

U.S. Agencies Take a Tough Approach to Merger Remedies

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In the second term of the Obama Administration, both the U.S. Federal Trade Commission (“FTC”) and the U.S. Department of Justice, Antitrust Division (“DOJ”)—the two agencies charged with merger review—continued to press for broad divestiture packages.

To support these efforts, the FTC has also announced plans to conduct a **“merger retrospective”** to determine the effectiveness of remedies imposed in some of the prior mergers.¹

In total, the FTC proposes studying 92 merger orders issued by the Commission between 2006 and 2012. The study

¹ Press Release, Fed. Trade Comm’n, FTC Proposes to Study Merger Remedies (Jan. 9, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/01/ftc-proposes-study-merger-remedies>.

will include interviews of the buyers of divested assets, significant competitors in each market, and customers.

The current antitrust enforcement environment means that merger parties should be prepared for the potential of prolonged review and protracted consent negotiations in transactions that raise concerns requiring relief.

On June 17, 2011, the DOJ issued an updated policy guide to merger

remedies. As indicated in the Guide:

The touchstone principle for the Division in analyzing remedies is that a successful merger remedy must effectively preserve competition in the relevant market. . . .

In horizontal merger matters, structural remedies often effectively preserve competition, including when used in conjunction with certain conduct provisions. Structural remedies may be appropriate in vertical merger matters as well, but conduct remedies often can effectively address anticompetitive issues raised by vertical mergers.

In all cases, the key is finding a remedy that works, thereby effectively preserving competition in order to promote innovation and consumer welfare.²

Recent precedent includes the agencies imposing a variety of behavioral conditions to support a structural divestiture. Transition services arrangements and supply arrangements have been more routinely included, beyond the pharmaceutical industry where they were the norm.³

Mandatory licensing provisions may also alleviate competitive concerns by enabling competitors access to a key input;⁴ some of the consents, however,

include not only a license for technology, but the right to purchase the technology or to transfer the license to a third party later.⁵

In addition, non-discrimination provisions have been included to incorporate the concepts of equal access, equal efforts, and equal terms.

For instance, the FTC's CoStar/Loopnet consent contained what the FTC characterized as ***“conduct relief that is unusual in a merger settlement.”***⁶

In addition to requiring that the parties divest LoopNet's Interest in Xceligent, a competing database that the FTC considered to be the ***“most similar competitor for information services”*** to CoStar, the consent also ***“imposes certain conduct requirements to assure the continued viability of Xceligent as a competitor to the merged firm and to reduce barriers to competitive entry and expansion. These additional provisions will facilitate Xceligent's geographic expansion and prevent foreclosure of [the parties'] established customer base.”***

The consent, for five years, (1) prohibits CoStar and Loopnet from restricting customers' ability to support Xceligent;

² U.S. Dep't of Justice, Antitrust Division, Antitrust Division Policy Guide to Merger Remedies (Aug. 19, 2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>

³ See, e.g., Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures in Order for Regal Beloit Corporation to Proceed with Its Acquisition of A.O. Smith Corporation's Electric Motor Business (Aug. 17, 2011), available at <http://www.justice.gov/opa/pr/2011/August/11-at-1056.html>; Hold Separate Order United States v. Bemis Co., Inc., No. 1:10-cv-00295 (D. DC Feb. 28, 2010), available at <http://www.justice.gov/atr/cases/f255700/255715.htm>.

⁴ See, e.g., Press Release, U.S. Dep't of Justice, Justice Department Requires Google Inc. to Develop and

License Travel Software in Order to Proceed with Its Acquisition of ITA Software Inc. (Apr. 8, 2011), available at <http://www.justice.gov/opa/pr/2011/April/11-at-445.html>; Press Release, U.S. Dep't of Justice, Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions (Jan. 18, 2011), available at <http://www.justice.gov/opa/pr/2011/January/11-at-061.html>.

⁵ See, e.g., United States v. Cameron Int'l Corp., No. 1:09-cv-02165 (D. D.C. Nov. 17, 2009), available at <http://www.justice.gov/atr/cases/f252000/252080.htm>.

⁶ Press Release, Fed. Trade Comm'n, FTC Places Conditions on CoStar's \$860 Million Acquisition of LoopNet (Apr. 26, 2012), available at <http://www.ftc.gov/opa/2012/04/costar.shtm>.

(2) requires Co-Star and Loopnet to allow customers to terminate their existing contracts, without penalty, with one year's prior notice; and (3) bars the merged firm from requiring customers to buy any of its products as a condition for receiving other products, and from requiring customers to subscribe to multiple geographic coverage areas to gain access to a single area in which they are interested.

In addition, the consent requires, for three years, that CoStar and LoopNet continue to offer their customers core products on a stand-alone basis.

A related provision prohibits the parties from limiting use of the REApplications product, a software tool for managing market research in connection with customers' purchase, lease, or license of CRE database services from competitors.

There have also been situations recently in which the agencies have required divestitures to include out-of-market assets (i.e., a divestiture package that goes beyond the assets in the relevant market).⁷

In Community Health Systems ("Community")/Health Management Associates ("HMA"),⁸ the FTC's concerns were focused on general acute care hospital inpatient services sold

⁷ For a discussion of remedies including out-of-market assets from the FTC's perspective see Dan Ducore, Divestitures may include assets outside the market (Apr. 24, 2015), available at <https://www.ftc.gov/news-events/blogs/competition-matters/2015/04/divestitures-may-include-assets-outside-market>.

⁸ Press Release, Federal Trade Comm'n, FTC Requires Community Health Systems, Inc. to Divest Two Hospitals as a Condition of Acquiring Rival Hospital Operator (Jan. 22, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/01/ftc-requires-community-health-systems-inc-divest-two-hospitals>.

to commercial health plans in two geographic areas; the FTC, however, required that Community include in the divestiture package the hospital facilities and all outpatient services and operations that were affiliated with the hospital, regardless of whether those services were provided at the hospital.

The FTC viewed the outpatient business as necessary for the buyer of each hospital to be as effective of a competitor as HMA had been prior to the transaction.

In Sun Pharmaceutical/Ranbaxy,⁹ the FTC although the expressed concerns that the combination would impact future competition for three strengths of generic minocycline tablets used to treat a variety of infections, the Commission required the firms to sell as well assets related to three dosages of generic minocycline capsules.

The FTC's rationale for including the capsules was that it would allow the upfront buyer to use a shorter FDA regulatory process because it would control both products and use the same ingredient (API) supplier.

In Holcim/Lafarge,¹⁰ the FTC conditioned clearance on the divestiture of plants and terminals, including a terminal in Alberta, Canada and cement plant in Ontario, Canada. Canadian assets that

⁹ Press Release, Fed. Trade Comm'n, FTC Puts Conditions on Sun Pharmaceutical's Proposed Acquisition of Ranbaxy (Jan. 30, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/01/ftc-puts-conditions-sun-pharmaceuticals-proposed-acquisition>.

¹⁰ Press Release, Fed. Trade Comm'n, FTC Requires Cement Manufacturers Holcim and Lafarge to Divest Assets as a Condition to Merger (May 4, 2015) available at <http://www.ftc.gov/news-events/press-releases/2015/05/ftc-requires-cement-manufacturers-holcim-lafarge-divest-assets>.

are named in the FTC consent decree were included by the FTC as necessary to remedy competitive concerns in northern U.S. markets.

Finally, in ZF Friedrichshafen AG/TRW Automotive Holdings Corp.,¹¹ the FTC conditioned approval of the \$12.4 billion merger that creates the world's second-largest auto parts supplier with the divestiture of TRW's linkage and suspension business in North America and Europe, even though only suppliers that have production facilities in the United States, Canada, and Mexico were deemed capable of competing for U.S. business.

The agencies have also taken a more expansive stance, particularly in transactions involving innovation and future generations of products. For instance, the DOJ recently announced that Applied Materials Inc. and Tokyo Electron Ltd. had abandoned their merger plans after the DOJ informed them that their remedy proposal failed to resolve the competitive concerns.¹²

Although the merger parties had reportedly offered to divest the overlapping etching and depositing business line of Tokyo Electron, the DOJ thought the package did not adequately address the future impact of the deal on innovation in future generations of semiconductor equipment.

¹¹ Press Release, Fed. Trade Comm'n, FTC Puts Conditions on Merger of Auto Parts Suppliers ZF Friedrichshafen and TRW Automotive Holdings Corp. (May 5, 2015) available at <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-puts-conditions-merger-auto-parts-supplier-zf>

¹² Press Release, U.S. Dep't of Justice, Applied Materials and Tokyo Electron Ltd. Abandon Merger Plans after Justice Department Rejected Their Proposed Remedy (Apr. 27, 2015), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

Similarly, in the Nielsen/Arbitron transaction, the FTC focused on protecting a future market for syndicated audience cross-platform measurement services.

The consent conditioned that transaction's approval on Nielsen's obligation to:

1. continue its cross-platform project with ESPN Inc. and Comscore Inc.; and
2. license Arbitron's people meter and related data, as well as software and technology being used in the ESPN project, to an FTC-approved third party for up to eight years.¹³

Both agencies have also increasingly required that the parties identify an acceptable "**upfront buyer**" before accepting divestiture packages.¹⁴ The "**upfront buyer**" requirement is justified by the agencies as being necessary to ensure that the divestiture will be effective in maintaining competition at the same level as pre-transaction.

¹³ Press Release, Fed. Trade Comm'n, FTC Puts Conditions on Nielsen's Proposed \$126 Billion Acquisition of Arbitron (Sept. 20, 2013), available at <http://www.ftc.gov/opa/2013/09/nielsen.shtm>. Commissioner Wright dissented from the decision on the basis that the future market theory shall be subject to a higher evidentiary standard. See Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Nielsen Holdings N.V. and Arbitron Inc. FTC No. 131-0058 (Sept. 20, 2013), available at <http://www.ftc.gov/os/caselist/1310058/130920nielsenarbitron-jdwstmt.pdf>.

¹⁴ The public attention on Advantage Rent A Car's filing for bankruptcy four months after the FTC approved its divestiture to resolve concerns in the Hertz/Dollar Thrifty deal exemplifies the risk — though extremely rare — that can arise for an agency from accepting an antitrust remedy. See David McLaughlin, Mark Clothier, and Sara Gay Forden, Hertz Fix in Dollar Thrifty Deal Fails as Insider Warned, Bloomberg (Nov. 29, 2013), available at <http://www.bloomberg.com/news/articles/2013-11-29/hertz-fix-in-dollar-thrifty-deal-fails-as-insider-warned>.

The transaction parties, however, can face substantial delay from the process: the need to identify a divestiture buyer, negotiate a divestiture agreement, and have that buyer and the package vetted by the agencies before the main transaction is permitted to proceed can literally add months to the review process.

For transaction parties with overlapping products/services that are likely to raise antitrust concerns, the recent enforcement activities and trends raise the potential for prolonged investigations and protracted consent negotiations as well as the potential that the divestiture package required to satisfy the agency may exceed the U.S. operations or currently sold products/services.

Transaction parties may be able to mitigate some of the harm by giving careful thought prior to the execution of the definitive agreements regarding the potential scope of relief and the management of the review process (including negotiation of remedies).

To minimize delay, parties may consider approaching potential divestiture buyers that are likely to be supportive of the package that will be offered to the reviewing agency to address their concerns while the investigation is still ongoing.

Absent such planning and initiative, the transaction's consummation will, at best, be delayed, and could even potentially fail on antitrust grounds.



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