties sixty to ninety days to locate an acceptable purchaser on their own and will require regular reports on the divestiture process to ensure the parties are making good faith efforts.[12]

The Division must approve any purchaser before the transaction is finalized. The DOJ Guide states that the agency will follow a three-part test to determine the purchaser's suitability. First, divestiture to the proposed purchaser must not itself cause competitive harm. Second, the purchaser must have a sufficient incentive to use the divestiture assets to compete in the relevant market. Finally, the purchaser must pass a "fitness test" to ensure it has sufficient business acumen, experience, and financial resources to be an effective long-term competitor in the market.[13] This test is not new: Divestiture decrees usually state that the Division must be satisfied that the purchaser has the "managerial, operational, technical and financial ability to compete using the divestiture assets."[14]

Similarly, an acceptable buyer from the FTC's standpoint is "one that can—with the package of assets to be divested—maintain or restore competition in the relevant market."[15] Thus, the parties must demonstrate that the proposed buyer has both the financial ability to complete the proposed transaction and the economic incentive to maintain or restore competition in the relevant market. In addition, an acceptable buyer will have "the experience, commitment, and incentives necessary to achieve the remedial purposes of the order."[16]

"Fix-It-First." One of the key differences between the FTC and DOJ approaches to merger remedies has been the Division's willingness to accept "fix-it-first" remedies, which are structural remedies that the parties implement before the merger is consummated—typically, the sale of a subsidiary or other specific assets of the merging parties to a third party. Despite the openly cooperative tone between the agencies on a number of fronts, the FTC and DOJ doggedly defend their positions on the fix-it-first/buyer-up-front divergence. The DOJ Guide expressly states that merging parties can avoid a Second Request through the use of the fix-it-first tactic.[17] Between June 2001 and July 2003, twelve of the thirty-four mergers challenged by the Division as anticompetitive were resolved through fix-it-first divestitures.[18]

The DOJ Guide cites several well-known rationales for allowing parties to engage in fix-it-first divestitures rather than requiring a consent decree. First, this remedy avoids potentially lengthy and complicated negotiations of a consent decree and enables consumers to realize the procompetitive efficiencies of the transaction more quickly. Second, fix-it-first remedies can provide more flexibility to the parties because the assets can be tailored to the specific proposed purchaser. Finally, on a practical level, fix-it-first remedies actually may "fix it." As Assistant Attorney General R. Hewitt Pate has noted, "we cannot seek a consent decree unless we conclude that a transaction would result in a violation of the law. . . . If parties alter their deal in a way that resolves our competitive concerns, we cannot then file a complaint challenging a transaction that no longer violates the antitrust laws."[19]

One possible reason the DOJ allows merging parties to employ fix-it-first remedies may be the DOJ's consent procedures. Under the Tunney Act, a consent decree cannot be finalized until the Division publishes it, along with a Competitive Impact Statement, in the *Federal Register* and accepts public comments for a sixty-day period.[20] Moreover, the decree is not final until a district court determines that its entry is "in the public interest."[21] Approval by a federal judge is generally not required of FTC consent agreements. Although consent agreements accepted by the FTC are subject to similar public notice and comment requirements,[22] final approval is within the Commission's discretion, and its final order is subject to review by a federal judge only if challenged.

Avoiding such judicial scrutiny may have its benefits for the Division. Perhaps the most extreme example was the district court's handling of the 1995 *Microsoft* consent decree regarding its licensing practices. In the Tunney Act hearing before Judge Sporkin of the U.S. District Court for the District of Columbia, the court extensively questioned the Division on whether the proposed consent met the public interest standard, and ultimately rejected it.[23] Although the U.S. Court of Appeals for the District of Columbia Circuit ultimately reversed Judge Sporkin's ruling and ordered him to approve the consent decree,[24] the *Microsoft* case clearly illustrates the potential benefits to the Division of avoiding a Tunney Act proceeding. A fix-it-first remedy enables the Division to avoid this public scrutiny and judicial review, thereby achieving the Division's goal of maintaining competition without requiring judicial intervention.

In contrast, the FTC has stated that it will not entertain "fix-it-first" proposals, and historically has disfavored their use. FTC Chairman Deborah Platt Majoras recently stated that the FTC strongly prefers binding consent orders and that the FTC "has no formal fix-it-first policy."[25]

Perhaps the FTC's reluctance to accept fix-it-first remedies has less to do with substantive policy than with the unique structural realities of the FTC. Unlike the DOJ, ultimate decision making at the FTC is shared by five commissioners. The decentralized and independent nature of the FTC's decision-making apparatus is not particularly conducive to back-and-forth negotiation. The discussion and negotiation

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required to implement a fix-it-first remedy may be more difficult to achieve in this environment than at DOJ, which has a single decision maker.

It is worth noting that the recent *Arch Coal* case may affect the FTC's approach to fix-it-first remedies.[26] In *FTC v. Arch Coal, Inc.*, the FTC challenged the merger of Arch Coal and Triton Coal Co. Despite the parties' attempt to modify the transaction to include a divestiture of certain assets to a third party, the FTC urged the court to evaluate the merger in its original form. The court denied the FTC's motion to preclude evidence of defendants' proposal to sell additional assets and analyzed the merger as modified by the proposed divestiture. Ultimately, the court refused to enjoin the transaction given the modest increase in market concentration post-divestiture.[27] The court's decision may encourage future defendants to fashion their own remedies and take their chances in court as well. It may also encourage the FTC to reevaluate its opposition to "fix-it-first" remedies rather than risk similar losses in future high profile cases.

"Buyer Up Front." Another important difference between the agencies' remedy approaches relates to the requirement that the merging parties identify in advance the buyer of any divested assets. In the case of the FTC, when the Commission is concerned about the adequacy of a proposed asset package or the risk that an acceptable buyer will not be found, "the Commission will, by requiring a buyer up front, attempt to minimize the risk that the remedy will be ineffective."[28] The FTC Statement indicates that the Commission often requires an up-front buyer, especially in cases in which the parties seek to divest something less than an autonomous business unit. Requiring an up-front buyer reduces the risk that the parties will be unable to find a buyer capable of maintaining or restoring competition and mitigates the possibility of asset deterioration pending divestiture.

The DOJ, on the other hand, has not embraced the up-front buyer strategy. The Division apparently has considered the strategy in certain cases,[29] but has never required a buyer in advance, and the DOJ Guide is silent on the issue.

"Crown Jewel" Provisions. Another significant difference between the agencies' approaches to merger remedies is the DOJ opposition to "crown jewel" provisions, which require the merging parties to include certain specified (and usually more valuable) assets in the proposed divestiture package if a suitable and willing purchaser is not found within a certain period. DOJ has, however, used "crown jewel" provisions in consent decrees in the past,[30] and prior statements by senior Division officials did not seem to share the aversion to the concept reflected in the Guide.[31]

The DOJ Guide cites two primary reasons to avoid crown jewel provisions. First, crown jewel provisions provide an opportunity for "purchaser manipulation."[32] If there are only a few potential purchasers and they know that the consent decree includes a crown jewel provision, they have an incentive to delay the negotiations to depress the price of the crown jewels.

Second, they can result in either under-inclusive or over-inclusive remedies that ultimately harm consumers. From the DOJ's perspective, crown jewel provisions usually amount to an admission that the Division accepted "less than effective relief at the outset" because the original divestiture assets were insufficient to give a purchaser the incentive to enter the market.[33] On the other hand, in some cases a crown jewel provision can present the opposite problem, representing acceptance of more relief than is needed to remedy the competitive concern. Because the goal of merger remedies is to restore competition, not punish the merging firms, the Division should not require the divestiture of crown jewel assets in excess of those necessary to remedy the competitive problem.

Unlike the DOJ, the FTC continues to support the use of crown jewel provisions. The FTC Statement indicates that under certain conditions, the Commission may accept a proposal to divest a smaller or less complete package of assets than would be required by DOJ—but only if it is accompanied by a "crown jewel" provision. If the parties are unable to divest the originally proposed assets within the agreed upon time frame, the Commission may appoint a divestiture trustee to divest the crown jewels.

Former Bureau of Competition Director William J. Baer defended the FTC's use of crown jewel provisions in its consent decrees, arguing that they "increase[] the incentive for the respondent to accomplish the divestiture within the time required by the Commission's order, and . . . provide[] a bigger, and presumably more attractive, package for the trustee in the event the respondent is unsuccessful."[34] He noted that crown jewel provisions "may be particularly valuable when there are some uncertainties about the saleability or viability of the divestiture package, or where the respondent may be able to frustrate the viability of a divestiture—for example, by not transferring all the necessary technology or know-how."[35]

The DOJ's condemnation of crown jewel provisions is notable in that it is not particularly necessary as practical guidance; practitioners do not need to be persuaded to avoid including crown jewel provisions in a consent decree because such provisions are generally contrary to their client's interests. However, the purpose of the Guide's comments on these provisions may be simply to highlight the Division's disagreement with the FTC on this remedy.

Trustees. One area of agreement between the agencies in their approaches to remedies is the use of trustees to facilitate divestitures. For example, the Division will require that every consent decree in a merger case include a provision for the appointment of a "selling trustee" that can sell the divestiture assets if the merging parties are unable to complete a divestiture to an acceptable purchaser within the requisite time period.[36] Similarly, the Commission historically has tended to include provisions in its consent orders for the appointment of a "divestiture trustee" when the parties are unable to divest the asset package within the required period.[37] In rare cases,

the Division may even appoint a selling trustee at the outset if the divestiture assets deteriorate rapidly and will not present a competitive threat to the merged firm unless they are sold quickly.

Both agencies have used "monitoring trustees" to review the merging parties' compliance with a consent decree.[38] However, under the DOJ Guide, a monitoring trustee is now required only in rare cases where "the trustee's experience is critical to an effective divestiture," because in most cases, the monitoring trustee would "simply duplicate" the Division's decree enforcement efforts.[39] Similarly, the DOJ Guide states that employing an "operating trustee" to manage the day-to-day operations of the divestiture assets is an extraordinary remedy that is appropriate only in rare cases where the defendant is likely to mismanage the divestiture assets during the divestiture period and impair their value.[40] The FTC, on the other hand, is much more willing to appoint monitoring trustees to oversee the terms of the consent order.[41]

The divergence between the FTC and DOJ on the issue of monitoring trustees may be based on practical concerns rather than policy considerations.[42] The FTC employs monitoring trustees most frequently in cases concerning technically complex product markets, such as pharmaceuticals, chemical products, or medical devices. For example, the Bayer/Aventis transaction in 2002 involved companies that competed in cutting edge, "new generation" chemical pesticide and herbicide markets. The relevant markets were highly concentrated, with significant barriers to entry. The FTC allowed the transaction to proceed pursuant to a consent order but insisted on significant divestitures and conduct remedies—including a requirement that the parties (1) provide technical assistance to the purchasers, and (2) assist the purchasers in retaining the parties' employees with particular experience in the divested businesses. Given the complexity of determining whether the parties were meeting these requirements and the highly technical nature of the product markets, the order established a monitoring trustee to oversee the parties' compliance with the consent order.[43]

Conduct Remedies

The DOJ Guide confirms that the Division generally disfavors conduct remedies and permits them only in extremely limited circumstances. Their primary use is to complement or "perfect" structural relief.[44] For example, in the recent Waste Management/Allied Waste transaction, the consent decree required the parties to divest specific assets and also modify certain contracts to make it easier for customers to switch to a competing waste hauler.[45] Similarly, if the purchaser of the divested assets cannot manufacture the product for a limited transitional period, a short-term supply agreement to provide the purchaser with the needed product may help preserve competition in the relevant market during the transitional period. Where personnel assets are significant to the purchaser's ability to compete successfully, another type of conduct relief, such as a temporary limit on the merged firm's ability to rehire the employees of a divested subsidiary or division, may be appropriate.

While the Division has never expressed a preference for conduct relief over structural remedies, prior policy statements emphasized the significance of such relief in cases involving significant intellectual property assets, which have become increasingly common.[46] Nevertheless, under the DOJ Guide, the Division will be even less likely to permit conduct remedies to replace structural relief entirely. The Guide states that conduct remedies "present substantial policy and practical concerns,"[47] and they will be permitted only in industries where there is already close government oversight.[48] Moreover, the DOJ Guide states that standalone conduct remedies are "only appropriate when a full-stop prohibition of the merger would sacrifice significant efficiencies and a structural remedy would similarly eliminate such efficiencies or is simply infeasible."[49] For example, structural relief may be impossible in a vertical merger where an upstream firm with a single plant acquires a downstream firm with a single plant.

Finally, paraphrasing the Merger Guidelines, the Division requires the efficiencies to be cognizable and "conduct-remedy specific."[50] Therefore, when structural remedies are impractical, the DOJ is much more likely to prohibit the merger than allow it to proceed with conduct relief.

The FTC Statement does not directly address the Commission's position regarding conduct remedies relative to structural relief. But the Statement does address conduct-oriented measures often required to supplement structural relief. The Statement notes that in some cases, the parties may be required to transfer sufficient intellectual properties rights to maintain or restore competition in the relative market.[51] Additionally, the parties should be prepared to enter into a supply agreement with the buyer of divested assets, where necessary to effectively compete immediately.[52] Under specific circumstances, transfers of key personnel or technical assistance may also be ordered.[53] The FTC's willingness to agree to such arrangements should not be overstated however. The Commission clearly disfavors such "continuing entanglements," and "seeks to avoid these because of the competitive issues they may raise and the complex monitoring they may require."[54] Further, "the more a proposed buyer must rely on these types of provisions, the more difficult it may be to persuade the staff that such a divestiture would remedy the Commission's competitive concerns."[55]

Conclusion

These recent initiatives by the DOJ and FTC help increase the transparency of the merger review process and shed light on the relatively few, but significant, differences between the agencies in their approach to merger remedies. Notably, while the FTC and DOJ often issue joint policy statements and guidelines to ensure uniformity within and between the agencies, the DOJ Guide applies only to the Division, and the FTC Statement applies only to the FTC.

The additional transparency provided by the new DOJ Guide also serves to highlight the agencies' substantial similarity in goals and processes. Indeed, FTC Chairman Deborah Platt Majoras has downplayed the apparent differences between the U.S. agencies indicating that the "supposed difference . . . is overblown" in practice.[56] For example, relatively few recent cases have been resolved using fix-it-first or crown jewel provisions, two areas where the agencies' policies diverge. Majoras has noted the worthwhile goal of procedural consistency on remedy issues, and has asked the Commission staff to carefully review the DOJ Guide to determine the significance of any differences between the agencies' policies and practices.[57] She also pledged to work closely with the Division to determine whether there is a need for greater conformity between the agencies and, if so, to determine how it can be achieved.[58]

But despite the similarities and cooperation between the two U.S. agencies, the DOJ's formulation and release of its own merger remedies guide further underscores the agencies' significant differences—the most obvious of which is the DOJ's dislike for buyer-up-front consent orders and the FTC's rejection of fix-it-first proposals. FTC Chairman Majoras suggested that each agency's unique experience with particular industries "may be the primary explanation for any variation in approach to remedy crafting, be it 'fix-it-first,' 'up front buyer,' the use of monitors, and the inclusion of crown jewel provisions." [59] Perhaps a better explanation for these differences rests upon the structural and procedural differences between the agencies themselves. It should not be surprising that an independent commission and an executive agency, with overlapping jurisdiction but very different governing structures, would develop distinct remedial preferences.

Nevertheless, officials from the DOJ and FTC continue to downplay these differences and declare their willingness to study these issues to determine if greater conformity would be beneficial. Whether this spirit of cooperation reflects Chairman Majoras's previous tenure at the DOJ or the FTC's recent unsuccessful attempt to avoid litigating fixes in the district courts, the increased transparency and guidance provided by the DOJ Guide and the earlier FTC Statement may continue to improve the certainty and efficiency of the merger review process. ■

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[1] U.S. Dep't of Justice, Antitrust Division, Policy Guide to Merger Remedies (Oct. 2004), *available at* http://www.usdoj.gov/atr/public/guidelines/205108.pdf [hereinafter DOJ Guide].

[2] Federal Trade Comm'n, Bureau of Competition, Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies (Apr. 2, 2003), *available at* http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm.

[3] For example, the Division filed 55 consent decrees in merger cases from 1997–2000; all but four of the decrees involved divestiture. *See* ABA Section of Antitrust Law, The Merger Review Process 295–96 (2d ed. 2001).

[4] DOJ Guide, *supra* note 1, at 8 (citing United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 331 (1961)).

[5] *Id.* at 9.

[6] *Id.* at 13. The DOJ Guide notes several caveats to the general preference for divestiture of an existing business entity. First, divestiture of less than an existing business entity may be appropriate where there is no existing entity smaller than the merging parties. Second, divestiture of less than an existing business entity may be appropriate where the evidence clearly demonstrates that certain of the entity's assets already are in the possession of, or are readily obtainable by, the potential purchaser. However, divestiture of more than an existing business entity may be appropriate in some circumstances. *See id.* at 13–14.

[7] *Id.* at 15.

[8] *See id.* at 17 (citing United States v. Miller Indus., Inc., 2001-1 Trade Cas. (CCH) ¶ 73,132 (D.D.C. 2000); United States v. Cookson Group plc, 1994-1 Trade Cas. (CCH) ¶ 70,666 (D.D.C. 1993)).

[9] FTC Statement, *supra* note 2.

[10] *Id.*

[11] *Id.*

[12] DOJ Guide, *supra* note 1, at 30.

[13] *Id.* at 31–32.

[14] *Id.* at 32.

[15] FTC Statement, *supra* note 2.

[16] *Id.*

[17] DOJ Guide, *supra* note 1, at 27.

[18] *See* R. Hewitt Pate, Statement Before the Committee on the Judiciary, U.S. House of Representatives, Concerning Antitrust Enforcement Oversight 9 (July 24, 2003), *available at* http://www.usdoj.gov/atr/public/testimony/201190.pdf.

[19] R. Hewitt Pate, Antitrust Enforcement at the DOJ—Issues in Merger Investigations and Litigation 12 (Dec. 10, 2002), *available at* http://www.usdoj.gov/atr/public/speeches/200868.pdf. But the DOJ Guide makes clear that the Division will refrain from filing a case only if the remedy restores the pre-merger level of competition and contains as much substantive relief as would be sought by the Division if a case were filed. The Division will also refuse to accept a fix-it-first remedy if the competitive harm from the transaction requires remedial provisions, such as a supply agreement with the purchaser, that include some continuing obligations for the merging parties. DOJ Guide, *supra* note 1, at 27–28.

[20] Antitrust Procedures and Penalties Act (Tunney Act), 15 U.S.C. § 16.

[21] *Id.* § 16(e).

[22] *See* 16 C.F.R. §§ 2.31–2.34, 3.25 (2004).

[23] Transcript of Hearing before District Judge Sporkin on January 20, 1995, *United States v. Microsoft Corp.*, 159 F.R.D. 318 (D.D.C. 1995).

[24] Microsoft Corp. v. United States, 56 F.3d 1148 (D.C. Cir. 1995).

[25] Deborah Platt Majoras, Looking Forward: Merger and Other Policy Initiatives at the FTC 8 (Nov. 18, 2004), *available at* http://www.ftc.gov/speeches/majoras/041118abafallforum.pdf.

[26] FTC v. Arch Coal Inc., 329 F. Supp. 2d 109 (D.D.C. 2004).

[27] *See id.* at 115 n.2 & 160.

[28] *See* Federal Trade Comm'n, Frequently Asked Questions About Merger Consent Order Provisions (Apr. 2, 2003), http://www.ftc.gov/bc/mergerfaq.

[29] *See, e.g.*, Deborah Platt Majoras, Antitrust Remedies in the United States: Adhering to Sound Principles in a Multi-Faceted Scheme 7 (Oct. 4, 2002), *available at* http://www.usdoj.gov/atr/public/speeches/200354.pdf ("[DOJ is], for example, exploring when it is appropriate and effective to permit parties to 'fix-it-first' . . . as contrasted with requiring an "upfront buyer" as part of an enforcement action before the deal may proceed. . . .").

[30] *See, e.g.*, United States v. Imetal, 2000 WL 33115577, *17 (D.D.C. May 25, 2000).

[31] *See, e.g.*, Deborah Platt Majoras, Houston, We Have a Competitive Problem:

How Can We Remedy It? 11–12 (Apr. 17, 2002), *available at* http://www.usdoj.gov/atr/public/speeches/11112.pdf (describing the benefits of crown jewel provisions and noting that DOJ has "used crown jewels in cases in which there is a complex divestiture process or some concern that there may be difficulty in divesting one set of assets").

[32] DOJ Guide, *supra* note 1, at 37–38.

[33] *Id.* at 37–38.

[34] William J. Baer, Reflections on 20 Years of Merger Enforcement Under the Hart-Scott-Rodino Act, 1996 WL 932058, *17 (Oct. 29, 1996).

[35] *Id.*

[36] *See* DOJ Guide, *supra* note 1, at 38.

[37] *See, e.g.*, George S. Cary, Merger Remedies (Apr. 10, 1997), *available at* http://www.ftc.gov/speeches/other/aba397.htm ("In virtually every recent Commission divestiture order there has been a provision for the appointment of a trustee to accomplish the divestiture at no minimum price should the respondent fail to divest in the time required.").

[38] *See, e.g.*, Majoras, *supra* note 31, at 12; United States v. AlliedSignal, Inc., 2000 WL 33115901, *10 (D.D.C. Mar. 22, 2000) (establishing a monitoring trustee to ensure compliance with the consent decree in the AlliedSignal/Honeywell transaction because the package of assets was large and complicated and the divestiture period was short).

[39] DOJ Guide, *supra* note 1, at 40–41. The DOJ Guide also affirms that the Division will "commit substantial resources" to monitor merger consent decree compliance and implementation, ensuring that remedies are fully implemented and enforcing decrees with civil or criminal contempt proceedings when necessary. *Id.* at 41.

[40] *Id.* at 40.

[41] The FTC considers monitoring trustees particularly helpful where the order requires the merging parties and the prospective purchaser to maintain a temporary collaborative relationship such as a supply arrangement. In fact, the FTC's 1999 Divestiture Study actively promotes using monitoring trustees in cases where the consent order includes conduct remedies such as short-term supply contracts. *See* Federal Trade Comm'n, Bureau of Competition, A Study of the Commission's Divestiture Process 29–30 (1999), *available at* http://www.ftc.gov/os/1999/08/divestiture.pdf.

[42] The agencies have insisted that incongruities between their approaches are not based on policy disagreements. *See, e.g.*, Majoras, *supra* note 25, at 10 (noting that the agencies' different views result from their industry specializations and a recognition of "the particular structural differences that mergers in those industries present. . . . Such differences from industry to industry, rather than any fundamental difference in analytical approach to remedies, may best explain why it may appear that the FTC has had a 'preference' for certain kinds of provisions as compared to the Division").

[43] *See* Analysis of the Complaint and Proposed Consent Order to Aid Public Comment, Bayer AG and Aventis SA, File No. 011-0199, *available at* http://www.ftc.gov/os/2002/05/bayeranalysis.pdf.

[44] DOJ Guide, *supra* note 1, at 18.

[45] United States v. Waste Mgmt., Inc., 2003 WL 23744285, *14 (D.D.C. June 27, 2003).

[46] *See, e.g.*, Majoras, *supra* note 31, at 8 (noting nonexclusive licensing remedy approved in the 3D/DTM case and stating that "[i]n today's economy . . . competition in some industries may depend solely on such contractual arrangements"). The Division has also approved firewalls, which are the most common form of conduct relief, in several merger cases involving the defense industry, usually in the context of vertical mergers. *See, e.g.*, United States v. Northrop Grumman Corp., 2003 WL 21659404, *19 (D.D.C. June 10, 2003).

[47] DOJ Guide, *supra* note 1, at 22.

[48] *Id.* at 20.

[49] *Id.* at 20.

[50] *Id.* at 21.

[51] *See* FTC Statement, *supra* note 2.

[52] *See id.*

[53] *See id.*

[54] *Id.* n.8.

[55] *Id.*

[56] Majoras, *supra* note 25, at 8.

[57] *Id.*

[58] *Id.* at 11.

[59] *Id.* at 10.

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