Merger reviews in the US and the EU: a comparative overview

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Review of a merger or acquisition leaves US and EU antitrust authorities with three options: clear the transaction, prohibit it, or let it proceed subject to remedies. The vast majority of transactions raise no substantial competition concerns and are therefore cleared. At the opposite, and fairly rare, extreme, some are so obviously detrimental to competition that nothing short of prohibition will prevent the identified harm—with any corrective modifications being of such magnitude that they would effectively neuter the deal's business rationale and thus prove unacceptable to the parties.

However, remedies can allow most potentially problematic transactions to proceed. Correctly formulated and implemented, such remedies should preserve a merger's efficiency-enhancing potential while eliminating its anti-competitive effects—a better outcome than a straightforward prohibition.

Both the US and the EU have gradually developed policies enabling antitrust authorities to clear otherwise problematic transactions if the parties offer appropriate remedies. In the US, the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DoJ) will look to overcome identified concerns by negotiating remedies with the merging parties that are incorporated into a binding 'consent order' (FTC) or into a binding 'consent decree' entered by a federal court at the request of DoJ. In the EU, Regulation 139/2004[1] (the ECMR) allows the European Commission (EC) to declare a potentially problematic concentration compatible with the common market where the notifying parties make the necessary modifications to their deals.

This article reviews the US and EU competition agencies' approaches with respect to merger remedies and documents what appears to be a notable convergence in policy. The most interesting points of divergence are not necessarily transatlantic, but rather between the two US antitrust agencies, particularly with respect to 'crown jewel' and fix-it-first divestiture strategies. Our comparative examination focuses on the general procedural framework, the types of remedies required, and specific concerns relating to divestitures.

Procedural framework

US merger control

In the US, responsibility for merger control is shared between the FTC and DoJ. Once a reportable transaction has been notified under the mandatory filing provisions stipulated in the Hart-Scott-Rodino Antitrust Improvements Act, either the FTC or DoJ has an initial period of 30 days to investigate the transaction. If the agency is not convinced that the transaction will not lead to a substantial lessening of competition, it will issue a 'request for additional information or documentary material' (second request). The parties' full response to the second request may require several months. This is followed by an additional 30-day review period, during which the agency may clear the transaction or initiate proceedings to block it, unless it reaches a remedial agreement or consent decree with the parties to alleviate competitive concerns. If no such agreement can be reached, the agency may ultimately decide to seek an injunction to prevent consummation of the transaction. While the procedures for non-reportable transactions vary somewhat, the remedies for transactions found to be anti-competitive are generally the same as for reportable transactions.

EU merger control

In the EU, the EC has exclusive jurisdiction to review and approve mergers and similar transactions meeting certain turnover thresholds. The vast majority of notified cases are cleared by the EC in phase I, which expires 25 working days after the notification. The parties can extend the initial review period to 35 working days by offering remedies within 20 working days of notification.[2] If a transaction requires a more in-depth review, the EC initiates a phase II procedure, to be completed within 90 working days, extended to 105 working days if remedies are offered after the 54th working day following the initiation of phase II.[3] Phase II commitments must be submitted to the EC not later than 65 working days from the initiation of phase II. An additional 20 working day extension is conditionally available upon the request of the parties or the EC, and it 'stops the clock', typically to allow both sides to review and negotiate any proposed remedies.

As is evident from these deadlines, a key difference between the EU and US procedures for remedies is that the EU remains bound to a strict and complex timetable. This factor can also influence the substance of the proposed remedies. Unless the notifying parties are properly prepared for the eventuality of remedies, the logistics of proposing appropriate remedies within the tight time-limits of phase I, which leave little or no margin for negotiation, can be fairly challenging. Such timing issues are less of a problem if the case moves to phase II, but this is a scenario that most notifying parties will want to avoid. Therefore, in phase I remedies, the EC will tend to err on the side of caution, and the parties may be required to offer more than they actually need to. This risk can be minimised through careful planning and informal pre-notification talks with the EC's case-team.

Types of remedies

In the US, DoJ recently released the Guide to Merger Remedies (Guide).[4] It followed the FTC's earlier publication of its Statement on Negotiating Merger Remedies (Statement).[5]

The main source of information outlining the EC's substantive approach to remedies is an EC Notice.[6] In addition, the EC's more detailed requirements for divestiture commitments have been further set forth in a set of Best Practice Guidelines[7] which include model texts for both divestment commitments and trustee mandates (discussed below).

The three agencies do not rely on an exhaustive list of possible remedies but broadly distinguish between structural and behavioural remedies. Structural remedies are one-off solutions that involve the transfer, through divestiture, of companies and/or assets. Behavioural (or 'conduct') remedies consist of ongoing post-merger obligations set forth in an order. Examples include open licensing schemes and the provision of access to certain facilities or services under predefined conditions.

All three agencies express a clear preference for structural mea-

sures because they generally address the cause of the competitive harm more directly and permanently and require less ongoing oversight by the agency. For example, DoJ's Guide notes that structural remedies "are relatively clean and certain and generally avoid costly government post-acquisition entanglement"[8] while the EC Notice states that: "[t]he most effective way to restore effective competition, apart from prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture".[9]

While the EC Notice identifies divestiture as the preferred remedy, it does not exclude resort to behavioural measures. For instance, where market entry is hindered by exclusive arrangements or where access to essential facilities is required in order for other players to compete effectively, the termination of exclusive arrangements or some form of conduct remedies may be desirable. DoJ and the FTC, on the other hand, have less enthusiasm for 'conduct remedies', believing they "present substantial policy and practical concerns" and that they are best suited to sector specific regulators whose knowledge and expertise of the industry concerned enable them to monitor better any evasive behaviour.[10] In short, DoJ and the FTC are much more likely to block a merger than impose behavioural remedies in a situation where structural remedies have been ruled out as impractical. In the words of the Guide, behavioural remedies are "more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent".[11]

Behavioural remedies have been successfully employed on occasion, usually in combination with structural measures and typically to address vertical concerns. For example, the order adopted following the EC and DoJ's review of *GE/Instrumentarium*[12] used oversight mechanisms to help encourage compliance with behavioural commitments with a minimum need for direct regulatory monitoring and enforcement. Nevertheless, the use of behavioural remedies in isolation has, by and large, proven to be exceptional.

Structural remedies may present their own problems. Choosing an inappropriate buyer or divesting too little or too much of the merged entity's assets might lead to distortions elsewhere in the market that cannot be undone.[13] In that respect behavioural remedies may offer more future flexibility. Nevertheless, the agencies prefer structural remedies because, once implemented, they do not require additional ongoing monitoring. As Justice Brennan indicated, divestiture is "the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should be in the forefront of a court's mind."[14] Similarly, the European Court of First Instance has stated that "structural remedies are, as a rule, preferable."[15]

Divestiture concerns

While divestiture is the preferred remedy in the US and the EU, its ultimate success depends on the way in which it is designed, implemented, and enforced. To that end, the US agencies and the EC have increasingly sought many of the same commitments though, as discussed below, there exists a degree of divergence among the three agencies with respect to requiring 'up-front buyers', allowing 'fix-it-first' divestiture, and as to the utility of 'crown jewel' provisions.

Sufficient assets

For divestiture to be successful, the divested business needs sufficient assets to ensure its long-term viability. The US agencies and the EC make clear that the main way of ensuring this is through divestiture of a stand-alone business/ongoing entity that has already shown its ability to compete in the relevant market or that has the ability to do so in the future.[16] A divested subsidiary already operating as a distinct business unit will meet this condition more easily than a diverse collection of loosely related assets or carved off parts of various businesses. Further, both the US agencies and the EC recognise that assuring the viability of a new (or reinforced) competitor through divestiture may require that it acquire ancillary or complementary tangible or intangible assets.[17]

Suitability of purchaser

Since the viability of divestiture also depends on the purchaser's suitability to run it effectively, the agencies attach great importance to the profile of the purchaser. Thus, as a condition for approval, the EC normally requires that the purchaser be "a viable existing or potential competitor, independent of and unconnected to the parties, possessing the financial resources, proven expertise and having the incentive to maintain and develop the divested business as an active competitive force in competition with the parties".[18] *TotalFina/Elf Aquitaine*[19] provided the first reported example of a formal EC rejection of proposed purchasers because the parties could not demonstrate that the purchasers would have had the requisite incentive to maintain competition in the market.

Similarly, both the FTC and DoJ reserve the right to approve a proposed purchaser. Before DoJ provides such approval, it must first be satisfied that divestiture will not itself cause harm (ie by conferring market power on the proposed purchaser), that the purchaser has incentives to utilise the divested assets to compete in the market in question (ie not to simply realise their value through prompt sale or liquidation), and that the purchaser ultimately has the experience and financial resources to be a viable long term competitor of the merged entity.[20] The FTC echoes this by stating that an acceptable buyer will have the ability and resources to "maintain or restore competition in the relevant market" as well as the "experience, commitment and incentives necessary to achieve the remedial purposes of the order".[21]

Upfront buyer/fix-it-first

The agencies' right to approve the proposed purchaser may not be enough to ensure an effective remedy if the notifying parties are unlikely to find any suitable candidates, eg because of uncertainty regarding the commercial appeal and viability of the divested business, because the interested candidates are not qualified, etc. In such cases, the agencies may insist on an agreement requiring an approved buyer prior to the agency's clearance decision. There are clear differences in the approach followed by each of the three agencies in this regard.

The FTC generally requires the proposed buyer to be identified before it will approve a consent decree and allow the deal to close.[22] By contrast DoJ "focuses on specifying in the decree the appropriate set of assets to be divested quickly rather than on the identification of an acceptable buyer" prior to entering into a consent decree.[23] Thus DoJ is less likely to insist on an upfront buyer noting that "[p]ermitting the parties to close prior to the identification of a buyer means that any pro-competitive efficiencies of a deal are realised on a relatively faster basis than might otherwise occur if the parties could not close until a buyer had been approved".[24]

DoJ is also open to a 'fix-it-first' structural approach under which the parties implement divestiture independently, as a private remedy, without the need for a consent decree.[25] A fix-it-first remedy eliminates DoJ's concerns and therefore obviates the need for a decree. Between June 2001 and July 2003, nearly one third of the remedies accepted by DoJ involved such an approach.[26] The FTC, on the other hand, generally requires parties to enter into a consent order, although it recently allowed a fix-it-first in *Harrahs/Caesars*.[27] The argument for requiring a consent order is that it reduces the risk that the merger parties will not find a suitable purchaser and that assets will decline in value while divestiture is being implemented. This policy might, however, become more difficult to maintain following *Arch Coal*, where the FTC's challenge to a transaction was unsuc-

cessful because of such fix-it-first divestiture.[28]

The EC is less likely to insist on an upfront buyer than the FTC, and the fix-it-first approach followed by DoJ is closely linked to US-specific procedural provisions that are not applicable in the EU framework.[29] Still, the EC occasionally insists on a suitable upfront buyer which can affect the parties' ability to obtain clearance. For example, in *Bosch/Rexroth*,[30] the first case in which the EC imposed the condition for an upfront purchaser, the merger was not allowed to go ahead until a suitably strong upfront purchaser had been found. A proposed divestiture to a weak buyer was rejected by the EC, because it raised the risk that the merging parties would easily win back their lost market share, given the expected absence of any effective competition from this buyer.

'Crown jewel' provisions

A 'crown jewel' provision involves a requirement that the merged firm add specific and typically more valuable assets into the divestiture package if the initially agreed upon divestiture does not happen before the prescribed deadline. The rationale for such a requirement is that it may make the divested business sufficiently more attractive to prompt an effective divestiture. DoJ disapproves of such measures, believing they represent "acceptance of either less than effective relief at the outset or more than is necessary to remedy the competitive harm".[31] DoJ is also concerned that crown jewel provisions will encourage manipulation of the divestiture process by purchasers who, aware that there are a limited number of alternative purchasers, have every incentive to delay acquisition negotiations in the hope that they will get an even more desirable package of assets later. The FTC, by contrast, believes that crown jewel measures may, in certain situations, be useful as means of making sure that a proposed remedy is ultimately realised.[32]

The EC, like the FTC, has an open mind with respect to crown jewel provisions and recent practice has shown that it is, in fact, willing to resort to such divestiture if the sale of the preferred assets has not occurred by a previously specified deadline (eg *Nestle/Ralston*).[33] Indeed according to the EC Notice, crown jewel provisions may be required if the implementation of the parties' preferred divestiture package is uncertain or difficult because of factors such as problems over the transfer of key contracts or intellectual property rights or concerns over third party pre-emption rights.[34] In the event of such uncertainty, the EC can demand that the parties propose an alternative divestiture (as well as a timetable) that is equally or better suited to address the EC's concerns than what was included in the initial divestiture offer previously.

Trustees in divestiture

DoJ requires that every consent decree include the appointment of 'selling trustee' who is empowered to sell the divestiture package if divestiture to a suitable purchaser does not occur by the specified deadline. Likewise, the FTC includes provisions in consent orders for the appointment of 'divestiture trustees' to facilitate divestiture under the same circumstances. In addition, the FTC often uses a 'monitoring trustee' to review the merging parties' compliance with consent decrees (particularly where the remedies agreed also involve behavioural commitments or the transfer of only a portion of an ongoing business), whereas DoJ believes a monitoring trustee merely duplicates its own monitoring role.[35]

Typically DoJ and the FTC will allow the parties a brief period (often two to three months) to implement an acceptable divestiture of the identified assets before a trustee sells the assets. Parties dealing with the EC usually have a slightly longer period (up to six months) within which to comply with any divestiture commitments before the appointment of a divestiture trustee becomes necessary.

In the EU, when parties provide undertakings to divest, these will be subject to the appointment of both a divestiture trustee and a monitoring trustee (or 'hold-separate' trustee) to ensure compliance with the commitments and to divest the assets if divestiture is not accomplished within the specified time. In particular, the hold-separate trustee will be expected to ensure that the merging parties fulfil their obligation to "maintain the economic viability and competitiveness" of the divested assets prior to their sale.[36]

Conclusion

Differences in the procedural framework for merger review in the US and the EU can influence the timing and content of remedies. Further, the three agencies have different views on the merits of certain remedies including, in particular, divestitures to an upfront buyer, a fix-it-first approach and the sale of 'crown jewels'. Such relatively minor differences do not mask the convergence of the agencies' views on most substantive issues concerning remedies. At the same time, however, the agencies' case-specific concerns will also depend on the definition of the markets affected by the transaction. If, as is usually the case, these are less than global in scope, the relevant market structures, competition concerns and any required remedies may differ substantially between the US and the EU, regardless of the agencies' generally similar policies on remedies.

Notes

1 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.
2 ECMR, Article 10(1).
3 ECMR, Article 10(3).
4 Department of Justice, Antitrust Division Policy Guide to Merger Remedies, (October 21, 2004) (Guide). See McDavid & Breed, 'Antitrust Law: Merger Remedies', *Nat'l L. J.* (Jan. 17, 2005).
5 Federal Trade Commission, Statement on Negotiating Merger Remedies, (April 2, 2003) (Statement).
6 Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and Regulation (EC) No. 447/98 at Official Journal C 68, 02.03.2001 (EC Notice).
7 Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation, 2 May 2003.
8 Guide § III.A.
9 EC Notice § III paragraph 13.
10 Guide § III.E.2, Statement n. 8, and EC Notice § III paragraph 14.
11 Guide § III.A.
12 GE/Instrumentarium, Case No. COMP/M.3083; *United States v Gen Elec Co*, Civ No. 03-1923 (DDC) (final judgment filed February 23, 2004).
13 Guide § IV.D.
14 *United States v EI du Pont de Nemours & Co*, 366 U.S. 316, 326 (1961).
15 *Gencor v Commission* , Case T-102/96 [1999] ECR II-753, paragraph 319.
16 Guide § II.C and Statement § 1 paragraph 1.
17 Guide § III.B and Statement § 1 paragraph 2.
18 EC Notice § VI paragraph 49.
19 TotalFina/Elf Acquitaine , Case No. IV/M.1628.
20 Guide § IV.D.
21 Statement § 1 paragraph 3.
22 See Federal Trade Commission's, Frequently Asked Questions About Merger Consent Order Provisions (April 2, 2003), http://www.ftc.gov/bc/mergerfaq.
23 Guide n. 42 .
24 Address by R Hewitt Pate, Antitrust Enforcement at DoJ – Issues in Merger Investigations and Litigation. Dec. 10, 2002.
25 DoJ's favourable view of fix-it-first remedies stems from the more

complex procedures it must comply with in order to receive federal court approval of DoJ antitrust consent decrees pursuant to the so-called Tunney Act, 15 USC § 16.

26 R Hewitt Pate, Statement Before the House Judiciary Committee Concerning Antitrust Enforcement Oversight 9 (July 24, 2003); transcript available at http://www.usdoj.gov/atr/public/testimony/201190.htm.

27 FTC Closes Investigation of Harrah's Entertainment Inc's Acquisition of Caesars Entertainment Inc (June 9, 2005).

28 *FTC v Arch Coal Inc*, 329 F. Supp. 2d 109 (D.D.C. 2004).

29 See supra, note 25.

30 *Bosch/Rexroth*, Case No. COMP/M.2060.

31 Guide § IV.H.

32 Statement § 2 paragraph 2.

33 *Nestle/Ralston Purina*, Case No. COMP/M.2337.

34 EC Notice § III paragraph 22.

35 Statement § 5 and Guide § IV.I Caveat 3.

36 Best Practice Guidelines paragraph 20.

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