

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

Roundtable on designing and testing effective consumer-facing remedies - Note by
the United States

5 June 2018

This document reproduces a written contribution from the United States submitted for Item 4 at the 127th Meeting of the Working Party No 3 on Co-operation and Enforcement on 5 June 2018.

More documentation related to this discussion can be found at
www.oecd.org/daf/competition/consumer-facing-remedies.htm

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JT03432292

United States

1. Introduction

1. Competition law enforcement benefits consumer welfare by preventing mergers or anticompetitive conduct that deny consumers or customers the benefits of competition.

federal agencies in the United States responsible for enforcing the federal antitrust laws. If the Agencies conclude that a merger is likely to lessen competition, the agencies may enter into a binding settlement¹ with the merging parties, designed to remedy or mitigate any anticompetitive effects of a proposed merger. Similarly, if the Agencies conclude that certain conduct violates the antitrust laws, they may enter into a settlement with the violators prohibiting them from continuing the conduct.

2. Certain features of competition remedies address dynamic dynamics to ensure the remedy effectively maintains competition in the market going forward. The remedy may address consumer-facing market practices, such as long-term contracts or reputational barriers that affect competition. In addition, the remedy may include provisions that maintain customer relationships, or conversely, facilitate customer switching.

3. The goal of a merger remedy is to restore or maintain competition lost as a result of the merger. The Agencies prefer structural remedies, which often include divestitures of tangible and intangible assets. The remedy may, for example, include provisions that facilitate the transfer of knowledgeable employees of the divested business to the buyer, or provisions that mandate the transfer of customers or customer contracts from the merging parties to the buyer. In some cases, remedies will also include behavioural relief to support the effectiveness of the structural relief, but the Agencies very rarely will approve behavioural remedies, standing alone, to resolve a merger. Thus, a remedy may include requirements that the merging parties supply finished product or technical information from the merging parties to another supplier, or address the harm to customers or contract terms and their enforcement.

4. The goal of non-merger remedies is to stop or prevent behaviour that lessens or distorts competition. The Agencies also seek to remedy harm from anticompetitive conduct, and prevent recurrence of behaviour that reduces consumer choices, increases prices, or slows innovation.

¹ Alternatively, the Agencies may seek an injunction order from a court to stop the merger or the behaviour. These contested cases may later result in a negotiated settlement, which would reflect the same principles discussed here, or the court may impose C B2 180.97999.6900022.97999ese ed67999.

2. Merger Remedies Seek to Maintain the Level of Competition for Consumers

5. Understanding market dynamics is important to designing

Humana, offering its Medicaid plans in only 12 states and Puerto Rico. In order to continue to operate the divested Medicare Advantage plans, Molina would need to develop provider networks and contracts assets that were not included in the divestiture for a product in which it lacked experience and across a broader geographic range than Molina had ever attempted. The assets that Molina purchased meant th

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14. The court rejected this proposed remedy, noting that there was no divestiture of an existing business entity, including no divestiture of personnel, information systems, or management infrastructure. The drawbacks of such a limited divestiture were illustrated

buyer responses to a questionnaire.¹⁸ For 24 pharmaceutical orders, staff evaluated internal and publicly available information.¹⁹

16.

participants suggested that attracting and retaining customers could be difficult.²⁰ The study pointed to a misunderstanding of customer buying behaviour as the underlying problem.

underestimating customer loyalty to a brand, or underestimating the difficulties of switching suppliers.

17. In one case, the customers evaluated suppliers every few years, leaving the buyer of the divestiture assets little opportunity to meet with customers.²¹ Meanwhile, the respondent, with a broader portfolio of products to market to customers, had an opportunity to meet with customers more frequently. Another buyer attributed its slow growth to the customer buying cycle that opened only every few years.²² In another divestiture, the buyer missed the seasonal buying cycle and had difficulty achieving sales for almost a year.²²

18. The remedy study confirmed that customer qualification requirements may delay

transition to another competitor. In addition, the remedy required the respondent to give certain long-term customers notice of their rights.

25. In one consummated transaction, the remedy required the respondent to transfer customer contracts along with the divestiture of the ongoing business. In addition, certain customers who entered into contracts with respondent after the illegal acquisition were able to terminate their contracts early. In another consummated transaction, the respondent was barred from imm

28. Another group of merger cases where divestitures often include customer accounts, information, and supporting assets are mergers involving retail banking and other consumer loan products. For example, in *U.S. v. Springleaf Holdings Inc.*, a merger involving the two largest providers of personal instalment loans to subprime borrowers in

active loans originated or serviced at those branches, including all historical performance

and other credit metrics with respect to loans that are active, closed, or defaulted that have been originated or serviced at the Divestiture Branches at any point since

³⁵ The Competitive Impact Statement filed by the Department added of local market conditions and to perform risk analytics essential to making personal instalment

5. Customer-Facing Remedies in Nonmerger Cases

29. Non-merger remedies may address demand-side factors in order to promote competition that is free of anticompetitive restraints or conduct. In non-merger cases, agency remedies seek to enjoin the law violators from continuing to engage in anticompetitive conduct that reduces consumer choice and/or increases the price of a good or service. In these circumstances, remedies are tailored to mitigate the harm that arises from the illegal conduct and prevent its recurrence.

30. Non-merger remedies may require conduct that mitigates the competitive harm and provides consumers with benefits that the illegal conduct denied to them. For example, in *Detroit Auto Dealers Association, Inc.*, the Commission alleged that the Detroit Auto Dealers Association and a large number of its member automobile dealers violated federal antitrust laws by illegally conspiring to limit competition in the sale of new cars in the Detroit area. The anticompetitive conduct included an alleged agreement among auto dealers to close dealerships on most weeknights and eliminate Saturday hours completely. The Order lifted restrictions on dealership hours and required dealers to maintain weekend hours so that customers of respondents (e.g., car buyers) had more of an opportunity to shop.³⁶

31. In addition, non

