e-Competitions
Antitrust Case Laws e-Bulletin

Concurrences
Antitrust Publications & Events

US Merger remedies

Merger remedies in the US: An overview of the leading cases

MERGERS, BEHAVIOURAL REMEDIES, FOREWORD, REMEDIES (MERGERS), UNITED STATES OF AMERICA, TRUSTEE (MERGERS), STRUCTURAL REMEDIES

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

Jessica K. Delbaum | Shearman & Sterling (New York)
John Skinner | Shearman & Sterling (New York)

e-Competitions Special Issue US Merger remedies | 5 March 2020

1. Introduction

This Special Issue presents a collection of important U.S. federal antitrust merger remedies since 2000. [*1*] The merger remedies guidance documents issued by the U.S. federal antitrust enforcement agencies, the Antitrust Division of the United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") (each, an "Agency," or collectively, the "Agencies"), [*2*] are the right starting point for anyone trying to understand the U.S. approach to merger remedies. These documents, however, speak in generalities and cite to a small number of illustrative examples. The goal of this compilation is to provide a broader collection of illustrative examples, which, taken as a whole, presents the Agencies' current approach to the analysis, implementation and enforcement of merger remedies. For this collection, the remedies cited fall into at least one of the following categories: (1) representative examples of common DOJ/FTC remedies (based on the type of remedy, the industry, and/or the competitive issue addressed); (2) leading examples of recent trends; and (3) unusual remedies resulting from unusual circumstances.

This Foreword puts these examples in context, condensing the main principles from the Agencies' guidance documents, adding some commentary, and pointing readers to illustrative relevant remedies for further reading.

2. Background

A basic familiarity with how the Agencies review and analyze mergers better facilitates the understanding of the U.S. approach to merger remedies.

The Hart-Scott-Rodino ("HSR") Act [*3*] established the U.S. premerger notification system. It requires parties whose mergers meet certain dollar thresholds to notify the Agencies and observe statutory waiting periods before consummating their merger. [*4*] While both Agencies receive all HSR Act notifications, a proposed merger is "cleared" to one of the Agencies (usually based on the reviewing Agency's experience in the relevant industry). The Agency then reviews the merger to determine whether it may be anticompetitive. If at the end of the initial 30-day waiting period [*5*] the reviewing Agency still has concerns about the merger's competitive implications, the Agency can extend the review period by issuing a Request for Additional Information and Documentary Material (a "Second Request"). The issuance of a Second Request stays the waiting period, and a new 30-day waiting period begins only once each of the parties has certified substantial compliance with its respective Second Request. [*6*]

The Agencies investigate whether the merger violates Section 7 of the Clayton Act, which prohibits transactions that may substantially lessen competition or tend to create a monopoly. [*7*] The reviewing Agency may conclude that a proposed merger violates this standard because, for example, the merger would allow the merged firm to either unilaterally raise prices profitably or more easily coordinate with rivals on pricing decisions. In such a situation, there are a few potential outcomes: (1) a contested lawsuit, (2) a settlement, or (3) the abandonment of the merger.

Unlike the European Commission, the Agencies cannot unilaterally block a transaction. To prevent the parties from closing their merger, the reviewing Agency must seek a preliminary injunction ("PI") in federal district court to stop the parties from closing a transaction pending a full trial on the merits of the transaction. [*8*] Many times, in the face of a multi-month delay, substantial litigation costs and an uncertain outcome, the parties choose to settle or abandon their transaction either before the PI is actually filed or before a judge rules on the PI. [*9*]

In practice, the vast majority of the Agencies' merger concerns are resolved through negotiated settlements before a PI is ever sought. These settlements generally take the form of a consent decree [*10*] between the reviewing Agency and the merging parties. As will be discussed in detail below, these settlements usually consist of obligations to address the anticompetitive aspects of the merger by making divestitures, limiting post-consummation conduct, or a combination of both.

In certain limited circumstances, the reviewing Agency may not require a consent decree to remedy competitive concerns. One such circumstance is when the merging parties unilaterally resolve the competitive concerns themselves, for example, by not acquiring certain assets (a so-called "fix-it-first" remedy). Another such circumstance occasionally occurs when another agency reviewing the transaction (e.g., a sectoral regulator or a foreign or state antitrust agency) requires a remedy that resolves the reviewing Agency's concerns and the Agency is satisfied that it does not independently need to be able to monitor or enforce that remedy.

When reviewing consummated mergers, the Agencies apply a substantive analysis similar to the pre-consummation merger review just discussed. Although the Agencies' approach to consummated merger remedies is similar, the integration of the parties' operations over time can affect the scope of remedies available. In addition, in certain circumstances, the Agencies may seek the disgorgement of profits gained as a result of an anticompetitive consummated merger.

Remedies can also result from settlements or judgments in private litigations challenging a merger. While such private actions challenging transactions are very rare, private plaintiffs did win a jury trial challenging a consummated transaction that the DOJ had declined to challenge; a federal judge required divestment as a remedy. [*11*]

3. Basic Principles of U.S. Merger Remedies

The Agencies recognize that almost every industry presents unique competitive dynamics, and therefore merger remedies also must vary. Nevertheless, the Agencies apply a basic set of principles across all merger remedies.

First, an appropriate merger remedy is one that effectively preserves (or restores) premerger competition. [*12*] Remedies are not meant to enhance competition as compared to the premerger state.

Second, remedies are not intended to determine market outcomes. The Agencies do not seek to "protect or favor particular competitors," or "determin[e] outcomes or pick[] winners and losers". [*13*]

Third, remedies are grounded in "a careful application of sound legal and economic principles to the particular facts of the case at hand." [*14*] Put another way, the remedy should flow from the theory or theories of competitive harm upon which the merger was challenged. [*15*]

4. Types of Remedies

There are two basic forms of merger remedies: Structural and behavioral. Structural remedies often involve the sale or licensing of assets; behavioral remedies involve restrictions on the merged firm's post-consummation conduct. As described below, most remedies fit into commonly used structural or behavioral molds. The Agencies have shown flexibility remedying competitive issues presented by mergers in unusual circumstances.

4.1 Structural remedies

Structural remedies generally involve the sale of tangible assets (e.g., business units or manufacturing facilities) or the sale or licensing of intangible assets (e.g., intellectual property), or a combination of both. Most competitive concerns related to horizontal mergers (i.e., mergers between actual or potential competitors) are resolved through structural remedies. [*16*]

For a structural remedy to be acceptable to the Agencies, the divestiture buyer(s) must possess "both the means and the incentive to maintain the level of premerger competition in the market(s) of concern." [*17*] The divestiture package must include all of the assets, whether tangible or intangible, that the divestiture buyer(s) would need to compete effectively with the merged firm. With this standard in mind, the Agencies generally prefer the divestiture of an existing standalone business, because it typically includes the necessary assets, personnel and customer relationships and has already proven its ability to compete. This standard was reiterated in the FTC's 2017 report analyzing merger remedies between 2006 and 2012, which found that all pre-consummation divestitures of existing standalone businesses succeeded, while divestitures of limited assets comprising less than a standalone business achieved a success rate of only 70%. [*18*]

If warranted by the circumstances, the Agencies occasionally will consider a structural remedy of less than an existing, standalone business. For example, the Agencies may accept such a remedy if the competitive concern relates only to some of the assets of two overlapping businesses and potential divestiture buyers will be able to compete effectively because they already possess, or easily could obtain, the other assets. [*19*]

On occasion, the Agencies may insist on the divestiture of more than just the overlapping assets (or businesses) of the merging parties. This can occur where, for example, a factory producing the overlapping products at issue also produces other products that do not raise antitrust concerns, or where a "full-line" of products or a key program operated by one party is necessary to compete effectively. [*20*]

Where the parties' assets creating or exacerbating the Agencies' competitive concerns with the merger are intangible (most often, intellectual property), the Agency requires the outright sale or licensing of those assets. Whether the merged firm is able to retain (non-exclusive) rights to intangible assets depends on the circumstances. These circumstances include the number (if any) of other retained products in which the merging parties use the intangible assets and the likelihood that the divestiture buyer will not be as incentivized to invest in the development or marketing of divested products that use licensed-in assets. [*21*]

When each party to a transaction has assets or businesses that, if divested, would address the Agency's competition concerns, the FTC has expressed a preference for the "easier-to-divest" product, especially in the context of pharmaceutical divestitures. In general, a divestment is "easier" when it is developed or manufactured by a third party, is already sold on-market as opposed to still in development, and is relatively simpler to manufacture than an alternative product. [*22*]

4.2 Behavioral remedies

Behavioral remedies usually restrict the merged firm's conduct in some way. Historically, the Agencies have discouraged the use of behavioral remedies because they are thought to be more difficult to implement, more costly to monitor, and easier to circumvent. The Assistant Attorney General for the Antitrust Division of the DOJ, Makan Delrahim, has emphasized this position, stating, "we strongly favor structural remedies. If a structural remedy isn't available, then, except in the rarest of circumstances, we will seek to block an illegal merger." [*23*] Likewise, following its 2017 Remedy Study, the FTC noted that it "prefers structural remedies such as divestitures to prevent competitive harm resulting from a merger." [*24*] The FTC, however, has continued to use behavioral remedies to resolve competition concerns in certain circumstances. [*25*] These remedies are most often used to counteract competitive concerns that have arisen in vertical mergers (i.e., mergers between companies at different levels of the supply chain). They are also used occasionally to address competitive concerns in horizontal mergers, usually in conjunction with a structural remedy.

The most commonly used behavioral remedies are firewalls, non-discrimination provisions, mandatory licensing, transparency obligations, anti-retaliation provisions, and prohibitions on certain contracting practices.

Firewalls are used to stop the flow of information among different parts of the merged firm. The need for firewalls often arises in the context of vertical mergers where, for example, a downstream firm being acquired may possess competitively sensitive information regarding the upstream acquirer's competitors (or vice versa). [*26*]

Non-discrimination provisions seek to ensure competitors have "equal access, equal efforts, and non-discrimination." [*27*] The Agencies consider the use of these provisions when, for example, an upstream acquirer may have incentives to favor a to-be-acquired downstream firm by offering less favorable terms to, or by refusing to deal with, the downstream acquired firm's competitors. To settle disputes that may arise with the implementation of these provisions, the Agencies may include arbitration provisions along with non-discrimination obligations. [*28*]

Mandatory licensing provisions often take the form of an obligation by the merging parties to license certain technology on fair, reasonable, and non-discriminatory terms. This obligation addresses competitive concerns when intellectual property owned by one of the merging parties is a key input in an industry. [*29*]

Transparency obligations are used in some vertical merger remedies to require the merged firm to disclose information to a regulatory authority, above and beyond what the firm ordinarily would be required to provide. Often the purpose of these provisions is to assist the regulatory body in preventing any regulatory evasion. [*30*]

Anti-retaliation provisions are used to prevent the merged firm from acting on anticompetitive incentives that may be created as a result of a vertical merger, or from acting in ways that might hinder the success of other aspects of a horizontal merger remedy. The most common version of the provision prohibits the merged firm from retaliating against customers who do business with (or consider doing business with) the merged firm's competitors. Another common version prohibits retaliation against an entity for raising remedy non-compliance issues with the reviewing Agency or for invoking any obligation under the decree. [*31*]

The Agencies also consider prohibitions on certain contracting practices by the merged firm. For example, a remedy may include a prohibition on the use of exclusivity or non-compete provisions that the merged firm might use to block access to an important input or to foreclose entry. [*32*] A remedy may also require the merged firm to discontinue certain incentive programs that the merged firm otherwise might use to reduce access to key distributors or customers. [*33*]

Contrary to its previous approach, the DOJ recently sought a divestment remedy in a vertical transaction. The district court, however, found that, under the limited case law relating to vertical transactions, the DOJ had failed to show that the transaction violated Section 7. The D.C. Circuit affirmed this decision. [*34*]

4.3 Hybrid Remedies

In certain circumstances, the reviewing Agency may determine that the most effective remedy includes both structural and behavioral elements. This determination may occur when competitive issues arise in multiple markets, each requiring a different form of remedy. Hybrid remedies also may help "perfect" structural relief; [*35*] for example, supply agreements or other transition services that assist the divestiture buyer in establishing itself in the marketplace. Other conduct restrictions sometimes included along with structural relief include restrictions on hiring (or re-hiring) scarce personnel assets and providing notice and observing waiting periods for non-Hart-Scott-Rodino Act reportable future transactions. [*36*]

4.4 Remedies Involving Partial Ownership Interests

Partial ownership interests also can present some remedial challenges, whether in the context of one entity (e.g., a private equity firm) owning stakes in two competitors, or where the company to be acquired owns a stake in the potential acquirer's competitor. Remedies in these scenarios have included divesting the interest, making an ownership interest passive, selling off the assets raising competitive concerns, and/or erecting firewalls. [*37*]

4.5 Unusual Remedies

Occasionally, the Agencies' respective consent decrees have included atypical provisions. For example, in the context of a failing firm defense to a consummated transaction, the FTC required that a limited sales process be conducted to determine the viability of a particular alternative, less anticompetitive buyer for a hospital. In another

more recent example, the FTC allowed the merging parties to enter into a multi-year license with a third-party competitor rather than divest one of the overlapping businesses. The Agencies also have shown a willingness to insist on remedies that address competitive concerns not directly related to the current merger. These remedies range from having to divest assets related to a prior acquisition to agreeing to abandon, settle and/or not bring certain types of lawsuits. [*38*]

In one recent instance, the DOJ obligated a divestiture buyer to be named as a defendant in the consent decree, meaning that if it failed to adhere to the requirements of the decree it would be in violation of the court order and potentially could be held in contempt. That consent decree ordered the purchaser to, among other things, build out a 5G broadband network in the United States and it set a timeline by which the purchaser must put the low- and mid-band wireless radio spectrum it already owned to use. [*39*]

4.6 Timing of Review

The Agencies also have shown a willingness to adjust the merger review process to take into account external timing exigencies while still preserving their ability to remedy any identified competitive concerns. [*40*]

4.7 Disgorgement

Disgorgement is an infrequently used merger remedy, but the Agencies have indicated a willingness to seek monetary remedies in the appropriate circumstances. [*41*] So far, the Agencies have sought disgorgement infrequently and only in consummated merger challenges, which is consistent with the theory that equitable monetary remedies seek restitution of "ill-gotten gains," which, in the merger context, would come in the form of post-consummation, supra-competitive profits. [*42*] For example, the DOJ found disgorgement appropriate where there was an anticompetitive price increase and deliberate attempts to evade antitrust enforcement. [*43*]

5. The Impact of Multi-Regulator Reviews

Many times, entities other than one of the Agencies also review the proposed merger; these additional entities can include other U.S. federal and state agencies as well as foreign antitrust agencies. The reviewing Agency often tries to coordinate with other reviewing entities to avoid unnecessary conflicts between review outcomes and remedy packages; however, the other entities may have different mandates, different standards of review, and/or different competitive concerns with the markets in their jurisdictions. These other reviews and their potential outcomes are one of the many factors the reviewing Agency considers when assessing the necessity and scope of remedies. [*44*]

6. Timing and Implementation of Remedies

6.1 Timing

The timing of the implementation of a merger remedy depends on the circumstances presented. Two factors that can affect timing significantly are the use of fix-it-first remedies and the use of up-front buyers.

6.1.1 Fix-it-first remedies

With fix-it-first remedies, parties structurally address anticipated competitive concerns prior to closing, obviating the need for a consent decree. A typical example of a fix-it-first remedy is selling certain overlapping assets or businesses to another competitor. [*45*] Historically, only the DOJ has been receptive to such remedies. [*46*]

The DOJ's policy is that "[a]n acceptable fix-it-first remedy should contain no less substantive relief than would be sought if a case were filed." [*47*] The DOJ will closely vet any fix-it-first remedy to ensure that it effectively restores premerger competition. A fix-it-first solution may present a number of advantages to merging parties; for example, avoiding the need to substantially comply with burdensome Second Requests and to negotiate a detailed consent decree may save considerable time and costs. In addition, as fix-it-first remedies are tailored to specific purchasers, they may include a smaller divestiture package than would be included in a consent decree.

Fix-it-first remedies, however, will not be accepted by the DOJ if the appropriate remedy to the competitive harm posed by the merger would include any post-consummation obligations on the part of the merged firm. [*48*] In that situation, the DOJ wants the monitoring and enforcement capabilities provided by a consent decree.

6.1.2 Up-Front Buyers

In some cases, the merging parties may propose, or the reviewing Agency may require, a specific purchaser of the divestiture assets before agreeing to the consent decree. The FTC frequently uses so-called "up-front buyers", especially where the divestiture package includes assets that have not operated previously as a separate business entity. [*49*] Historically the DOJ has not required up-front buyers, but more recently, the DOJ has started to include up-front buyers in remedy packages. [*50*] The up-front buyer process can add significant additional time, so this possibility should be built into closing timelines for the underlying transaction. [*51*] In one instance where the merging parties were unable to complete the required divestment in the agreed upon timeframe after administrative challenges in international jurisdictions, the DOJ required daily incentive payments until the divestiture was completed, as well as reimbursement of the DOJ's attorney's fees and costs incurred in addressing the delays. [*52*]

6.2 Implementation

Once the remedy package has been finalized, the Agencies often require the inclusion of certain provisions to ensure that the remedy is implemented effectively.

6.2.1 Hold Separate Provisions

When a consent decree mandates post-consummation divestitures, the Agencies almost always insist on provisions that require the parties to ensure that the divestiture assets are maintained as "separate, distinct, and saleable." [*53*] The purpose of these provisions is to "prevent interim competitive harm and to preserve the viability and competitiveness of the assets pending divestiture." [*54*]

6.2.2 Trustee Provisions – Monitoring and Divestiture

The Agencies both consider appointing a monitoring trustee to oversee the merging parties' compliance with their hold separate obligations, divestiture obligations, and/or conduct restrictions. Historically, the FTC has appointed monitoring trustees far more frequently than the DOJ, but this divergence may be diminishing. [*55*]

When consent decrees call for divestitures, both Agencies generally insist on provisions that provide for the appointment of a trustee with responsibility for effectuating the divestiture should the parties not complete the divestiture by the prescribed deadline. The divestiture trustee is empowered to sell the divestiture assets, at no minimum price, after a certain period of time.

6.2.3 Proposed Divestiture Buyer Approval

Even if a buyer up-front is not required, the reviewing Agency will insist on a provision allowing it to approve any proposed divestiture buyer. [*56*] The Agencies vet proposed divestiture buyers using the following criteria: (1) divestiture to the proposed buyer must not itself present significant competitive concerns; (2) the proposed buyer must have the incentive to use the divestiture assets to compete in the relevant market (as opposed to redeploying them elsewhere); and (3) the proposed buyer must have "sufficient acumen, experience, and financial capability to compete effectively." [*57*]

6.2.4 Reporting and Inspection Requirements

Most consent decrees include provisions requiring the merged firm to submit periodic written reports setting out all actions taken (or not taken) in compliance with the decree. The Agencies also insist on provisions giving them (and/or a trustee, where applicable) the power to inspect books and records and conduct interviews with employees to monitor compliance.

6.2.5 Crown Jewel Provisions

Occasionally, the reviewing Agency will insist on a so-called "crown jewel" provision requiring parties to divest an alternative, usually more valuable, collection of assets if an acceptable purchaser for the original divestiture package is not found in a timely manner. [*58*] The crown jewel package may either include more of the assets included in the original divestiture package, or a different set of assets (e.g., a more valuable manufacturing plant).

7. Public Comments and Final Approval

The DOJ and the FTC have different procedures for seeking public comments on, and final approval of, proposed remedies.

The DOJ must file a proposed consent decree with a federal district court. Under the Antitrust Procedures and Penalties Act ("APPA"), [*59*] the decree is then subject to a sixty-day comment period, during which public comments may be filed with the DOJ. At the end of the comment period, the DOJ submits to the federal district court any comments received, as well as its response to the comments, and can move to have the consent decree entered as final. Upon receiving this motion, the court will make its determination as to whether the decree "is in the public interest." In making this determination, the APPA instructs courts to look to the "competitive impact" of the decree and the decree's impact on the "public generally." [*60*] Normally, this is a relatively straightforward process. [*61*] However, a district court has recently, for the first time, required a full evidentiary proceeding, including live witnesses, in connection with a review of a consent decree proposed by DOJ, resulting in a months-long review and potentially additional remedies beyond the DOJ's proposed scope. [*62*]

In contrast, the FTC uses its own administrative procedures to finalize proposed consent decrees. After the FTC Commissioners vote to provisionally accept the agreement, there is a thirty-day comment period, during which public comments may be filed with the FTC. Following the public comment period, the FTC Commissioners vote

again, this time about whether to issue the consent decree as final.

[1] The term "merger" is used broadly to capture acquisitions, mergers, and certain joint ventures.

[2] U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (2004) [hereinafter DOJ Merger Remedies Guide], available at *https://www.justice.gov/sites/default/files/atr/legacy/2011/06/16/205108.pdf* ↗ (last visited August 27, 2019) (in September 2018, the DOJ withdrew its 2011 Policy Guide to Merger Remedies and announced that the 2004 Policy Guide would be in effect until an updated policy is released); FED. TRADE COMM'N, STATEMENT OF THE FEDERAL TRADE COMMISSION'S BUREAU OF COMPETITION ON NEGOTIATING MERGER REMEDIES (2012) [hereinafter FTC Merger Remedies Statement], available at *http://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-* ↗ remediesstmt.pdf (last visited August 27, 2019; Frequently Asked Questions About Merger Consent Order Provisions, FED. TRADE COMM'N, *http://www.ftc.gov/bc/mergerfaq.shtm* ↗ (last visited August 27, 2019) [hereinafter FTC Merger Consent Order FAQ].

[3] 15 U.S.C. § 18a, and the rules and regulations promulgated thereunder, 16 C.F.R. §§ 801.1-803.90.

[4] Unlike the European Commission, the Agencies can (and do) review mergers that do not have to be reported under the HSR Act.

[5] The initial waiting period is 15 days for all-cash tender offers and certain bankruptcy transactions.

[6] For all-cash tender offers and certain acquisitions in bankruptcy, this second waiting period is 10 days, and is triggered upon the substantial compliance of the buyer only. Substantially complying with a Second Request is usually extremely time-consuming and expensive, as it usually entails producing large amounts of documents and data and submitting extensive narrative interrogatory responses.

[7] 15 U.S.C. § 18.

[8] The FTC holds full merits proceedings before an Administrative Law Judge and under its own rules for administrative proceedings. The DOJ must conduct full merits proceedings before the same federal district court that tried the PI; as a result, the two proceedings are often combined.

[9] See, *e.g.*, Press Release, Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish (July 26, 2019), *https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package* ↗; Press Release, FTC Challenges CDK Global, Inc.'s Proposed Acquisition of Competitor Auto/Mate, Inc. (March 20, 2018), *https://www.ftc.gov/news-events/press-releases/2018/03/ftc-challenges-cdk-global-incs-proposed-acquisition-competitor* ↗. Press Release, Visant and Jostens Respond to FTC Decision on Proposed Transaction (Apr. 17, 2014), *http://www.jostens.com/newsreleases/20140417.html* ↗; Press Release, Statement of FTC

Bureau of Competition Director Deborah Feinstein on Jostens' Decision to Drop its Proposed Acquisition of American Achievement Corp. (Apr. 17, 2014), *http://www.ftc.gov/news-* ↗ events/press-releases/2014/04/statement-ftc-bureau-competition-director-deborah-feinstein.

[*10*] Settlements with the DOJ are embodied in a "Final Judgment," which is filed with, and eventually issued by, a federal district court; settlements with the FTC are embodied in a "Decision and Order," which the FTC issues itself, first in proposed and then final form. In this Foreword, the term "consent decrees" is used to refer to Final Judgments and Decision and Orders.

[*11*] ***J. Bruce McDonald, Julia McEvoy, Joseph Antel***, *The US District Eastern Court of Virginia orders a defendant in private antitrust litigation to divest a manufacturing plant following a competitor's merger challenge (Steves and Sons / Jeld-Wen), 5 October 2018, e-Competitions Bulletin October 2018, Art. N° 8999.*

[*12*] *DOJ Merger Remedies Guide*, at 4-5 and n. 1; FTC Merger Consent Order FAQ, at Q. 15.

[*13*] *DOJ Merger Remedies Guide*, at 5.

[*14*] *DOJ Merger Remedies Guide,* at 3.

[*15*] *Id* at 4.

[*16*] See, *e.g.*, ***Robert D. Stoner***, *The US Department of Justice clears a merger between two vertically linked businesses in the healthcare sector due to sufficient competition in their respective markets subject to divestment of their horizontally overlapping business (CVS / Aetna), 10 October 2018, e-Competitions Bulletin October 2018, Art. N° 89285* ; ***James A. Fishkin, Rani A. Habash***, *The US FTC requires divestitures in many local markets (Ahold / Delhaize), 22 July 2016, e-Competitions Bulletin July 2016, Art. N° 80944* ; ***Ausra Ona Deluard***, *The US FTC settles investigation by requiring divestiture of 60 dialysis clinics (Fresenius/Liberty), 23 may 2012, e-Competitions Bulletin May 2012, Art. N° 52959* ; United States v. Int'l Paper Co., No. 1:12-cv-00227 (D.D.C. May 3, 2012), Dkt No. 13; United States v. Exelon Corp., No. 1:11-cv-02276, 2012 WL 3018030 (D.D.C. May 23, 2012); United States v. Unilever, N.V., No. 1:11-cv-00858 (D.D.C. July 19, 2011) Dkt. No. 8 ; ***Katherine Whitehead***, *The US FTC imposes the divestiture of US operations, as well as the provision of transitional services, and the return of distribution rights for a product before clearing a merger affecting multiple markets for animal health and pharmaceutical products (Pfizer / Wyeth), 25 January 2010, e-Competitions Bulletin January 2010, Art. N° 53072*; United States v. Cameron Int'l Corp., No. 1:09-cv-02165 (D.D.C. May 11, 2010) Dkt. No. 8; BASF SE, No. C-4523 (U.S. Fed. Trade Comm'n May 14, 2009), *http://www.ftc.gov/sites/default/files/documents/cases/2009/05/090526basfdo.pdf* ↗; ***Mark J. Botti, Kelly M. Cleary***, *The US DoJ seeks divestiture and conduct remedies after breaking new ground by analyzing the anticompetitive impact on the Medicare Advantage system (UnitedHealth / Sierra Health), 24 September 2008, e-Competitions Bulletin September 2008, Art. N° 53249* ; ***Patrick R. Cowlishaw***, *The US DOJ requires a partial divestiture of local private telephone fibers in 19 cities before clearing a merger between a popular incumbent local exchange carrier and a prominent long-distance carrier in the telecommunications industry (Verizon / MCI), 29 March 2007, e-Competitions Bulletin March 2007, Art. N° 53261* ; ***Patrick R. Cowlishaw***, *The US DOJ conditions the approval of a merger upon the divestiture of several fibers carrying local private telephone calls between buildings, a majority of which are owned or controlled by the merging telecommunications firms in 19 metropolitan areas (SBC / AT&T), 29 March 2007, e-Competitions Bulletin March 2007, Art. N° 53260* ; Boston Scientific Corp., No. C-4164, 2006 WL 2330115 (U.S. Fed. Trade Comm'n July 21, 2006); ***Katherine Whitehead***, *The US FTC seeks divestiture of an exact copy of software, thereby resolving anticompetitive effects from a*

completed merger in the engineering software industry (MSC / UAI / CSAR), 29 October 2002, e-Competitions Bulletin October 2002, Art. N° 53073 ; ***Katherine Whitehead**, The US FTC imposes the largest retail divestiture of its history, affecting multiple levels of the production chain, before clearing one of the largest mergers in the gasoline industry (Exxon / Mobil), 26 January 2001, e-Competitions Bulletin January 2001, Art. N° 53070.*

[*17*] DOJ Merger Remedies Guide, at 9. See also, Section 6.2.4 *infra* for further discussion of the Agencies' approval criteria for a proposed divestiture buyer.

[*18*] See ***Roxane C. Busey, Brian F. Burke**, The US FTC issues its second report on merger remedies, 1 January 2017, e-Competitions Bulletin January 2017, Art. N° 84449* and ***David P. Wales, J. Bruce McDonald, Ryan C. Thomas**, The US FTC publishes its merger remedies report and signals tougher enforcement, 1 January 2017, e-Competitions Bulletin January 2017, Art. N° 83552.*

[*19*] See, *e.g.*, ***Katherine Ambrogi**, The US DoJ requires the sale of copies of three databases before approving a merger in the financial data sector (Thomson / Reuters), 17 June 2008, e-Competitions Bulletin June 2008, Art. N° 53244* ; United States v. Unilever, N.V., No. 1:11-cv-00858 (D.D.C. July 19, 2011) Dkt. No. 8 (consumer goods; no manufacturing assets included in required divestiture because of the existence of numerous contract manufacturers).

[*20*] See, *e.g.*, Press Release, Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto (May 29, 2018), *https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened* ↗ ("in order to fully prevent competitive harm from the merger, the settlement requires the divestiture of additional complementary assets that are needed to ensure that BASF has the same innovation incentives, capabilities and scale that Bayer would have as an independent competitor"); United States v. United Technologies Corp., No. 1:18-cv-02279-RC (October 10, 2018) (Competitive Impact Statement), available at *https://www.justice.gov/atr/case-document/file/1100066/download* ↗ (in addition to overlapping business, divestiture assets included other ice protection products, fueling systems and other industrial products, hovercraft skirts, composites, and commercial aviation products); ***Katherine Whitehead**, The US DoJ conditions approval of a merger upon the divestiture of a Canadian subsidiary in order to preserve competition for 'tin mill' products in the eastern United States (Mittal / Arcelor), 23 May 2007, e-Competitions Bulletin May 2007, Art. N° 53068* ; ***Katherine Whitehead**, The US DoJ imposes the divestiture of US operations, including the manufacturing plant and related assets, prior to approving a merger in the market for carbon bonded ceramics products (Cookson / Foseco), 23 May 2008, e-Competitions Bulletin May 2008, Art. N° 53065.*

[*21*] See, *e.g.*, ***William MacLeod, Richard E. Donovan, W. Joseph Price**, The US DoJ demands divestiture and licensing to create two new competitors and imposes conduct remedies to limit the benefits of vertical integration in a merger concerning the industry for primary ticketing services at concert venues (Ticketmaster / Live Nation), 30 July 2010, e-Competitions Bulletin July 2010, Art. N° 53237* ; United States v. Unilever, N.V., No. 1:11-cv-00858 (D.D.C. July 19, 2011) Dkt. No. 8 (consumer goods; required divestiture included rights to IP associated with hair care products); United States v. Cameron Int'l Corp., No. 1:09-cv-02165 (D.D.C. May 11, 2010) Dkt. No. 8 (oil refining; non-exclusive license to desalting technology) ; ***Roger Fones**, The US DOJ imposes non-traditional remedies in the form of both structural and conduct relief before clearing a merger in order to address the unique reliance on intellectual property and innovation required in the market for genetically-engineered cotton seeds (Monsanto / Delta / Pine Land), 6 November 2008, e-Competitions Bulletin November 2008, Art. N° 53257* ; ***Mark Levy**, The US DoJ requires extensive divestitures and changes the terms of licensing agreements before approving*

a merger in the market for genetically-engineered cotton seeds, but 13 state attorneys general claim these remedies do not solve the problem (Monsanto / Delta / Pine Land), 6 November 2008, e-Competitions Bulletin November 2008, Art. N° 53258 ; Itron, Inc. 138 F.T.C. 311, 316 (2004) (electricity meters; non-exclusive license to meter reading technology); Cephalon Inc., No. C-4121, 2004 WL 2618642 (U.S. Fed. Trade Comm'n Sept. 20, 2004) (pharmaceuticals; non-exclusive license to pain drug)-FTC; ***Katherine Whitehead***, *The US FTC imposes divestiture of assets for one product and licensing of patents for two other products prior to approving a merger in the pharmaceuticals industry (Amgen / Immunex), 3 September 2002, e-Competitions Bulletin September 2002, Art. N° 53069.*

[*22*] See ***Kristin Sanford, Jeff L. White***, *The US FTC conditionally clears a merger subject to divestitures in the pharmaceutical market (Amneal / Impax), 27 April 2018, e-Competitions Bulletin April 2018, Art. N° 88733.*

[*23*] U.S. Dep't of Justice, Assistant Attorney General Makan Delrahim Delivers Remarks at the Federal Telecommunications Institute's Conference in Mexico City, November 7, 2018, available at: *https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-federal-institute* ↗.

[*24*] Fed. Trade Comm'n, Looking back (again) at FTC merger remedies, February 3, 2017, available at: *https://www.ftc.gov/news-events/blogs/competition-matters/2017/02/looking-back-again-ftc-merger-remedies* ↗.

[*25*] See, *e.g.*, ***Jon B. Dubrow***, *The US FTC conditionally approves a merger in the office supply market subject to behavioural remedies (Staples / Essendant), 28 January 2019, e-Competitions Bulletin January 2019, Art. N° 89216* ; ***Jon B. Dubrow***, *The US FTC conditionally approves a vertical merger in the defense industry to behavioural remedies (Northrop Grumman / Orbital ATK), 5 June 2018, e-Competitions Bulletin June 2018, Art. N° 88785.*

[*26*] See, *e.g.*, ***Jon B. Dubrow***, *The US FTC conditionally approves a merger in the office supply market subject to behavioural remedies (Staples / Essendant), 28 January 2019, e-Competitions Bulletin January 2019, Art. N° 89216* ; ***Jon B. Dubrow***, *The US FTC conditionally approves a vertical merger in the defense industry to behavioural remedies (Northrop Grumman / Orbital ATK), 5 June 2018, e-Competitions Bulletin June 2018, Art. N° 88785* ; ***Stuart Gurrea, Gloria Hurdle***, *The US DoJ requires conduct remedies before allowing a vertical merger between a popular generic online search engine and a widely-used flight information services provider (Google / ITA), 5 October 2011, e-Competitions Bulletin October 2011, Art. N° 53197* ; ***Joel R. Grosberg, David C. Gold man, Gregory E. Heltzer***, *The US DoJ requires minor conduct remedies before approving a vertical merger affecting the market for petroleum needle coke (GrafTech / Seadrift), 24 March 2011, e-Competitions Bulletin March 2011, Art. N° 53063* ; ***Patrick Bock, Jeremy J. Calsyn***, *The US FTC imposes conduct remedies prior to clearing a vertical merger causing anticompetitive concerns in the soft drink industry (PepsiCo / Pepsi Bottling), 27 September 2010, e-Competitions Bulletin September 2010, Art. N° 53246.*

[*27*] See, *e.g.*, ***Jon B. Dubrow***, *The US FTC conditionally approves a vertical merger in the defense industry to behavioural remedies (Northrop Grumman / Orbital ATK), 5 June 2018, e-Competitions Bulletin June 2018, Art. N° 88785* ; *DOJ Merger Remedies Guide*, at 23-24.

[*28*] See United States v. Comcast Corp., No. 1:11-CV-00106, 2011 WL 5402137 (D.D.C. Sept. 1, 2011); Valero, L.P., 140 F.T.C. 40, 60 (2005); United States v. Northrop Grumman Corp., No. 1:02CCV02432, 2003 WL 21659404 (D.D.C. June 10, 2003); ***Ilene Gotts, Joseph G. Krauss***, *The US FTC imposes a host of conduct remedies, regulating business operations and*

reporting obligations, to prevent the exclusion of other competitors resulting from a vertical merger in the internet and cable industries (AOL / Time Warner), 17 April 2001, e-Competitions Bulletin April 2001, Art. N° 53267.

[*29*] See, *e.g.*, ***Stuart Gurrea, Gloria Hurdle***, *The US DoJ requires conduct remedies before allowing a vertical merger between a popular generic online search engine and a widely-used flight information services provider (Google / ITA), 5 October 2011, e-Competitions Bulletin October 2011, Art. N° 53197* ; ***Robert A. Lipstein, Ryan C. Tisch, Mika Clark***, *The US DoJ conditions approval of a joint venture upon behavioral remedies, such as specific terms of licensing and management of video content, in the industries of online video distribution and video programming (Comcast / NBC Universal), 1 September 2011, e-Competitions Bulletin September 2011, Art. N° 53234* ; ***Roger Fones***, *The US DOJ imposes non-traditional remedies in the form of both structural and conduct relief before clearing a merger in order to address the unique reliance on intellectual property and innovation required in the market for genetically-engineered cotton seeds (Monsanto / Delta / Pine Land), 6 November 2008, e-Competitions Bulletin November 2008, Art. N° 53257.*

[*30*] See Entergy Corp., No. C-3998 (U.S. Fed. Trade Comm'n Jan. 31, 2001), *http://www.ftc.gov/sites/default/files/documents/cases/2001/01/entergydo.pdf* ↗ (natural gas transportation).

[*31*] See, *e.g.*, ***Laura A. Wilkinson, Megan Peloquin***, *The US FTC imposes divestiture and "unusual" conduct remedies to protect the competitor after an acquisition in commercial real estate databases and information services (CoStar / Loopnet), 29 August 2012, e-Competitions Bulletin August 2012, Art. N° 53018* ; United States v. Comcast Corp., No. 1:11-CV-00106, 2011 WL 5402137 (D.D.C. Sept. 1, 2011); ***Patrick Bock, Jeremy J. Calsyn***, *The US DoJ seeks to divest part of the business and require the licensing of software in order to mitigate anticompetitive effects of a merger in the ticketing services industry (Ticketmaster / Live Nation), 30 July 2010, e-Competitions Bulletin July 2010, Art. N° 53238.*

[*32*] See ***Andre P. Barlow***, *The US DOJ approves a merger in the vehicle air springs market under conditions in order to resolve a vertical antitrust concern (Continental / Veyance Technologies), 11 December 2014, e-Competitions Bulletin December 2014, Art. N° 73546* ; ***Laura A. Wilkinson, Megan Peloquin***, *The US FTC imposes divestiture and "unusual" conduct remedies to protect the competitor after an acquisition in commercial real estate databases and information services (CoStar / Loopnet), 29 August 2012, e-Competitions Bulletin August 2012, Art. N° 53018* ; ***Geoffrey Oliver, David P. Wales***, *The US FTC proposes acquisition consent agreement to resolve unprecedented allegations on enforcement of standards- essential patents (Bosch/SPX), 26 november 2012, e-Competitions Bulletin November 2012, Art. N° 49833* ; Graco, Inc., 155 F.T.C. 665 (2013) (polyurethane foams and polyurea coatings).

[*33*] See ***Matthew Vaccaro***, *The US Department of Justice conditionally approves merger in the beer sector (AB InBev / SABMiller), 20 July 2016, e-Competitions Bulletin July 2016, Art. N° 80225.*

[*34*] See ***Nathaniel L. Asker, Aleksandr B. Livshits, Matthew Joseph***, *The U.S. District Court of Columbia rejects the DOJ's challenge to a vertical merger in the entertainment sector (AT&T / Time Warner), 12 June 2018, e-Competitions Bulletin June 2018, Art. N° 90032* ; ***Kathryn M. Fenton, Michael H. Knight, J. Bruce McDonald, Ryan C. Thomas, Thomas D. York***, *The U.S. District Court of Columbia rejects the Government's challenge to a vertical merger between an entertainment company and a distribution company (AT&T / Time Warner), 12 June 2018, e-Competitions Bulletin June 2017, Art. N° 90040.*

[35] *DOJ Merger Remedies Guide*, at 18.

[36] See, *e.g.*, ***Robert A. Lipstein, Ryan C. Tisch, Mika Clark***, *The US DoJ conditions approval of a joint venture upon behavioral remedies, such as specific terms of licensing and management of video content, in the industries of online video distribution and video programming (Comcast / NBC Universal), 1 September 2011, e-Competitions Bulletin September 2011, Art. N° 53234* ; ***William MacLeod, Richard E. Donovan, W. Joseph Price***, *The US DoJ demands divestiture and licensing to create two new competitors and imposes conduct remedies to limit the benefits of vertical integration in a merger concerning the industry for primary ticketing services at concert venues (Ticketmaster / Live Nation), 30 July 2010, e-Competitions Bulletin July 2010, Art. N° 53237* ; ***Ausra Ona Deluard***, *The US FTC settles investigation by requiring divestiture of 60 dialysis clinics (Fresenius/Liberty), 23 may 2012, e-Competitions Bulletin May 2012, Art. N° 52959* ; ***Cory Johnson***, *The US DoJ approves the acquisition, for $4.3 billion, by industry's leading digital information company of a competitor's disk storage market (Western Digital / Hitachi), 5 March 2012, e-Competitions Bulletin March 2012, Art. N° 53091* ; *BASF SE, No. C-4523 (U.S. Fed. Trade Comm'n May 14, 2009), http://www.ftc.gov/sites/default/files/documents/cases/2009/05/090526basfdo.pdf ↗ (personnel hiring restrictions)*; ***Laura A. Wilkinson, Megan Peloquin***, *The US FTC imposes divestiture and "unusual" conduct remedies to protect the competitor after an acquisition in commercial real estate databases and information services (CoStar / Loopnet), 29 August 2012, e-Competitions Bulletin August 2012, Art. N° 53018.*

[37] See, *e.g.*, ***Wayne Dale Collins, David A. Higbee, Djordje Petkoski, Jessica K. Delbaum, Arjun Chandran***, *The US FTC files a complaint challenging a proposed acquisition (Red Venture / Bankrate), 3 November 2017, e-Competitions Bulletin November 2017, Art. N° 85146* ; ***Laura A. Wilkinson, Megan Peloquin***, *The US FTC imposes divestiture and "unusual" conduct remedies to protect the competitor after an acquisition in commercial real estate databases and information services (CoStar / Loopnet), 29 August 2012, e-Competitions Bulletin August 2012, Art. N° 53018* ; United States v. Deutsche Börse AG, No. 1:11-cv-02280 (D.D.C. Jan. 3, 2012), Dkt. No. 3 (financial exchanges; divest ownership interest in acquirer's competitor, within two years, making interest passive and erecting firewall in the interim); ***Katherine Whitehead***, *The US DoJ requires divestiture of operations in 4 cities prior to clearing a private-equity investor's acquisition of a media company, thereby preventing anticompetitive effects in the market for radio stations (Bain Capital / Clear Channel), 29 July 2008, e-Competitions Bulletin July 2008, Art. N° 53066* ; ***Laura A. Wilkinson, Jeff L. White***, *The US FTC challenges, for the first time, private-equity firms acquiring a minority interest in one firm while holding a partial ownership interest in a rival firm and requires certain conduct remedies to protect competition in the market for gasoline terminating services (Carlyle / Kinder Morgan), 14 March 2007, e-Competitions Bulletin March 2007, Art. N° 53253.*

[38] See, *e.g.*, ***Katherine Whitehead***, *The US DoJ requires rescission of a merger-to-monopoly and puts conduct remedies in place to ensure competition in the market for local newspapers in a city in West Virginia (Daily Gazette / MediaNews), 19 July 2010, e-Competitions Bulletin July 2010, Art. N° 53074* ; *United States v. Cameron Int'l Corp., No. 1:09-cv-02165 (D.D.C. May 11, 2010) Dkt. No. 8 (oil refining; in addition to remedies related to competitive concerns from notified merger, divestiture required to remedy competitive concerns from earlier, consummated merger)*; ***Fiona A. Schaeffer, Ausra Deluard***, *The US FTC requires an unusual method of testing for a less anticompetitive purchaser by offering the sale before completing the requisite due diligence, then clearing the merger in the acute care facilities industry (King's Daughters Hospital /Scott & White), 23 December 2009, e-Competitions Bulletin December 2009, Art. N° 53245*; ***Jeff L. White, Kari A. Wallace***, *The US FTC places a price cap on intra-company prices as a condition precedent to clearing a merger in the market for iron sucrose administrated intravenously (Fresenius / Daiichi), 20 October 2008, e-Competitions Bulletin October 2008, Art. N° 53247* ;

Chevron Corp., 140 F.T.C. 100, 106 (2005) (reformulated gasoline; prohibition on enforcement of certain patent rights, including collecting royalties and requiring the dismissal of pending litigation); ***Franklin M. Rubinstein, Ryan Maddock***, *The US FTC challenges an acquisition in the market for audience measurement services (Nielsen / Arbitron), 20 September 2013, e-Competitions Bulletin September 2013, Art. N° 64452* ; CoreLogic Inc., No. C-4458, 2014 WL 2331024 (U.S. Fed. Trade Comm'n May 20, 2014) (national assessor and recorder bulk data) ; ***Geoffrey Oliver, David P. Wales***, *The US FTC proposes acquisition consent agreement to resolve unprecedented allegations on enforcement of standards-essential patents (Bosch/SPX), 26 november 2012, e-Competitions Bulletin November 2012, Art. N° 49833.*

[***39***] United States v Deutsche Telekom AG, No. 1:19-cv-022320TJK (July 30, 2019) (Competitive Impact Statement), *available at https://www.justice.gov/opa/press-release/file/1189336/download ↗*.

[***40***] See, *e.g.*, Tops Markets, LLC, 151 F.T.C. 551, 557 (2011) (supermarkets; flexible review process, to avoid liquidation in bankruptcy proceedings); United States v. Connors Bros. Income Fund, No. 1:04CV01494 (D.D.C. Apr. 18, 2005), Dkt. No. 16 (consumer goods; flexible review process, taking Canadian investment law deadline into account).

[***41***] Clear evidence of this willingness came with the FTC's recent withdrawal of its "Policy Statement on Monetary Equitable Remedies in Competition Cases" on the grounds that the statement was too limiting and "chilled the pursuit of monetary remedies." U.S. FED. TRADE COMM'N, WITHDRAWAL OF THE COMMISSION POLICY STATEMENT ON MONETARY EQUITABLE REMEDIES IN COMPETITION CASES (July 31, 2012), *available at http://www.ftc.gov/os/2012/07/120731commissionstatement.pdf ↗*.

[***42***] See ***James B. Kobak, Renee C. Redman***, *The US FTC collects significant penalties for violations of the pre-merger notification rules after clearing a merger in the market for electronic integratable drug information databases (Hearst / Medi-Span), 15 October 2001, e-Competitions Bulletin October 2001, Art. N° 53265.*

[***43***] See ***Andre P. Barlow***, *The US DOJ obtains disgorgement of profits for illegally consummated merger in the sector of city sightseeing by bus (Coach USA, City Sights, Twin America), 16 March 2015, e-Competitions Bulletin March 2015, Art. N° 73545.*

[***44***] See, *e.g.*, Press Release, "FTC Requires International Industrial Gas Suppliers Praxair, Inc. and Linde AG to Divest Assets in Nine Industrial Gas Markets as a Condition of Merger" (October 22, 2018) (requiring divestment of source contracts equal to all of Praxair's helium source contract volume, less the volumes ordered divested to other companies by the European Commission and China), *https://www.ftc.gov/news-events/press-releases/2018/10/ftc-requires-international-industrial-gas-suppliers-praxair-inc ↗*; Press Release, "Justice Department Requires Divestiture of Certain Herbicides, Insecticides, and Plastics Businesses in Order to Proceed with Dow-Dupont Merger" (June 15, 2017) (noting that the DOJ and the European Commission cooperated closely throughout the course of their respective investigations and divestment requirements from each jurisdiction had areas of overlap), *https://www.justice.gov/opa/pr/justice-department-requires-divestiture-certain-herbicides-insecticides-and-plastics ↗*; ***Katherine Ambrogi***, *The US DoJ requires the sale of copies of three databases before approving a merger in the financial data sector (Thomson / Reuters), 17 June 2008, e- Competitions Bulletin June 2008, Art. N° 53244* ; ***Cory Johnson***, *The US DoJ approves the acquisition, for $4.3 billion, by industry's leading digital information company of a competitor's disk storage market (Western Digital / Hitachi), 5 March 2012, e-Competitions Bulletin March 2012, Art. N° 53091* ; United States v. Deutsche Börse AG, No. 1:11-cv-02280 (D.D.C. Jan. 3, 2012), Dkt. No. 3 (financial exchanges; DOJ decree, blocked

by the EC); United States v. Exelon Corp., No. 1:11-cv-02276, 2012 WL 3018030 (D.D.C. May 23, 2012) (electricity generation plants; FERC review); Entergy Corp., No. C-3998 (U.S. Fed. Trade Comm'n Jan. 31, 2001), *http://www.ftc.gov/sites/default/files/documents/cases/2001/01/entergydo.pdf* ↗ (natural gas transportation; state energy regulator review); ***David Stallibrass***, *The Chinese MOFCOM conditionally approves an acquisition in the biotechnology sector (Thermo Fisher / Life Technologies), 14 January 2014, e-Competitions Bulletin January 2014, Art. N° 64569.*

[***45***] See ***Katherine Whitehead***, *The US DoJ approves a merger upon the leasing of 18 round-trip flight to a competitor in the airline industry (United / Continental), 27 August 2010, e-Competitions Bulletin August 2010, Art. N° 53071.*

[***46***] The FTC more often requires a consent decree even after the parties have restructured their transaction to alleviate competitive concerns. See, *e.g., In re Buckeye Partners*, File No. 041 0162 (Sept. 27, 2004) (Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment), *available at http://www.ftc.gov/os/caselist/0410162/040927anal0410162.pdf* ↗; Deutsche Gelatine-Fabriken Stoess A.G., Trade Reg. Rep. (CCH) ¶ 15,228 (Apr. 17, 2002)

[***47***] *DOJ Merger Remedies Guide,* at 27.

[***48***] Id.

[***49***] *FTC Merger Remedies Statement,* at 7 ("The Commission will typically require an up-front buyer if the parties seek to divest assets comprising less than an autonomous, on-going business or if the to-be-divested assets are susceptible to deterioration pending divestiture.").

[***50***] See ***Cory Johnson***, *The US DoJ approves the acquisition, for $4.3 billion, by industry's leading digital information company of a competitor's disk storage market (Western Digital / Hitachi), 5 March 2012, e-Competitions Bulletin March 2012, Art. N° 53091* ; ***Margaret A. Ward, Philip A. Proger, Craig Waldman***, *The US DoJ requires divestiture of the entire US business, but to a different buyer than the one proposed by the parties, before approving a merger in the market for point-of-sale terminals in retail stores (VeriFone / Hypercom), 21 November 2011, e-Competitions Bulletin November 2011, Art. N° 53060* ; ***Mark J. Botti, Kelly M. Cleary***, *The US DoJ seeks divestiture and conduct remedies after breaking new ground by analyzing the anticompetitive impact on the Medicare Advantage system (UnitedHealth / Sierra Health), 24 September 2008, e-Competitions Bulletin September 2008, Art. N° 53249.*

[***51***] See ***James A. Fishkin, Rani A. Habash***, *The US FTC requires divestitures in many local markets (Ahold / Delhaize), 22 July 2016, e-Competitions Bulletin July 2016, Art. N° 80944.*

[***52***] Press Release, Justice Department Requires General Electric Company to Make Incentive Payments to Encourage Completion of Divestitures Agreed to as a Condition of Baker Hughes Merger (October 17, 2017), *https://www.justice.gov/opa/pr/justice-department-requires-general-electric-company-make-incentive-payments-encourage* ↗.

[***53***] *DOJ Merger Remedies Guide,* at 28.

[***54***] *FTC Merger Consent Order FAQ,* at Q. 40.

[***55***] See, *e.g.*, United States v. Bayer AG, No. 1:18-cv-01241, 2019 WL 1431903 (D.D.C.

February 8, 2019); United States v. CVS Health Corp., No: 1:18-cv-02340, (D.D.C. November 20, 2018), available at: *https://www.justice.gov/atr/case-document/file/1113231/download* ↗; ***Michael Kilby**, The US FTC and Canadian Competition Bureau adopt a similar approach to grocery mergers (Albertsons, Sobeys, Loblaw), 27 January 2015, e-Competitions Bulletin January 2015, Art. N° 71410* ; Western Digital Corp., 155 F.T.C. 1504 (2013) (hard disks); United States v. Thomson Corp., No. 1:08-CV-00262, 2008 WL 2910467 (D.D.C. June 17, 2008); Hospira, Inc., No. C- 4182, 2007 WL 963993 (U.S. Fed. Trade Comm'n Mar. 21, 2007); Boston Scientific Corp., No. C-4164, 2006 WL 2330115 (U.S. Fed. Trade Comm'n July 21, 2006)); United States v. Northrop Grumman Corp., No. 1:02CCV02432, 2003 WL 21659404 (D.D.C. June 10, 2003) (DoD monitor); United States v. Anheuser-Busch InBev SA/NV, No. CV 13-127 (RWR),2013 WL 7018607 (D.D.C. Oct. 24, 2013); see also ***Peter J. Love, Kenneth W. Field**, The US DOJ shows flexibility in crafting structural remedies in merger between two leading brewers (Anheuser-Bush InBev/Grupo Modelo), 19 April 2013, e-Competitions Bulletin April 2013, Art. N° 61732* (providing overview of consent decree).

[***56***] See, *e.g.*, United States v. Int'l Paper Co., No. 1:12-cv-00227 (D.D.C. May 3, 2012), Dkt No. 13; BASF SE, No. C-4523 (U.S. Fed. Trade Comm'n May 14, 2009), *http://www.ftc.gov/sites/default/files/documents/cases/2009/05/090526basfdo.pdf* ↗; ***Margaret A. Ward, Philip A. Proger, Craig Waldman**, The US DoJ requires divestiture of the entire US business, but to a different buyer than the one proposed by the parties, before approving a merger in the market for point-of-sale terminals in retail stores (VeriFone / Hypercom), 21 November 2011, e-Competitions Bulletin November 2011, Art. N° 53060.*

[***57***] DOJ Merger Remedies Guide, at 30-32; see also *FTC Merger Remedies Statement,* at 10 ("The staff will therefore evaluate a proposed buyer to determine whether it has (1) the financial capability and incentives to acquire and operate the assets, and (2) the competitive ability to maintain or restore competition in the market.").

[***58***] *FTC Merger Consent Order FAQ,* at Q. 24.

[***59***] 15 U.S.C. § 16(b)-(h).

[***60***] Id. § 16(e).

[***61***] See United States v. Int'l Paper Co., No. 1:12-cv-00227 (D.D.C. May 3, 2012), Dkt No. 13 (approval shortly after sixty day comment period); but cf. United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d 1 (D.D.C. 2007) (approval approximately seventeen months after proposed final judgment filed).

[***62***] United States v. CVS Health Corporation, No. 18-cv-02340, 2019 WL 2085718 (D.D.C. May 13, 2019).