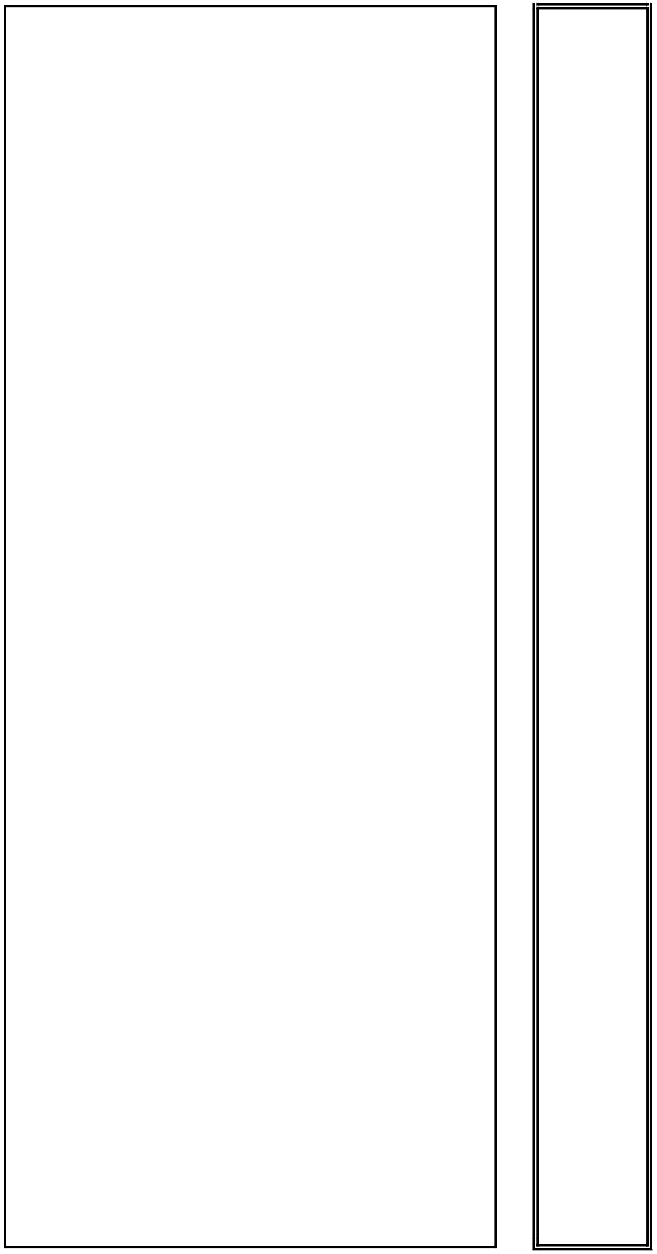

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1. This paper is intended to articulate the principles and practices employed by the United States competition enforcement agencies—the Antitrust Division of the United States Department of Justice ("Antitrust Division")[1] and the United States Federal Trade Commission ("Federal Trade Commission) (together, the "Agencies")—in analyzing, implementing, and enforcing merger remedies.

1. Background

2. Understanding the United States' approach to merger[2] remedies requires an appreciation of how the United States' premerger notification system functions. The United States has two key substantive merger control statutes, the Sherman Act[3] and the Clayton Act.[4] The Hart-Scott-Rodino Act[5] governs premerger notification and requires merging parties fo(erg)12.6 (ing par.0018 12.T12.4 (f)-2.2)6.5 (t 620.2n (eth)131634

law and analysis applies to both consummated and unconsummated mergers. The expiration of waiting periods does not create any legal "safe harbor" for an anticompetitive merger.[8]

2. Key Principles of Merger Remedies Policy

6. Because mergers can vary significantly, effective merger remedies also vary from case to case. However, the Agencies apply certain basic principles to all their merger remedies. First, effectively

17. Non-discrimination provisions incorporate the concepts of equal access, equal efforts, and equal terms.[12] When including a non-discrimination clause in a remedy, the Agencies may insist on an arbitration provision that will allow complainants to resolve controversies regarding the merged entity's conduct under the clause without direct Agency

those circumstances, a supply agreement can help prevent the loss of a competitor from the market, even temporarily. Similarly, temporary limits on the merged firm's ability to reacquire personnel may at times be appropriate as part of a divestiture to ensure that the purchaser will be a viable competitor.[20] The Agencies may also require the merged firm to provide certain interim technical assistance to a purchaser, especially in cases involving highly technical and complex production markets.

4. Implementing Effective Remedies

25. Merger remedies are effective only when properly implemented. Proper implementation involves pll re136013 Tm[(13.2 (encie738BDC 3.8280 Td27[(Merg)12.3 LBody)10.9 (re14)18.4 (edies3.5 (ng EA.06x-)2081

28. In some cases the parties may propose an upfront buyer for a specific package of divestiture assets. The Agencies may enter into a consent order agreeing to this type of proposal if they determine that the proposed sale will effectively preserve competition in the relevant market post-merger. This type of arrangement can benefit both the merging parties and the Agencies. The parties benefit because the divestiture process is generally shorter and more certain than if they shopped a broader package of assets to a number of potential purchasers for a post-consummation sale. The Agencies and consumers benefit from avoiding any loss of competition during the search for purchasers, and avoiding costs arising in a longer investigation and post-consummation sale process. The Agencies also gain the certainty that the divestiture will occur, and thus effectively preserve competition. The FTC generally requires upfront buyers if there is any real risk that approvable purchasers might not exist for a divestiture package, or if there is concern about the viability of the divestiture package during the divestiture period. For example, the FTC routinely requires upfront buyers in mergers involving pharmaceutical products, because a successful divestiture requires finding an approvable and interested purchaser from a very small group of candidates (other pharmaceuticals manufacturers who do not have overlapping products). The FTC also routinely requires upfront buyers in food retailing mergers, because retailing assets are particularly susceptible to competitive diminishment (loss of consumer interest or "franchise") during the divestiture period.

29. In all merger cases with divestiture orders, the Agencies will require identification of a package of assets to be divested pursuant to the order or decree (even for upfront buyers). In the absence of an upfront buyer, the Agencies must be satisfied that the asset package will be sufficiently broad to attract a purchaser in whose hands the assets will help preserve competition – that is, that the package contains everything a competitor would need. The Agencies also will need to confirm, in their investigation, that there will be at least one acceptable potential purchaser for the specified asset package. The Agencies do this by interviewing likely interested purchasers.

30. When parties dispute what assets must be included in the divestiture package, the Agencies may agree to the parties' proposed package on the condition that, if an acceptable purchaser cannot be found for that package, the parties must include additional valuable assets – "crown jewels" – to increase the likelihood that an appropriate purchaser will emerge.[21] The Agencies must approve any proposed purchaser. Generally, the Agencies will allow the parties an opportunity to find a purchaser on their own within sixty to ninety days. The Agencies will reserve the right to appoint a selling trustee to complete the sale if the parties are unable to do so in that timeframe.

4.2. Implementation

31. Once a divestiture package has been identified, the Agency generally will require certain measures to safeguard effective implementation of the remedy, including a hold separate provision, provisions for operating, monitoring, and selling trustees, and the right to disapprove a proposed purchaser.

32. Consent decrees or orders mandating post-consummation divestiture will require the merged firms to take all steps necessary to ensure that the assets to be divested are maintained as separate, distinct, and saleable. A hold separate agreement or order is designed to maintain the independence and viability of the divested assets and to preserve competition in the market during the pendency of the divestiture. The remedy also often includes an asset preservation clause, which requires the defendant to preserve and maintain the value and goodwill of the divestiture assets during the divestiture process. Because hold

[21] The use of crown jewels and upfront buyers are related: if there is doubt that the offered package is viable or sellable, the Agencies can insist on an upfront buyer (to test the offer before a settlement is reached), or may instead agree to a crown jewel provision.

separate and asset preservation provisions will not in all cases entirely preserve competition, these provisions do not eliminate the need for a speedy divestiture.

33. If the Agencies are concerned that a defendant has the ability and incentive to mismanage the divestiture assets during the typical divestiture period, thereby reducing the likelihood that the divestiture will effectively preserve competition, the Agencies will consider appointing an operating trustee or manager to oversee day-to-day management of the assets and to assure that they will be operated competitively. The Agencies also may appoint a monitoring trustee to review a defendant's compliance with its obligations to sell the assets to an acceptable purchaser as a viable enterprise and to abide by injunctive provisions to hold separate certain assets from the defendant's other business operations. Similarly, the Agencies may consider appointing a monitoring trustee to oversee compliance with a conduct remedy involving ongoing obligations, especially when effective oversight requires technical expertise or industry-specific knowledge.

34. The Agencies must have the ability to seek appointment of a selling or divestiture trustee to sell the divestiture assets if a defendant fails to complete the ordered sale by the ordered deadline. Therefore, the Agencies' divestiture decrees always include a provision for the appointment of a selling trustee. In most cases, the Agencies will allow the defendant a reasonable opportunity to divest the assets to an acceptable purchaser before they ask the court to appoint a trustee to complete the sale.[22] However, in rare circumstances, in which the Agencies have reason to believe that the defendant will not complete the ordered divestiture within a reasonable time, the Agencies may require the immediate appointment of a selling trustee.

35. The Agencies must approve any proposed purchaser. The Agencies condition their approval on the satisfaction of three fundamental tests. First, divestiture of the assets to the proposed purchaser must

enforcement mechanisms are sufficient, and whether the decree may cause harm to third parties. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public."[24]

38. The Federal Trade Commission must also ask a court to block a proposed merger. In other respects, however the Commission uses its own administrative procedures to settle cases. When the parties reach a settlement agreement with the Commission's staff, the Commission must vote to accept the agreement for public comment. During the 30-day public comment period (which begins with a Commission press release and publication of the proposed complaint and consent order), anyone may file comments concerning the case. Following the public comment period, the Commission will determine whether to issue the proposed order as final. The Commission may renegotiate terms, if information indicates that that is appropriate. Or (very rarely), the Commission may decide to close the investigation and not issue an order at all. None of these decisions require approval of the courts.[25]

6. Compliance

39. The Agencies devote significant resources to ensuring that their decrees and orders are fully implemented. When an order requires a divestiture, the responsible Agency will closely monitor the sale, including reviewing (a) the sales process, (b) the competitive, financial, and managerial viability of the purchaser, (c) any documents related to the sale, and (d) any relationships between the purchaser and defendants, to ensure that no such relationships will inhibit the purchaser's ability or incentive to compete vigorously. For a decree that requires affirmative acts, the responsible Agency will determine whether the required acts have occurred and evaluate the sufficiency of compliance. When a decree prohibits certain actions, the responsible Agency or a monitoring trustee will conduct periodic or ongoing inquiries to determine whether defendants are observing the prohibitions.

40. Merger orders and decrees must include provisions allowing the Agencies to monitor compliance. These decrees may require defendants to submit written reports and permit the Agencies to inspect and copy all relevant books and records and to interview defendants' officers, directors, employees, and agents, as necessary, to investigate any possible decree violations. Agency orders also may require firms to regularly provide to the relevant Agency certain data useful for decree oversight or to self-report decree violations or allegations of violations. Although the Agencies may issue civil investigative

42. The Federal Trade Commission may seek daily civil penalties and injunctive relief, both to obtain compliance and to punish past or ongoing non-compliance. The civil penalty proceeding is similar to a civil contempt proceeding but is a separate proceeding established by statute. The Commission may bring an enforcement action either in its own name, or, with the help of the Department of Justice, in the name of the United States.

7. Guidance

43. The remedies principles described in this paper are addressed in more detail in publicly available guidelines documents issues by the Agencies. The Antitrust Division has recently released an updated version of its Policy Guide to Merger Remedies.[26] The Federal Trade Commission's Bureau of Competition has released two related guides: a statement on negotiating merger remedies,[27] and frequently asked questions about merger remedies.[28] Both Agencies also at times discuss these issues during speeches and at bar and other public meetings.

8. International Consultation and Cooperation

44. Increasingly, the Agencies review mergers that also are reviewed by other competition agencies around the world. For example, in early 2010, the Antitrust Division took into account the commitments that the parties in the *Cisco/Tandberg* merger gave to the European Commission regarding interoperability in concluding that the proposed merger was not likely to be anticompetitive.[29] The Division and the European Commission worked together very closely on their investigations and closed them on the same day. The Division also worked closely with the German Federal Cartel Office (FCO) on the acquisition of certain patents and patent applications from Novell Inc. by CPTN Holdings LLC.[30] At the request of the two agencies, CPTN – a holding company owned originally by Microsoft Inc., Oracle Corp., Apple Inc. and EMC Corp. – made revisions to the transaction agreements that were necessary to protect competition and innovation in the open source software community. The close cooperation between the agencies was aided by waivers from the parties that allowed the sharing of information and assessments of likely competitive effects and coordination on potential revisions to the parties' agreements. Finally, in May 2011, the Division entered into a consent decree with Unilever and Alberto-Culver requiring the parties to divest two hair care brands in order to proceed with Unilever's $3.7 billion acquisition of Alberto-Culver.[31] The Division communicated with the UK Office of Fair Trading, the Mexican Federal Competition Commission and South Africa's Competition Commission – although the differences in products and markets were such that the outcomes in the various jurisdictions were not identical. Both Unilever and Alberto-Culver provided waivers, in a timely way, to facilitate the international cooperation in this case. Some recent FTC enforcement actions that involved cooperation with the European Union include *BASF SE*, cited earlier,[32] which involved divestitures in high performance pigments markets, and *Agilent Technologies*, which involved world-wide divestitures in mass spectrometry and gas chromatography

26 See press release at http://www.justice.gov/atr/public/press_releases/2011/272365.htm.

27 http://www.ftc.gov/bc/bestpractices/bestpractices030401.shtm.

28 http://www.ftc.gov/bc/mergerfaq.shtm.

29 See press release at http://www.justice.gov/atr/public/press_releases/2010/257173.htm.

30 See press release at http://www.justice.gov/atr/public/press_releases/2011/270086.htm.

31 See press release at http://www.justice.gov/atr/public/press_releases/2011/270854.htm.

32 See press release at http://www.ftc.gov/opa/2009/04/basf.shtm.