International Antitrust Committee: The Newsletter

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MESSAGE FROM THE COMMITTEE CO-CHAIRS
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MESSAGE FROM THE EDITOR
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REMEDIES' STRATEGY IN YOUR JURISDICTION:
CLOSING PROBLEMATIC TRANSACTIONS

ARGENTINA: Alfredo M. O'Farrell & Santiago del Río, Marval, *O'Farrell & Mairal* 4

BELGIUM: Peter L'Ecluse & Femke Vanderhaeghen, *Van Bael & Bellis*........................11

BRAZIL: Jose Carlos da Matta Berardo, *Barbosa, Müssnich & Aragão Advogados*........................15

CANADA: Jason Gudofsky, David Rosner & Kathryn McNeece, *Blake, Cassels & Graydon LLP*...21

COLOMBIA: Alejandro García de Brigard, *Brigard & Urrutia* 28

EUROPEAN UNION: Suzanne Rab, *Serle Court* 32

FRANCE: Marc Pittie & Pierre Honoré, *Bredin Prat* 37

INDIA: Naval Satarawala & Harman Singh Sandhu, *Shardul Amarchand Mangaldas & Co*..........43

ITALY: Massimo Merola, *Bonelli Erede Pappalardo*........................49

MEXICO: Amilcar Peredo & Gabriel González Aragón, *Basham, Ringe y Correa, S.C*........................53

RUSSIA: Vassily Rudomino & Ksenia Tarkhova & Roman Vedernikov, *ALRUD*........................56

SOUTH AFRICA: Judd Lurie, *Bowman Gilfillan* 61

SPAIN: Oriol Armengol I Gasull & Jaime de Blas Aguilera, *Pérez-Llorca*........................67

UKRAINE: Timur Bondaryev & Maryna Alekseyeva, *Arzinger Law Office*........................70

UNITED KINGDOM: Suzanne Rab, *Serle Court*........................74

USA: Jason D. Cruise & Lindsey S. Champlin, *Latham & Watkins LLP*........................79

USA

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Parties to a merger with significant antitrust issues often agree to remedies with a U.S. antitrust agency to address the agency's concerns. A U.S. merger remedy must effectively preserve competition in the relevant markets where antitrust issues exist. If a remedy that would preserve competition is unavailable, the agency will generally seek to block the transaction through litigation. This article provides a general overview of issues that arise as part of the U.S. merger remedy process.

Timing. The parties may offer a remedy, or otherwise begin a remedy dialogue, with the reviewing antitrust agency at any time during the course of the review process. These conversations may take place early in the process, sometimes before or just after the Hart-Scott-Rodino ("HSR") filing, (a "fix-it-first" approach) or later in the process, following the agency's review and indication of serious concerns.

The fix-it-first approach involves the parties proposing a remedy at the onset of the agency's review that is designed to resolve any antitrust concerns and thereby avoid a formal challenge to the merger. This approach, if successful, obviates the need for the often burdensome process associated with the formal U.S. consent decree process. A fix-it-first remedy can be beneficial for the parties because they are able to craft their own remedy. For example, if they are proposing an asset divestiture, the parties are able to carefully select the assets to be divested and fashion the package toward a specific buyer. Examples of proposed fix-it-first remedies include the provision in NXP's recent agreement to acquire Freescale in which it committed to begin the process of selling its high-power RF device business promptly after signing, as well as FirstGroup's sale of a large Alaska school bus contract and related assets to proceed with its acquisition of Laidlaw International.[1] If successful, a fix-it-first remedy may result in a shorter period of agency review that streamlines the process for both sides: the parties are able to close their transaction sooner, and the agency is able to preserve competition in the affected markets more quickly. The U.S. agencies are less likely, however, to accept a fix-it-first remedy that requires monitoring or other ongoing agency involvement to ensure compliance. Thorough analysis of the contemplated remedy, ideally with input from the reviewing agency, is critical to ensure that a fix-it-first remedy succeeds.

More commonly, the parties wait until they are further along in the agency review process before proposing a remedy. This may involve offering a remedy at several stages, including (i) after the agency declines to clear the transaction within the 30-day HSR waiting period and issues burdensome "Second Request" subpoenas, (ii) after completing the responses to the Second Requests, if the agency continues to express concerns, or (iii) when the agency appears poised to head to court, or has already filed a complaint, to stop the transaction. The ideal approach for a particular merger will depend on the parties' timing and business goals and the nature of the agency's antitrust concerns.

The Remedy Package. Effective merger remedy packages vary from deal to deal. The U.S. agencies generally prefer "structural" remedies that involve the divestiture of businesses or assets. They favor the sale of an entire existing business unit, rather than components of that business. "Behavioral" remedies, which involve obligations of the parties to take or not to take certain actions, are less favored, but have been accepted

1 Freescale Semiconductor, Form 425, March 2, 2015, available at http://investors.nxp.com/phoenix.zhtml?c=209114&p=IROL-secToc&TOC=aHR0cDovL2FwaS50ZW5rd2I6YXJkLmNvbS9vdXRsaW5lLnhtbD9yZXBvPXRlbmsmaXBhZ2U9MTAxMTQ2NDcmc3Vic2lkPTU3&ListAll=1; FirstGroup plc and Laidlaw International Inc. Sell Off School Bus Contract in Alaska to Resolve Antitrust Concerns, September 27, 2007, http://www.justice.gov/atr/public/press_releases/2007/226377.htm.

on many occasions. Behavioral remedies are often used in vertical mergers, or where a structural remedy would eliminate a merger's efficiencies. Common types of behavioral remedies used in the U.S. include information firewalls, non-discrimination provisions, mandatory licensing, transparency measures and anti-retaliation provisions.

Hybrid remedies that combine structural and behavioral provisions are not uncommon, particularly where there is a vertical aspect to the competition concerns. For example, the transaction between Live Nation and Ticketmaster involved both horizontal (ticketing services) and vertical (promoter and venue owner combining with ticketing services provider) aspects. The remedy in that transaction had both structural provisions aimed at creating new ticketing services firms and behavioral provisions including prohibitions on mandatory bundling.[2] Hybrid remedies may also be utilized for mergers where behavioral provisions are necessary to facilitate structural provisions. For example, a transitional supply agreement may be needed for a business divestiture.

A structural remedy package generally includes all assets—tangible and intangible—that the divestiture buyer needs to compete. The tangible assets that make up a remedy often include manufacturing facilities and machinery, sources for raw materials and key inputs, personnel, marketing and distribution organizations, customer relationship information and capital resources. Intangible assets include, for example, intellectual property rights and know-how. The U.S. antitrust agencies allow the merged firm to retain rights to share intellectual property with the divestiture buyer in some cases. The agencies, however, will generally seek to avoid long-term ongoing financial, supply and technical relationships and other entanglements between the merged firm and the divestiture buyer in areas where they are expected to compete. For this reason, these relationships are generally only transitional, and not permanent, in duration. This is meant to avoid limiting the long-term competitiveness of the divestiture buyer, or limiting the level of its competition with the merged firm for a meaningful amount of time.

Where the proposed remedy package is less than an existing business unit, the U.S. antitrust agencies may require additional safeguards to ensure that the remedy successfully preserves competition. These safeguards sometimes take the form of an "upfront buyer" requirement in which the parties must identify the specific divestiture buyer for the reviewing agency prior to consummating their merger, or a "crown jewel" provision that obligates the parties to add further valuable assets to the remedy package to entice suitable buyers if the initial package is not drawing in viable buyers. There is often also a trustee provision that hands control of the divestiture process to a third party trustee once a certain period of time has passed after the consummation of the merger and the parties have not yet completed the divestiture.

In certain instances, the U.S. agency may require that the divestiture package actually include more assets than are included in an existing business unit when additional assets are needed to preserve competition. One example is the situation where a supplier needs access to more than one product—and perhaps an entire line of products—in order to compete successfully.

The Buyer. Another key consideration in the remedy process is whether to propose a "buyer upfront" or to negotiate a post-consummation divestiture. A "buyer upfront" refers to a situation in which the parties identify a specific buyer for the divested business or assets, and the reviewing agency considers and approves the divestiture buyer before the remedy is finalized. The alternative is a more traditional post-consummation divestiture, in which the contents of the remedy package are approved by the agency, the parties consummate their merger, and then they move forward with

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2 Competitive Impact Statement at 13-18, United States v. Ticketmaster (D.D.C. 2010) (No. 10-cv-139) (filed Jan. 25, 2010), *available at* http://www.justice.gov/atr/cases/f254500/254544.pdf.

identifying a buyer, obtaining agency approval of the buyer, and completing the divestiture.

The U.S. antitrust agencies sometimes prefer a buyer upfront because it is more certain and requires less after-the-fact agency monitoring. The FTC has stated that it typically requires an upfront buyer when parties are divesting primarily IP rights, less than an existing business, or any other limited asset set.[3] An upfront buyer can also be beneficial for the parties in some situations because of the certainty and the possibility of a shorter divestiture process. It also affords the parties the opportunity to negotiate a transaction without the timing pressure of consent decree provisions, which may result in more favorable sale terms.

The post-consummation divestiture option has its own benefits for the parties in terms of more quickly closing their merger, and having some amount of additional flexibility in selecting a divestiture buyer. For these divestitures, though, the agency must be persuaded that the proposed remedy package will attract a buyer with the ability to preserve competition. Further, the reviewing agency still must approve the buyer in these post-consummation scenarios. The parties may demonstrate a buyer's suitability to the reviewing agency in numerous ways, including through submission of information about its business acumen, experience in the same or related industries, financial stability and resources, past success in deploying acquired businesses, strategic plans for the business to be divested, and incentives to compete vigorously in the new business.

The parties may approach potential buyers at any time in the process. Communications with these buyers may be responsive to a Second Request subpoena, so the reviewing agency could obtain information about the nature of the discussions during its review process. The timing and contents of these communications, therefore, should be planned with care.

Once selected, the buyer plays a key role in the agency review and consent decree process. The reviewing agency typically discusses the remedy package with the buyer, including exploring its plans for the business. The agency analyzes the proposed sale agreement and pays attention to the purchase price. If the price is too low, this may suggest the buyer intends to re-sell the assets. On the other hand, a particularly high purchase price may suggest the buyer is paying a premium to acquire a strong market position, or that that the buyer will be saddled with debt following the purchase, negatively impacting its ability to compete over the long-term. The U.S. agencies also disfavor the selling party financing the divestiture buyer, and they will review the agreement carefully for these types of arrangements. The main concern is that if the seller retains some amount of financial control, this necessarily weakens the buyer's competitive position and incentives. It also may present the opportunity for the exchange of competitively sensitive information in some situations.

Implementation. The agreed remedy package is memorialized in a consent decree. Consent decrees are public documents, which are available in court filings, government publications and/or on the reviewing agency's website. The consent decree package typically has several main components which include: (i) the complaint, (ii) the decision, (iii) an analysis of how the proposed remedy addresses the agency's competition concerns and (iv) the hold separate order (if a divestiture has not been finalized). The hold separate order requires the parties to "hold separate" the assets to be divested to ensure that they continue to be kept separate and sellable. This involves segregating the assets from the merged firm both physically and through the use of personnel firewalls to prevent information sharing.

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3 Negotiating Merger Remedies, Statement of the Bureau of Competition, January 2012, at 7-8, *available at* https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.

As mentioned above, the agencies may appoint trustees to assist with remedy implementation where necessary. If the reviewing agency suspects the parties may mismanage the assets during the hold separate period it may appoint an operating trustee. The agency may also appoint a monitoring trustee to oversee the parties' compliance with the consent decree. If the parties are unable to sell the assets in the period provided in the consent decree, this typically triggers the activation of a divestiture trustee who is directed to complete the divestiture for the parties.

Agency Enforcement. Agency staff closely monitor compliance with consent decrees. This involves keeping abreast of the divestiture sale process and reviewing filings and other reporting that the parties are required to submit. Consent decrees also allow agency staff to monitor compliance through physical inspections.

If a U.S. agency suspects a consent decree has been violated, it may institute an enforcement action to compel compliance. DOJ has the power to bring civil and criminal contempt proceedings for consent decree violations. A criminal enforcement action will only be brought if a clear and definite order was knowingly and willfully disobeyed.[4] The agencies may also investigate suspected consent decree violations through issuing a civil investigative demand or "CID" which is a subpoena requesting documents and information. This process may be as burdensome and lengthy as a Second Request.

Amendments. The U.S. agencies have processes for approving amendments to existing consent decrees. Once an FTC order implementing a remedy becomes final, it must be modified according to the Commission's Rules of Practice. Under these rules, a party must show that "changed conditions of law or fact require the rule or order to be altered, modified or set aside, in whole or in part, or that the public interest so requires."[5] Modification of a DOJ final judgment requires court approval. Where DOJ consents to a party's proposed modification, the court must determine whether the modification is in the public interest. Courts frequently modify consent decrees and generally accept DOJ's conclusion that a modification is in the public interest. Where DOJ opposes the proposed modification, the party seeking the modification "bears the burden of establishing that a significant change in circumstances warrants revision of the decree."[6] This type of consent decree modification is more difficult for a party to achieve.

Every merger presents unique issues and each remedy negotiation will differ. Counsel should devise a strategy based on their client's business goals with particular attention to timing factors that often are the driver of the optimal approach.

4 18 U.S.C. § 401(3).
5 16 C.F.R. § 2.51.
6 United States v. Western Elec. Co., 154 F.R.D. 1, 7-8 (D.D.C. 1994) (quoting Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748, 760 (1992)).