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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

-- Note by the United States

-- UNITED STATES --

1. Global merger[1] activity has recently reached historic levels in terms of number, size, and complexity. In FY 2015, there were 67 proposed mergers valued at more than USD 10 billion (United States dollars), more than twice as many as in 2014. Last year, there were 280 transactions worth more than USD 1 billion, nearly double the number of deals exceeding that value threshold in FY2010.[2] A number of these mergers involved close competitors in already concentrated industries. In the U.S., mergers are reviewed by either the Antitrust Division of the U.S. Department of Justice (DOJ) or the Federal Trade Commission (FTC) (together, the Agencies). If the reviewing Agency concludes that a transaction would be anticompetitive, it will carefully consider whether to go to court to block that transaction or, alternatively, whether to allow the transaction to proceed because there is an adequate and enforceable remedy.

2. This submission briefly describes (i) the legal standard and process for merger review in the U.S.; (ii) legal presumptions concerning market shares and concentration; (iii) the goal of merger remedies; and (iv) crafting effective remedies to preserve or restore competition. It concludes with examples of recent Agency merger investigations involving complex remedies.

1. The legal standard and review process.

3. Section

[3] Under this standard, as interpreted by the Supreme Court, the Agencies seek not only to stop imminent anticompetitive effects, but to be forward-looking and stop

6.
affirmed by the U.S. courts. For instance, after the Commission conducted a trial and imposed a remedy in *Polypore Int'l Inc. v. FTC*,[5] the Court of Appeals upheld the divestiture order, citing numerous U.S. Supreme Court cases.[6]
[7]

7.
decision to settle is a decision to accept the remedy as a resolution of the unlawful merger. The Agencies
erm is understood by other enforcers, although they do informally obtain views of market participants as part of their investigation of the merger and any proposed remedies. Once the reviewing Agency has determined to accept a consent, it has procedures for inviting third party/public views about proposed remedies in settlements: DOJ follows the procedures of the Antitrust Procedures and Penalties Act (APPA);[8] the FTC has rules providing for a period of public comment on a proposed settlement.[9]

8. In cases that are *not* settled, however, courts may be called upon to analyze both the original transaction and any proposed remedy. Recently, in *FTC v. Sysco*, as further discussed below, the trial court agreed with the FTC
successfully established that the merger would likely harm competition, the defendant had failed to carry its burden to prove that its proposed remedy would solve the problem.

2. Presumptions concerning market shares and concentration.

9. The Supreme Court in *Philadelphia National Bank* clarified Section 7 by establishing a
tage share of the relevant
[10] is unlawful.

in those Guidelines ergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to [11]

10. Merging parties often try to justify their mergers by claiming efficiencies and other procompetitive benefits will result from the merger. If these benefits are uncertain or do not sufficiently offset the potential harms, the Agencies view these mergers with great skepticism.

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5 686 F.3d 1208 (11th Cir. 2012).

6 *Id.* at 1218-19.

United States v. E. I. Du Pont De Nemours & Co., 366 U.S. 316, 326 (1961).

8 15 U.S.C. § 16(b h).

9 See US submission to June 2016 Competition Committee roundtable on Commitment Decisions in Antitrust Cases (DAF/COMP/WD(2016)23).

10 *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963).

11 *Horizontal Merger Guidelines* 2.1.3. (2010), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

3. The goal of merger remedies.

11. A successful merger remedy must effectively preserve (or restore, in the case of a consummated merger) competition in the relevant market. The Agencies have each issued guidance setting forth their approach to analyzing remedies, as described in the U.S. submission to the June 2011 WP3 roundtable on *Remedies in Merger Cases*.[12] There should be a close, logical nexus between the proposed remedy and the alleged violation the remedy should fit the violation and flow from the theory or theories of competitive harm.

12. When either of the Agencies has determined to challenge a transaction, the parties frequently urge the reviewing Agency to accept some form of settlement, typically asset divestitures, but, less often, they may also offer conduct commitments or supply agreements. Whether a settlement can be reached

anticompetitive problems that have been identified by the reviewing Agency.

13. The Agencies thoroughly review every settlement offer, but are skeptical of offers consisting of conduct commitments or asset divestitures that only partially remedy the likely harm. They will not settle antitrust violations without a high degree of confidence that a remedy will fully protect consumers from anticompetitive harm.

4. Crafting effective remedies.

14. As the Agencies have described in their guidance documents, speeches, and other papers,[13] the most effective remedy iness
in the affected markets.
case-by-

15.
experience, acceptable remedies tend to share certain features. An acceptable remedy in a horizontal merger almost always needs to be structural, i.e., preserving an independent competitive force in the

from increased market power. The structural relief should involve divesting standalone business units rather than simp

16. Complex settlements, especially where an asset package is cobbled together from separate assets

preserve competition will be lower. Consumers should not have to bear the risk that a complex settlement may fail to preserve competition. Consequently, in some situations, a well-structured settlement can preserve competition. In other situations, however, there may be no settlement that can remedy a will not hesitate to challenge the transaction.

17. As explained in the earlier cited reference materials, the Agencies use a number of tools to minimize the chance of ineffective remedies. In particular, the Agencies may appoint monitors both to help design and enforce remedies especially when the parties must undertake complicated steps, such as supplying a critical input, transferring technical information, etc. Because monitors can apply their special exper

5.2 *Halliburton/Baker Hughes*

21. In April 2016, DOJ sued to block Halliburton, the largest oilfield services company in the United States, from acquiring its closest rival, Baker Hughes.[18] Along with Schlumberger, these companies are the

services companies. Over 90% o

The investigation revealed serious antitrust problems in numerous markets representing billions of dollars of revenue: the merger would cause a substantial lessening of competition in 23 product and service markets

gas wells, and to complete those wells.

22. In many of these markets, the merger would have left the industry with just two dominant suppliers. In eight of the markets alleged in the complaint, the post-merger Halliburton and Schlumberger would have over 90% of U.S. sales. In nine other markets, two firms would have a combined share above 70%. And in two of the markets offshore stimulation vessels and offshore liner hanger systems the merged Halliburton alone would have a share above 80%.

23. In addition to these very high market shares, Halliburton and Baker Hughes, along with Schlumberger, drive innovation in these markets, often leading the way in developing next-generation technology to solve the most challenging problems facing the oil and gas industry. DOJ alleged, for example, that Baker Hughes had hundreds of active research projects and launched 160 new products in 2014 alone, generating over USD 1 billion in revenue. The Big Three are unique in many respects, and are often the only suppliers qualified to bid on difficult projects involving offshore or deep onshore wells where products must function in high temperatures and at high pressures.

24. The parties were well aware of the antitrust risks of their transaction. Halliburton prevailed upon Baker Hughes to undertake the venture only with a threat of a costly and disruptive hostile takeover battle and a promise of three things: (i) a premium on th (ii) a commitment to divest assets representing up to USD 7.5 billion in sales; and (iii) a reverse breakup fee payment to Baker Hughes of USD 3.5 billion if the merger could not be completed.

25. From the start Halliburton publicly claimed that it could fix any and all competition concerns, in the United States and around the world. DOJ carefully examined the proposed remedies, but concluded that no remedy could preserve the lost competition. The parties presented a complicated array of piecemeal divestitures and entanglements that involved selling or licensing a miscellaneous array of assets. The Big Three would become a Big Two, in the U.S. and globally. Halliburton mostly would keep the more successful product lines and sell assets related to the less

26. In addition, the merged Halliburton would be acting on behalf of the buyer of this array of assets for the foreseeable future. Contracts and licenses would not immediately be conveyed to the new owner. Customers could not be compelled to work with a new supplier, so a complicated and lengthy customer-by-customer negotiation would be required. Halliburton also would hold back certain IP used by the divested product lines and would limit the uses to which other IP could be put. To make matters worse, Halliburton would be transferring fewer than half of over 400 facilities currently used or relied upon by the divestiture assets, causing enormously disruptive relocation of employees, equipment and, in some cases, major operations to new facilities. DOJ concluded that the remedy would eliminate a formidable rival Baker Hughes and replace it with a smaller, weaker rival that was not the equivalent of Baker Hughes.

27. A final concern was that the proposed remedy would require DOJ and the court to devote substantial resources over many years to supervise a remedy so complicated and convoluted that it would require unprecedented resources to oversee it. DOJ would take on responsibilities more often associated with an energy sector regulator, a role for which a law enforcement agency is not well-equipped.

28. The Agencies in appropriate circumstances negotiate solutions to otherwise anticompetitive mergers. Those settlements typically involve limited, discrete and clean divestitures. But not every merger can be resolved by a settlement. In *Halliburton/Baker Hughes,* the anticompetitive concerns were pervasive, the affected markets were numerous, and any remedy would be incomplete, complex and risky. Customers and competition should not have to bear the risks of a failed or inadequate remedy. DOJ sued to block the acquisition, and on 1 May 2016, the parties abandoned it.[19]

5.3 Superior/Canexus

29. In *Superior/Canexus*, the FTC was concerned that the proposed merger would eliminate competition between the largest and third-largest producers and sellers of sodium chlorate.[20] Extensive discussions were held in which the parties attempted to assemble a package of plants that could provide nationwide supply of sodium chlorate to customers in locations across the country. Ultimately, however, the parties and the FTC could not reach agreement on the particular assets to be divested. When the FTC then voted to authorize the staff to go to court to seek an injunction, the parties abandoned the transaction.[21]

5.4 Applied Materials/Tokyo Electron

30. In April 2015, Applied Materials Inc. and Tokyo Electron Ltd. abandoned their plans to merge

parties were the largest and second-largest providers of non-lithography semiconductor manufacturing equipment. The proposed merger would have combined the two largest competitors with the necessary know-how, resources, and ability to develop and supply high-volume non-lithography semiconductor manufacturing equipment.

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19 DOJ cooperated closely with the European Commission, Australia, Brazil, and Mexico in reviewing this proposed merger.

20 *See*

31. The parties offered
competition was not focused on existing products. The parties competed by racing to be the innovator. To replicate existing competition, the divestiture buyer needed to have the same capacity to innovate. DOJ

not sufficient to preserve existing competition with respect to the development of equipment for next-generation semiconductors.[22]

6. Mergers Determined by the Agencies to be Acceptable Subject to Substantial Remedies

6.1 ABI/Grupo Modelo

32. DOJ had concerns when Anheuser-Busch InBev SA (ABI), the largest American beer company, proposed to acquire Grupo Modelo S.A.B. de C.V. (Modelo), the largest Mexican beer company and third largest brewer of beer sold in the US. ABI and MillerCoors, the other large American beer company, often engaged in interdependent pricing rather than vigorous competition. Modelo, a much smaller third firm,
s price increases.
to innovate.

33. ABI initially offered a woefully inadequate remedy: some behavioral conditions placed on the merged firm and a long-term supply arrangement that would have put the importer of Modelo products totally at the mercy of ABI.
independent, fully-integrated brewer with permanent control of Modelo brands in the US.

34. When DOJ sued, ABI consented to substantial structural relief. ABI agreed to divest and/or license to Constellation Brands, Inc. (Constellation) (i) a perpetual and exclusive license to Corona Extra, the #1 import and #5 best-selling brand in the US, and nine other Modelo brands; (ii
most technologically advanced brewery in Mexico, near the Texas border; (iii) Mode
Imports, LLC (Crown), a Modelo/Constellation joint venture that imported, marketed, and sold Modelo beers in the US; and (iv) other assets, rights, and interests necessary to ensure that Constellation could compete in the US using Modelo brands, independent of a relationship with ABI and Modelo.

35. In addition, to ensure that Constellation could meet current and future demand for Modelo brands in the US independently of ABI, Constellation, which was made a party to the settlement and court order, committed to expand the new brewery in Mexico. ABI also agreed to various transition services and

retention of employees at the divested brewery. Other requirements to ensure that Constellation would

created firewalls within ABI to protect Constellatio
transition services and supply agreements.

36. -of-the-art brewery in Mexico sufficient to supply U.S demand today and into the future. Under the new owner, Modelo beer sales have grown dramatically in the U.S.[23]

22

jurisdictions.

23 *See* https://www.justice.gov/atr/case/us-v-anheuser-busch-inbev-sanv-and-grupo-modelo-sab-de-cv for court filings related to *ABI/Grupo Modelo*.

6.2 US Airways/American Airlines

37. When DOJ investigated the US Airways/American A