



Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement

John E. Kwoka and Diana L. Moss¹

Executive Summary

The 2011 revision to the ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (REMEDIES GUIDE) is notable in that it signals a shift in the Department of Justice's (DOJ's) approach to merger remedies. The earlier REMEDIES GUIDE, issued in 2004, emphasized structural remedies such as divestitures as the preferred approach to resolving competitive problems with mergers. In contrast, the 2011 revision is considerably more favorably disposed toward the use of behavioral remedies that proscribe specified anticompetitive behaviors of the merged companies.

The 2011 REMEDIES GUIDE expands the types of behavioral remedies that the DOJ states the agency will consider, providing for relatively more complex, interventionist, and on-going restraints. This stands in contrast to past behavioral remedies that were generally limited in scope and ancillary to other provisions of consent orders. This apparent policy shift is illustrated by the behavioral remedies employed by the DOJ in three recent merger cases – Ticketmaster-Live Nation, Comcast-NBCU, and Google-ITA. These three cases involve the use of multiple behavioral remedies, ranging from access conditions (e.g., licensing and non-discrimination requirements), firewalls, anti-retaliation provisions, to arbitration requirements, and provide for monitoring and compliance enforcement.

The expansive new approach to behavioral remedies raises a number of concerns about their likely operation, effectiveness, and requirements for ongoing government monitoring and compliance enforcement. Many of these issues are similar to problems encountered in traditional industry regulation, ranging from countervailing incentives to implementation costs. Behavioral remedies also pose practical problems for antitrust

¹ John E. Kwoka is the Neal F. Finnegan Professor of Economics, Northeastern University and Diana Moss is Vice President and Director, American Antitrust Institute (AAI). John Kwoka served as consultant to the states in the Ticketmaster-Live Nation matter. Analysis contained herein regarding the case is based on public information and focuses on issues subsequent to that consultancy. Many thanks to Randy Stutz, Special Projects Director, AAI, for the summary of the Google-ITA case, to Bert Foer for helpful review of earlier drafts, and to Ke Li for research support. The AAI is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. AAI is managed by its Board of Directors, which alone has approved of this White Paper. For more information, see www.antitrustinstitute.org.

enforcement, including tensions created by blending prosecutorial and compliance functions within the Antitrust Division of the DOJ and the difficulties of “testing” their effectiveness to ensure best practices.

How well the packages of behavioral remedies function to restore competition in the markets affected by the three particular mergers examined in this White Paper remains to be seen. Nonetheless, it identifies a number of issues that warrant attention and prompt some concern and based on this early analysis, a number of observations and policy recommendations would seem justified.

I. Introduction

The U.S. antitrust agencies periodically issue revisions of various merger policy guidelines in order to better reflect changes in practice and advances in analytical techniques. Two important revisions have occurred just within the past two years. One is the 2010 revision of the U.S. Department of Justice (DOJ)/Federal Trade Commission (FTC) HORIZONTAL MERGER GUIDELINES (GUIDELINES), the first significant updating since the 1992 GUIDELINES. The 2010 revisions are widely considered a significant improvement over the previous version. The other is the DOJ's 2011 ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (REMEDIES GUIDE), which revised DOJ's stated approach to remedial actions with respect to mergers raising competitive concerns.²

The REMEDIES GUIDE is notable in that it signals a shift in the DOJ's approach to merger remedies. The earlier REMEDIES GUIDE, issued in 2004, emphasized structural remedies such as divestitures as the preferred approach to resolving competitive problems with mergers. In contrast, the 2011 revision is considerably more favorably disposed toward the use of behavioral remedies that proscribe specified anticompetitive behavior of the merged companies. Such remedies are now endorsed more widely for vertical mergers, where current policy is commendably more active than in the past. Moreover, their potential use would not seem to be restricted to vertical cases. This policy revision is reflected in three recent mergers that in quick succession have all been permitted subject to consent orders with substantial behavioral remedies. These are the mergers of

² Department of Justice, *Antitrust Division Policy Guide to Merger Remedies* (June 2011), available at <http://www.justice.gov/atr/public/guidelines/272350.pdf>. This supersedes the same document issued in October 2004, available at <http://www.justice.gov/atr/public/guidelines/205108.pdf>.

Ticketmaster-Live Nation, Google-ITA, and Comcast-NBCU. The 2011 REMEDIES GUIDE essentially codifies much of the approach adopted in these merger cases.

This White Paper takes a closer look at these new developments in merger remedies. It begins in Section II by examining the shift toward behavioral remedies in the 2011 REMEDIES GUIDE. It discusses the merits of structural versus behavioral remedies and the basis for past preference for structural remedies in the U.S. and in other major competition jurisdictions. Section III reviews three recent merger cases that were resolved with behavioral remedies. These case studies encapsulate the breadth of the DOJ's revised approach. Section IV analyzes in detail the difficulties associated with behavioral remedies by drawing parallels with well-known challenges faced by economic regulation. Section V concludes with policy recommendations.

II. Structural Versus Behavioral Approaches to Merger Remedies

A. Structural Versus Behavioral Remedies

The literature contains several alternative definitions of structural versus behavioral remedies,³ but most have at their core the following distinction: a structural remedy to an otherwise anticompetitive merger creates or preserves legally and operationally independent firms so as to maintain competition in the affected market. By contrast, a behavioral remedy permits integration subject to operating rules intended to prevent the merged firm from subsequently undermining market competition.

The quintessential structural remedy is divestiture. If done correctly, divestiture of a division or product or facility can create a new competitor or strengthen an existing

³ A summary can be found in STEPHEN DAVIES & BRUCE LYONS, *MERGERS AND MERGER REMEDIES IN THE EU: ASSESSING THE CONSEQUENCES FOR COMPETITION*, at ch.2 & 41-42 (Edward Elgar Publications, 2008).

competitor and thereby replace the competition otherwise lost as a result of the merger. In principle, once created, the divested entity will act as an independent firm, seeking to maximize profit by engaging in the same competitive actions as other firms in the market. Moreover, once such a new firm is created, there typically is no on-going oversight or other action required of the competition authority, and no constraints or reporting requirements on the firm. There are countless examples of divestitures in antitrust cases – either offered up front by the merging parties (so-called “fix it first”) or negotiated as part of a settlement process – but most have these stated characteristics.

By contrast, behavioral remedies – sometimes called “conduct” or “non-structural” remedies – allow the parties to integrate fully, but then impose certain operating rules on their business behavior so as to prevent competition from being undermined or compromised. In short, these remedies seek to permit the merger to achieve efficiencies but without the anticompetitive behavior the firm would otherwise engage in. Depending on the perceived threat, these rules can take several different forms. Some, like information firewalls, constrain the internal operation of the firm, while others – illustrated by non-retaliation rules – are directed at the firm’s behavior toward external rivals.⁴

The common feature of behavioral remedies is that they are in effect attempts to require a merged firm to operate in a manner inconsistent with its own profit-maximizing incentives. But allowing the merger and then requiring the merged firm to ignore the

⁴ Structural and behavioral remedies can also be combined in a “hybrid” approach. It should also be noted that some remedies defy easy classification. For example, while the 2011 Remedies Guide terms licensing of intangible assets (e.g., patent rights) a divestiture remedy, such a provision in the Google-ITA consent is not so labeled.

incentives inherent in its integrated structure is both paradoxical and likely difficult to achieve. Furthermore, the behavior that such remedies seek to prohibit or require is often difficult to fully specify, leading to subsequent enforcement issues. In some cases, the behavior may be so integral to the firm that it may be unrealistic to suppose the firm can avoid it. As a result, behavioral rules usually must be supplemented with close and ongoing oversight of the merged firm's actual conduct, typically relying upon a monitor with authority to require reports and perhaps to intervene in the decision-making of the merged firm.

B. Revised DOJ Remedies Guidelines and Behavioral Approaches

1. Substantive Changes in the DOJ REMEDIES GUIDE

The policy shift in the DOJ's 2011 REMEDIES GUIDE is revealed in several major differences relative to the 2004 REMEDIES GUIDES. First, gone from the new REMEDIES GUIDE is any specific statement of preference for structural remedies and the appropriateness of behavioral relief in only limited circumstances. Replacing that is the statement that: "In certain factual circumstances, structural relief may be the best choice to preserve competition. In a different set of circumstances, behavioral relief may be the best choice."⁵ The 2011 REMEDIES GUIDE goes on to state only that structural remedies "often" suffice in horizontal cases, but that in vertical cases conduct remedies "often" address competitive concerns, sometimes in conjunction with structural remedies.⁶ In taking this position, it moves away from a strong structural emphasis to a more case-by-case approach involving conduct remedies.

⁵ 2011 REMEDIES GUIDE, *supra* note 2, at 4.

⁶ *Id.* at 2.

Second, the 2011 REMEDIES GUIDE contains a separate and expanded section on behavioral remedies and a new section on hybrid remedies. Much of the valuable guidance on structural divestiture passes intact from the 2004 to the 2011 REMEDIES GUIDE. However, the new REMEDIES GUIDE is discernibly more optimistic than its predecessor regarding the role of behavioral remedies. They are declared to be a “valuable tool” in remedying a merger’s competitive harm while preserving its potential efficiencies.⁷ The behavioral approach is specifically endorsed for vertical mergers and for mergers with both horizontal and vertical components. Altogether missing from the 2011 REMEDIES GUIDE is any mention of four substantial costs associated with behavioral remedies, namely, the direct costs of monitoring, the costs of evasion, the potential to restrain procompetitive behavior, and the difficulty of adaptation to changing market conditions.⁸ While these were central to the 2004 REMEDIES GUIDE approach, that discussion is deleted without explanation of the basis for changed thinking.

Third, the 2011 REMEDIES GUIDE expands the types of behavioral remedies that the DOJ states it will consider. In addition to firewalls, transparency provisions, and non-discrimination provisions, the revision also discusses possible use of mandatory licensing, anti-retaliation, prohibitions on certain contracting practices, and arbitration requirements as part of non-discrimination provisions. These go beyond past DOJ statements and practices with respect to merger remedies.

Finally, a section on compliance discusses remedies enforcement. It observes that enforcement is dependent on the allocation of internal Antitrust Division resources to the

⁷ *Id.* at 6-7.

⁸ This view was endorsed by the chief economist at DOJ at the time. *See* David S. Sibley & Ken Heyer, *Selected Economic Analysis at the Antitrust Division: The Year in Review*, 23 REV. IND. ORGAN. 95 (2003).

development of best practices and *ex post* reviews of remedies effectiveness. It does not address the question of where such resources will be found.

2. Analysis of the DOJ's New Approach to Behavioral Remedies

The new approach to remedies stands in contrast not only with structural remedies – which require no subsequent oversight – but to some degree also with instances where behavior-oriented remedies have been used in the past. Past behavioral remedies were generally restricted to vertical mergers, were limited in scope, and were ancillary to other provisions of the consent orders. Newer behavioral remedies are not so limited in their application, and involve relatively more complex, interventionist, on-going restraints.

More specifically, these new behavioral remedies differ in several respects. They are different in that they stand at the core of merger resolution, so the effectiveness of the settlement rises or falls with their effectiveness. They are different in that they are being used not simply in network or infrastructure industries, as has sometimes been the case before, but in more traditional horizontal mergers.⁹ They are different in that they intervene more deeply and broadly into the operations of the merged firms, seeking to blunt anticompetitive incentives at a more fundamental level. And they are different since collectively they require novel forms of oversight and expanded resource commitment by the DOJ.

⁹ Analysis of European mergers shows that there may be a preference for behavioral remedies in network and infrastructure industries, with access remedies common in information and telecommunications. See Thomas Hoehn, *Structure Versus Conduct – a Comparison of the National Merger Remedies Practice in Seven European Countries*, 17 INT. J. ECON. BUS. 9 (2010). The DOJ's consent order in the case of George's acquisition of Tyson's chicken processing complex provides a recent example of a behavioral remedy in a horizontal merger. See *United States v. George's Foods, LLC.*, 76 Fed. Reg. 38,426 (DOJ June 30, 2011) (proposed final judgment).

These differences raise a number of questions about the design, operation, and efficacy of the new behavioral remedies. Interestingly, for a trenchant critique, one need look no farther than the first (2004) DOJ REMEDIES GUIDE itself, which emphasized a structural approach. That document stated that a behavioral remedy “typically is more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent.”¹⁰ While the 2004 GUIDE acknowledged that behavioral remedies could be appropriate in “limited circumstances,” it noted that firewalls, fair-dealing provisions, and transparency provisions all pose “substantial policy and practical concerns.”¹¹ It specifically pointed out that firewalls require considerable time and effort to monitor and enforce, fair dealing provisions have potential for “harm as well as good,” and transparency provisions run the risk of being circumvented by the merging parties and require the authority and courts to expend resources on monitoring and enforcement.¹²

As noted above, the 2011 REMEDIES GUIDE looks past these concerns. In doing so, however, it does not offer support from experience or empirical evidence or other sources for a shift in policy. Rather, the case for such remedies is largely a series of declarative statements concerning their possible usefulness, without addressing critiques – including that in the earlier REMEDIES GUIDE – of this approach.

This is not to say that behavioral remedies have no place in merger control nor that structural remedies are without flaw. Behavioral remedies have on occasion been

¹⁰ 2004 REMEDIES GUIDE, *supra* note 2, at 7-8.

¹¹ *Id.* at 22.

¹² *Id.* at 24.

employed in unusual horizontal cases.¹³ As noted earlier, they may have a role to play in mergers involving network and infrastructure industries. And they have been utilized in consent orders in vertical mergers where – as both the 2004 and 2011 REMEDIES GUIDES suggest – there are specific efficiencies that can be preserved while addressing competitive harms from a merger.¹⁴ Indeed, where the alternative is no enforcement action whatsoever against competitively problematic vertical mergers, the use of behavioral remedies may be viewed as a worthwhile policy effort to impose at least some measure of restraint on the merged firms.¹⁵ But the 2004 REMEDIES GUIDE cautioned that their limitations would make the use of stand-alone behavioral relief to resolve competitive concerns rare. Recent experience raises the question as to whether that admonition remains valid.

Nor should it be presumed that structural remedies are perfect. They clearly have limitations, and their track record is not unblemished.¹⁶ Their limitations include: information asymmetries between the antitrust authority, merging parties, and potential

¹³ For example, in the settlement of the investigation of the GM joint venture with Toyota by the FTC in 1982, the agency expressed concern about the possibility of exchange of information on a number of topics judged not central to the joint venture. The consent order explicitly prohibited disclosure of a list of topics, leaving enforcement, however, to the parties themselves. See John K. Kwoka, *International Joint Venture: General Motors and Toyota (1983)*, in *THE ANTITRUST REVOLUTION* 46 (John E. Kwoka & Lawrence J. White eds., 2nd ed. 1994).

¹⁴ See, e.g., Gerald F. Faulhaber, *Access and Network Effects in the “New Economy”*: AOL-Time Warner (2000), in *THE ANTITRUST REVOLUTION* 453 (John E. Kwoka & Lawrence J. White eds., 4th ed. 2004). For further detail, see, e.g., James Langenfeld, *Non-Horizontal Merger Guidelines in the United States and the European Commission: Time for the United States to Catch Up?* 16 *GEO. MASON L. REV.* 851 (2009) and Thomas C. Wilcox, *Behavioral Remedies in a Post- Chicago World: It's Time to Revise the Vertical Merger Guidelines*, 40 *ANTITRUST BULL.* 227 (1995).

¹⁵ Vertical merger enforcement overall was relatively relaxed in prior administrations, so that current efforts to intervene at all deserve praise.

¹⁶ For a good discussion of how remedies policy can be improved, see, e.g., Thomas J. Horton, *Fixing Merger Litigation “Fixes”*: Reforming the Litigation of Proposed Merger Remedies Under Section 7 of the Clayton Act, 55 *S.D. L. REV.* 165 (2010).

buyers; incentives for the merging parties to dispose of assets so as to not fully restore competition; market structure post-remedy; and the conduciveness of the market to collusion following an asset sale.¹⁷ The track record of structural remedies in the U.S. has been examined by the FTC in a study that found only a minority of remedies were successful in fully restoring the competition lost by a merger.¹⁸ Importantly, however, that study linked such failures to the improper framing of structural remedies and offered a number of recommendations for improvements in policy. Those recommendations have been implemented and have improved subsequent policy with respect to merger remedies.

C. Preference for Structural Remedies in the U.S. and Other Major Jurisdictions

As noted, the 2004 REMEDIES GUIDE expressed a clear preference for structural remedies, citing “speed, certainty, cost, and efficacy” as key factors by which the potential effectiveness of a remedy should be measured.¹⁹ By way of explanation, the 2004 REMEDIES GUIDE stated that structural remedies were preferred to behavioral remedies because:

... they are relatively clean and certain, and generally avoid costly

¹⁷ For a summary of the relevant literature, see, e.g., Christian Steiner, Kai Huschelrath, & Jurgen Weigand, *Merger Remedies Involving Restructuring Costs in a Cournot Framework*, 38 EMPIRICA 417, 419-20 (2011); Massimo Motta, Michele Polo, & Helder Vasconcelos, *Merger Remedies in the European Union: An Overview*, 52 ANTITRUST BULL. 603 (2007); Stephen Davies & Matthew Olczak, *Assessing the Efficacy of Structural Merger Remedies: Choosing Between Theories of Harm?* 37 REV. IND. ORGAN. 83 (2010).

¹⁸ See Federal Trade Commission, *A Study of the Commission’s Divestiture Process* (1999), available at <http://www.ftc.gov/os/1999/08/divestiture.pdf>. Among the few empirical analyses of remedies are Tomaso Duso, Klaus Gugler, & Burcin Yurtoglu, *How Effective Is European Merger Control?* 55 EUR. ECON. REV. 980 (2011), and John Kwoka & Daniel Greenfield, *Does Merger Control Work? A Retrospective on Enforcement Policy, Remedies, and Outcomes* (forthcoming 2011). Both of these studies conclude that structural and behavioral remedies are at best only partially effective in constraining firms that have been allowed to merge.

¹⁹ 2004 REMEDIES GUIDE, *supra* note 2, at 7-8.

government entanglement in the market. A carefully crafted divestiture decree is “simple, relatively easy to administer, and sure” to preserve competition.²⁰

This preference for structural remedies was illustrated in countless merger cases both before and after issuance of the 2004 REMEDIES GUIDE.

In this approach, U.S. policy was consistent with the enforcement posture in Canada, the European Union, United Kingdom, and Canada. In 2001, the European Commission stated:

...Commitments that are structural in nature, such as the commitment to sell a subsidiary, are, as a rule, preferable from the point of view of the Regulation’s objective, inasmuch as such a commitment prevents the creation or strengthening of a dominant position previously identified by the Commission and does not, moreover, require medium or long-term monitoring measures.²¹

The UK Competition Commission expressed a similar preference in 2008 in this way:

In merger inquiries, the CC will generally prefer structural remedies, such as divestiture or prohibition, rather than behavioral remedies because: (a) structural remedies are likely to deal with an SLC [substantial lessening of competition] and its resulting adverse effects directly and comprehensively at source by restoring rivalry; (b) behavioral remedies may not have an effective impact on the SLC and its resulting adverse effects, and may create significant costly distortions in market outcomes; and (c) structural remedies do not normally require monitoring and enforcement once implemented.²²

Finally, the Canadian Competition Bureau made a similar statement in 2006:

Competition authorities and courts generally prefer structural remedies to behavioral remedies because the terms of such remedies are more clear

²⁰ *Id.* at 8.

²¹ Notice on Remedies Acceptable Under Council Regulation No. 4064/89 and Under Commission Regulation No. 447/98, 2001 O.J. (C 68) 3, 4 (EC), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:068:0003:0011:EN:PDF>.

²² Competition Commission, *Merger Remedies: Competition Commission Guidelines*, at 14-15 (Nov. 2008) (U.K.), *available at* http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/CC8.pdf.

and certain, less costly to administer, and readily enforceable.²³

The Canadian policy bulletin goes even further, stating that if a behavioral remedy required any monitoring, it would not be considered on a standalone basis.²⁴

These policies have undergone review and been affirmed in several jurisdictions. In the U.S., the FTC's evaluation of divestiture remedies has already been noted. Similar issues have been recognized and studied by antitrust authorities in other countries, including in the 2005 report issued by the Directorate-General Competition of the European Commission and a 2011 Canadian Competition Bureau study.²⁵ Such studies, as well as cumulative experience, have fostered considerable learning and improvements in a structural approach to consent orders. Even in light of their limitations, the European, U.S., and Canadian studies generally concluded that structural remedies have been largely effective – and superior to alternatives – in accomplishing their stated goal.

In sum, it is clear that structural remedies have been the preferred method of resolving concerns with a proposed merger. Limitations with structural remedies do exist, but these have been identified and at least to some degree addressed. As discussed in Section IV, it is less clear that the significant disadvantages of behavioral remedies can similarly be resolved.

²³ Competition Bureau, *Information Bulletin on Merger Remedies in Canada*, at 6 (Sept. 22, 2006) (Can.), available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Mergers_Remedies_PDF_EN1.pdf/\\$FILE/Mergers_Remedies_PDF_EN1.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Mergers_Remedies_PDF_EN1.pdf/$FILE/Mergers_Remedies_PDF_EN1.pdf).

²⁴ Competition Bureau, *Competition Bureau Merger Remedies Study*, at 13 (Aug. 11, 2011) (Can.), available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-merger-remedy-study-summary-e.pdf/\\$FILE/cb-merger-remedy-study-summary-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-merger-remedy-study-summary-e.pdf/$FILE/cb-merger-remedy-study-summary-e.pdf).

²⁵ See Competition Bureau Canada, *supra* note 24; and Directorate General for Competition, *Merger Remedy Study* (2005) (E.C.), available at http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf. See also Marleen van Kerckhove, *The EU Remedies Study: Towards Transatlantic Convergence in Merger Remedies?* 21 ANTITRUST 66, 66-67 (2006-2007).

III. Recent Case Studies of Behavioral Remedies

The more favorable view of behavioral remedies in the 2011 REMEDIES GUIDES is not simply a statement of policy. Rather, it has already been implemented in three merger cases that were decided in quick succession by the DOJ. These three cases are Ticketmaster-Line Nation, Comcast-NBCU, and Google-ITA. The intended scope and the practical difficulties associated with behavioral remedies are clearly illustrated by these cases.

A. Ticketmaster-Live Nation

In early 2009, Ticketmaster proposed to acquire Live Nation in an all-stock transaction worth an estimated \$2.5 billion.²⁶ Ticketmaster has long been known as the leading company in artist management and dominant seller of tickets to live music events across the country, with contracts for more than 80 percent of large venues in 2008. At the same time, Live Nation had been the leading concert promoter, handling one-third of major concert events, was the second leading owner-operator of concert venues in the country, and also provided ticketing services. The merger was thus a match of complementary jigsaw pieces, creating a comprehensively integrated and dominant company in the live music business. The DOJ's investigation of the proposed merger was joined by 17 states and coordinated with the Canadian Competition Bureau. The UK Competition Commission investigated the transaction separately.

The threshold competitive issue concerned the effect of combining Ticketmaster's dominant position in primary ticketing services with Live Nation's significant upstart competitive service. The proposed merger would therefore eliminate the only sizeable

²⁶ *Live Nation, Ticketmaster Agree to Merge*, USATODAY, Feb. 10, 2009, http://www.usatoday.com/money/media/2009-02-10-live-nation-merge-ticketmaster_N.htm.

horizontal competitor (or potential competitor) to Ticketmaster's dominant position. The potential adverse effects would not be remedied by entry, as DOJ noted several significant impediments. Paramount among these was the fact that major venues were reluctant to contract for ticketing services with providers who might not be able to handle the demands of major events. The transaction clearly would also increase the degree of vertical control. No rival at any stage would be able to avoid transacting with a merged Ticketmaster-Live Nation for necessary related services, and that necessity would create considerable potential for several types of mischief toward rivals and harm to consumers.

The first was the possibility that Live Nation would use competitively sensitive information about the artists, venues, and fans, to the competitive disadvantage of promoters that placed artists at venues serviced by Ticketmaster. A second concern was the possibility that the merged firm's artist management arm "Front Line" might steer artists to its own promotion operation, or that venues that did not sign Front Line talent might find their access to other concert talent restricted. The third centered on the possibility that independent rivals might find that if they became too aggressive in competing with the merged entity, Ticketmaster-Live Nation could make it difficult for them to secure artists or concerts or venues.

Although the parties claimed significant cost savings from vertical integration, as well as revenue synergies from being able to market more effectively to fans, the DOJ viewed these claims skeptically. It noted that each company already was significantly integrated, and that absent the merger, "venues and concertgoers would have continued to enjoy the benefits of competition between two vertically integrated competitors."²⁷

²⁷ United States v. Ticketmaster Entm't, Inc., 75 Fed. Reg. 6,721, 6,724 (DOJ Feb. 10, 2010) (competitive impact statement). See also James D. Hurwitz, *Ticketmaster-Live Nation: An AAI White Paper* (Am.

Despite these concerns, the DOJ approved the merger, subject to conditions directed at both the horizontal and vertical issues, effective for 10 years. To replace the lost horizontal competition, DOJ required the licensing of the basic ticketing platform (Host) to AEG – the second leading concert promoter and operator of a number of major venues – in the belief that AEG would have strong incentives to utilize Host both to do its own ticketing and to compete for new ticketing business. The consent order also required the divestiture of Paciolan, the venue-based ticketing division, to Comcast-Spectacor, a small and primarily regional ticketing service.²⁸

To address vertical concerns, DOJ prohibited the merged firm from several specific actions: (1) retaliation against venue owners who contracted for primary ticketing services with a rival; (2) any requirement that a venue use its primary ticketing services when that venue wanted only to obtain concerts promoted by the merged firm; (3) any requirement that venues take the merged firm’s concerts as a condition for obtaining ticketing services; and (4) using ticketing data in their non-ticketing businesses.

B. Comcast-NBCU

In late 2009, Comcast Corporation (Comcast) and General Electric (GE), parent of NBCU Universal (NBCU), agreed to pool assets in a joint venture (JV) valued at about

Antitrust Inst., April 28, 2009), *available at* http://www.antitrustinstitute.org/files/TICKETMASTER%20Revised.4.28.09_043020092221.pdf.

²⁸ United States v. Ticketmaster Entm’t, Inc., 75 Fed. Reg. 6,715, 6,717 (DOJ Feb. 10, 2010) (proposed final judgment). In actuality, AEG has been slow to undertake ticketing, and ironically has bypassed Host in favor of the start-up Outbox in developing ticketing services. Mitchell Peters, *AEG Launches Axs Ticketing Platform To Rival Ticketmaster*, BILLBOARD.BIZ, Aug. 22, 2011, <http://www.billboard.biz/bbbiz/industry/touring/aeg-launches-axs-ticketing-platform-to-rival-1005324562.story>.

\$30 billion.²⁹ The transaction was reviewed by the DOJ and Federal Communications Commission (FCC). In their public statement to the FCC, the parties explained that Comcast would contribute its cable and regional sports networks and digital media properties to the JV and NBCU would contribute its cable networks, filmed and televised entertainment, and theme parks. Comcast’s cable systems and internet sites for aggregating and marketing video programming content (Fancast and Hulu), however, would *not* be contributed to the JV.³⁰ The DOJ and FCC coordinated their merger investigations and remedies. The DOJ cast it as a vertical combination that would allow the largest cable multichannel video programming distributor (MVPD) and high-speed internet (HSI) provider in the U.S. to control the programming of one of the most important producers of video content – one that had actively supported online video distribution (OVD) development.

The Complaint concluded that both OVDs and MVPDs were in the relevant product market for video programming distribution (VPD).³¹ It noted that Comcast considered the emergence of OVDs a significant competitive threat and had not only improved existing services but also developed new, innovative services in response. Moreover, NBCU’s programming was a “potent tool” that if controlled by Comcast could

²⁹ Comcast, *Comcast and GE to Create Leading Entertainment Company*, Dec. 3, 2009, http://files.shareholder.com/downloads/CMCSA/928665591x0x336642/8627242a-6cc5-4885-8261-c139a0db6352/CMCSA_News_2009_12_3_General_Releases.pdf.

³⁰ *In the Matter of Applications of Comcast Corp., Gen. Elec. Co. and NBC Universal, Inc. for Consent to the Transfer of Controls of Licenses, Applications and Public Interest Statement*, MB Docket No. 10-56 (FCC May 4, 2010), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020394237>. See also *In the Matter of Applications of Comcast Corp., Gen. Elec. Co. and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, Memorandum Opinion and Order, MB Docket No. 10-56, FCC 11-4 (Jan. 20, 2011).

³¹ OVD included professional, full-length streamed or downloaded programming. MVPDs included cable, cable overbuilders, telcos, and digital broadcast satellite providers. *United States v. Comcast Corp.*, 76 Fed. Reg. 5,440, 5,443 (DOJ Jan. 31, 2011) (compl.).

be used to disadvantage VPD rivals.³² The DOJ's theory of competitive harm was therefore that Comcast could disadvantage its MVPD rivals and curb nascent competition from OVDs by cutting off or raising the costs of important NBCU content, thus reducing the competitive pressure on Comcast to innovate.³³ Moreover, high barriers to entry in MVPD made OVDs the most likely candidate for additional competition in Comcast's cable franchise areas. Finally, the complaint noted that the proposed JV would not produce efficiencies sufficient to reverse the competitive harm of the proposed JV.

Despite these concerns, the DOJ reached a settlement allowing the merger to proceed, subject to certain behavioral remedies that would be in effect for seven years. The most important of the remedies outlined conduct that was required, prohibited, or permitted. The affirmative conduct requirements created a non-discrimination regime, including the required provision of "economically equivalent" and "comparable" video programming to OVDs.³⁴ The consent decree attempted to define and set parameters for non-discrimination conditions. For example, economic equivalence was defined as the prices, terms, and conditions that "in the aggregate, reasonably approximate" those on which the JV provided programming to an MVPD. Comparability was defined as

³² *Id.* at 5,440.

³³ *Id.* at 5,440 & 5,445. In its comments to the FCC, the AAI offered that additional perspective that with control over a larger cache of valuable programming *and* two major distribution channels (cable television and HSI), Comcast-NBCU could strategically control how the two competing platforms developed. *In the Matter of Applications of Comcast Corp., Gen. Elec. Co. and NBC Universal, Inc. for Consent to the Transfer of Controls of Licenses*, Comments of the American Antitrust Institute, MB Docket No. 10-56 (FCC June 21, 2010), *available at* http://www.antitrustinstitute.org/sites/default/files/AAI_Comcast_NBCU%20Comments_2_070220101958.pdf.

³⁴ *United States v. Comcast Corp.*, 76 Fed. Reg. 5,459, 5,461-64 (§§ IV-VI) (DOJ Jan. 31, 2011) (proposed final judgment).

“reasonably similar in kind and amount, considering the volume and its value” to that which an OVD received from a peer.³⁵

The provisions included a special non-discrimination provision for Hulu (in which NBCU held a 32 percent ownership share) consisting of delegation of the JV’s voting rights and a firewall to prevent the transmission of competitively sensitive information from Hulu to the JV.³⁶ Another condition prohibited discriminatory or retaliatory behavior and practices involving Comcast’s internet facilities. Yet other conditions covered arbitration rights and conditions for OVDs and compliance enforcement. In an unusual development, the presiding judge delayed approval of the Proposed Final Judgment (PFJ) under the American Antitrust Procedures and Penalties Act due to concerns over a non-appealable arbitration process for OVDs and the enforceability of the PFJ.³⁷

C. **Google-ITA**

In mid-2010, Google proposed to acquire ITA Software, Inc. (ITA) for \$700 million. ITA licensed a leading software product that allowed travel websites to furnish consumers with complex and customized flight search functionality. Prior to the acquisition, ITA had licensed its “QPX” Pricing and Shopping (P&S) system both to airlines and leading online travel intermediaries (OTIs), which included online travel agents (OTAs) such as Orbitz and Expedia, and meta-search travel sites (Metas) like

³⁵ *Id.* at 5,461 (§ IV(A) & § IV(B)).

³⁶ Programming provided by the JV to Hulu was to be comparable in terms of “type, quantity, ratings, and quality” and provided on “substantially the same terms and conditions as were in place on January 1, 2011.” *Id.* at 5,462 § IV(G).

³⁷ To resolve these concerns, the judge ordered that the parties create and maintain a report for a period of two years, detailing the various aspects of arbitration requests under the FCC and DOJ processes. *United States v. Comcast Corp.*, No. 1:11-CV-00106, at 5 & 7-8 (D.D.C. Sept. 1, 2011) (memorandum order).

Kayak and Bing Travel. The transaction was difficult to characterize in that the merging parties did not directly compete or even fit together vertically in an existing supply chain. Moreover, the risk of anticompetitive effects was strongest in a market – flight search services – that neither party had entered pre-merger or would necessarily enter post-merger. But Google had both the ability and the intent to develop a comparative flight search services product incorporating QPX technology, and by doing so it would place itself in direct competition with customers of ITA.³⁸

In its Complaint, the DOJ identified two relevant product markets – a P&S system market and a comparative flight search market – each of which was nationwide in geographic scope. The comparative flight search market included both OTAs and Metas, but excluded airline sites, which are not good substitutes for OTIs. The DOJ emphasized that QPX was a critical flight search tool for which OTIs currently had no adequate alternatives.³⁹ The agency identified a post-merger incentive for Google to foreclose or disadvantage rival OTIs’ access to QPX, the concomitant risk of reduced innovation among travel websites, and the potential to unfairly raise rivals’ costs and harm consumer choice.⁴⁰ The DOJ characterized entry barriers into the P&S system market as “extremely high,” supported by the failure of two start-up firms to gain any meaningful OTI market

³⁸ See Dennis Schaal, *Kayak to Google: Bring It On*, TNOOZ, July 21, 2011, <http://www.tnooz.com/2011/07/21/news/kayak-to-google-bring-it-on/>.

³⁹ United States v. Google, Inc., 76 Fed. Reg. 21,017, 21,017 (DOJ April 14, 2011) (compl.).

⁴⁰ In a white paper, the AAI elaborated on or added to the DOJ’s concerns, citing the possibility for the transaction to raise rivals costs, raise barriers to entry, or eliminate potential competition in both the comparative flight search services and P&S markets where Global Distribution Systems (GDSs) and others were attempting to compete with QPX in P&S markets. See Randy Stutz, *An Examination of the Antitrust Issues Posed by Google’s Acquisition of ITA* 18, (Am. Antitrust Inst., White Paper, Feb. 18 2011), available at <http://www.antitrustinstitute.org/sites/default/files/Google-ITA%20AAI%20White%20Paper2.18.11.pdf>.

share and the time required for Google itself to develop its own P&S system.⁴¹ Moreover, the DOJ argued that the transaction would raise entry barriers in the comparative flight search market by placing QPX out of the reach of potential entrants.⁴²

The remedy reflected in the consent order consisted entirely of behavioral relief, to be effective for five years. It featured a mandatory licensing component, a quality-of-terms component, maintenance and R&D commitments, a dispute resolution mechanism, a series of explicit behavioral prohibitions, a set of affirmative behavioral obligations, monitoring and compliance provisions (including arbitration), and modifiable firewall protections to address the possible exchange of competitive sensitive information regarding OTIs.

From an upstream perspective, the settlement obligated Google to continue licensing both ITA's existing QPX product and its future "InstaSearch" product to OTIs on fair, reasonable and non-discriminatory price and non-price terms.⁴³ From a downstream perspective, the decree prohibited Google from entering agreements that would restrict the rights of airlines to share certain data with parties other than Google, obliged Google to include certain airline data in the P&S system results generated for all OTIs, and prohibited Google from tying the sale of ITA products and services to the purchase of other Google products and services. The consent order also contained the requirement that Google create a website where OTIs could submit complaints

⁴¹ *Supra* note 39, at 21,020.

⁴² *Id.*

⁴³ United States v. Google, Inc., 76 Fed. Reg. 21,026, 21,028-29 (DOJ April 14, 2011) (proposed final judgment).

concerning Google’s compliance with the decree. In September 2011, Google launched its ITA-powered flight search product.⁴⁴

IV. Evaluation and Implications of Behavioral Remedies

The new behavioral remedies raise a number of practical problems. Here those problems are discussed in detail, by drawing an analogy between behavioral remedies and traditional regulation. This is followed by a discussion of enforcement concerns.

A. Parallels Between Economic Regulation and Behavioral Remedies

The characteristics of the new behavioral remedies – their scope, their intrusiveness, the need for on-going oversight – raise a number of significant concerns about their likely operation and effectiveness. Significantly, many of these concerns are similar to those raised by traditional industry regulation. Traditional industry regulation is rooted in the belief that the conduct of a profit-maximizing firm with market power can be effectively constrained by the imposition of operating rules combined with administrative oversight. Behavioral remedies in an antitrust context have similar presumptions, objectives, and methods. Indeed, the 2004 REMEDIES GUIDE stated succinctly that a conduct remedy “would, in effect, manage or *regulate* the merged firm’s postmerger business conduct [emphasis added].”⁴⁵

Much like traditional economic regulation, the ideal behavioral remedy literally prevents the firm from maximizing profit by modifying its incentives toward conduct that is socially more efficient and beneficial. Much like traditional regulation, however, prohibiting certain actions by the firm does not negate its incentive to pursue profit, nor

⁴⁴ Kourosh Gharachorloo, *An Early Look at Our Flight Search Feature*, INSIDE SEARCH: THE OFFICIAL GOOGLE SEARCH BLOG, (Sept. 13, 2011), <http://insidesearch.blogspot.com/2011/09/early-look-at-our-flight-search-feature.html>.

⁴⁵ 2004 REMEDIES GUIDE, *supra* note 2, at 7.

its interest in circumventing the prohibition. For these reasons, just as does regulation, behavioral remedies require ongoing oversight, monitoring, and compliance enforcement on the part of the government and a parallel compliance organization within the merged company. Both may involve nontrivial costs.

What is striking about this analogy is that traditional regulation has come to be widely known for various inherent limitations, administrative costs, and unintended effects. Indeed, much of the modern economic theory of regulation examines the forces and conditions that handicap regulatory authorities and undermine the effectiveness of regulatory policy. And a great many economic studies have demonstrated the practical problems inherent in any effort to constrain normal profit-maximizing behavior by use of rules and oversight. Considerable empirical evidence establishes a very mixed record for modifying the behavior of regulated firms in many industries, and the frequent distortionary effects of regulatory constraints.⁴⁶ These concerns would seem to make regulation-like remedies a questionable model for effective merger control.

Next we examine some specific difficulties faced by the new behavioral remedies that echo those of traditional regulation.

1. Asymmetry of Information

A behavioral consent decree would strive to disallow strategic decisions designed to disadvantage rivals, but permit legitimate business decisions of the merged firm. For example, the prohibitions on retaliation against competitors such as those in the

⁴⁶ For cautionary views about economic regulation, *see, e.g.*, Paul Joskow & Nancy Rose, “*The Effects of Economic Regulation*,” in HANDBOOK OF INDUSTRIAL ORGANIZATION 1449 (Richard Schmalensee & Robert D. Willig eds., 1989) and KIP VISCUSI, JOSEPH HARRINGTON & JOHN VERNON, ECONOMICS OF REGULATION AND ANTITRUST (2005).

Ticketmaster-Live Nation and Comcast-NBCU consent orders may seem straightforward, but in actual practice, disentangling the firm's motives for a specific action in order to determine whether it is properly characterized as "retaliatory" is not straightforward.⁴⁷ While sometimes an action may only have one explanation, often there are multiple possibilities. The antitrust agency or its monitor does not sit at the meetings where such decisions are made. Notes and documents are not always reliable guides to motives. The agency is at an obvious and inherent informational disadvantage relative to the firm in making that determination, leading to some deference to the firm's explanation for its behavior. Mere prohibitions on retaliation, in short, may provide entirely inadequate protection to rivals.

This informational asymmetry is analogous to that in the context of traditional regulation. There a key asymmetry involves the firm's costs, which the company understands far better than the regulator, but which the regulator needs to ascertain in order to establish price and allowed profit. A further asymmetry arises in making judgments about the motivation for certain actions by the company. In electricity markets, for example, strategic withholding of supply in order to drive up price in periods of scarcity is formally prohibited in most organized markets, but what constitutes strategic withholding versus supply reductions for ordinary business reasons is often

⁴⁷ In Ticketmaster-Live Nation, for example, retaliation is defined as "refusing to provide live entertainment events, or providing live entertainment events to a venue owner on less favorable terms, for the purpose of punishing or disciplining a venue owner because the venue owner has contracted for or is contemplating contracting with a company other than defendant for primary ticketing services. The term 'retaliate' does not mean pursuing a more advantageous deal with a competing venue owner." It takes little creativity to envision the various ways in which a particular action might be interpreted differently under this statement. *United States v. Ticketmaster Entm't, Inc.*, 75 Fed. Reg. 6,715, 6,716 (DOJ Feb. 10, 2010) (final proposed judgment)..

beyond an outsider's (i.e., regulator's) ability to distinguish. That leaves a considerable opportunity for the utility to manipulate the system.⁴⁸

2. Inherently Unspecifiable Aspects of the Order

Consent orders prescribe or proscribe behavior in the face of possible complexity of the product, the transaction, the relationship to rivals, and uncertainty about the future. Each of these dimensions adds to the difficulty of fully specifying the conduct in question, and consent orders become complex insofar as they attempt to set forth as many dimensions and contingencies as possible. Case studies such as Google-ITA highlight the complexities associated with such agreements, including the many exceptions and provisos whose meanings and effects are not easily ascertainable. It therefore seems likely that enforcers, as basically outsiders, will not be able to successfully specify all aspects of the conduct in question. Moreover, they will not be able to foresee future developments that may affect the settlement provisions. While the use of monitors might be helpful in that they permit real-time judgments about these matters, that process too is cumbersome and uncertain in its effectiveness. All of these factors increase the likelihood that enforcers will miss important nuances and that the consent order will bind less tightly than intended.

Difficulty in fully specifying the consent order is analogous to another information problem in traditional regulation – the difficulty faced by the regulator in fully specifying the product or service to be performed. Thus, while “price” may be specifiable, “quality” is less so, with the result that the contract with respect to quality is

⁴⁸ For more discussion of the difficulties of discerning motivation, see Frank A. Wolak, *Lessons from the California Electricity Crisis* (Ctr. for the Study of Energy Mkts., Univ. of Cal. Energy Inst., Working Paper No. 110, 2003).

“incomplete” and may not be fulfilled. As shown by price caps in telecom and electricity, even if the regulated firm sets prices as intended, quality may decline since that raises profit. But quality is less easily identifiable to the regulator.⁴⁹ The parallels to the antitrust context are clear. The 2011 REMEDIES GUIDE recognizes the problem in stating: “Remedial provisions that are vague or that can be construed when enforced in such a manner as to fall short of their intended purposes can render useless the enforcement effort.”⁵⁰ But calls for effective provisions cannot escape the fact that some issues simply cannot be fully specified, regardless of the agency’s effort, thus rendering such orders potentially “useless.”

3. Countervailing Incentives

Consent orders can require or prohibit specific behavior, but they cannot abolish the merged firm’s incentive to maximize profit, especially when some of the proscribed behavior would seem perfectly normal. Thus, the firm subject to such an order will persistently confront opportunities to use information, develop business practices, or interact with competitors in ways that would increase its profits but that are prohibited by the consent order. For example, information firewalls in Google-ITA and Comcast-NBCU clearly impede the joint operation and coordination of business divisions that would otherwise naturally occur. Non-discrimination provisions in Ticketmaster-Live Nation and other cases require even-handed treatment even though the merged company has more leverage against some businesses relative to others. Such provisions require the firm to “leave money on the table.” The firm may therefore be expected to crowd the

⁴⁹ See David Sappington, *Regulating Service Quality: A Survey*, 27 J. REGUL. ECON. 123 (2005).

⁵⁰ 2011 REMEDIES GUIDE, *supra* note 2, at 5.

boundaries of the consent decree and search for alternative methods of achieving the same objectives.

Although the 2011 REMEDIES GUIDE acknowledges the problem of attempted “circumvention of the decree,”⁵¹ it does not address the difficulty of preventing such actions. Those difficulties are illustrated by mandatory licensing fees or non-discrimination provisions which usually rely on language requiring “commercially reasonable” terms or “substantially the same” treatment of rivals. The meaning of such language in actual practice, however, is inherently debatable, with the result that the merged firm may well be able to evade or at least minimize the effect of the order.

These problems are similar to those affecting traditional regulation. Regulation cannot abolish a firm’s incentive to maximize profit at the expense of customers and rivals, but it does try to restrain certain of its actions. The difficulties of doing so are demonstrated by the long struggle to implement an equal access system in telecommunications and the ongoing challenges of enforcing a wholesale open access regime in the U.S. electricity industry. The Bell Operating Companies, for example, spent many years and untold resources striving to relax the “line of business” restrictions imposed by the 1984 consent decree. These examples all caution about the difficulties of countering firm’s natural incentives.

4. Implementation Costs

On-going oversight of a growing number of consent orders is likely to be a resource-intensive exercise, and the source of the necessary funding is unclear. It may be possible to extract the necessary resources from the parties, or it might be the case that

⁵¹ *Id.*, at 13.

the agency obtains additional budgetary resources for these purposes. But it is more likely the case that the necessary resources come in large part from the agency's existing budget, implying a trade-off against its other enforcement activities and initiatives.

Based on evidence from traditional regulation, the amounts may be considerable. Close to 15 percent of the Federal Energy Regulatory Commission's (FERC's) and FCC's budgets for 2010, for example, were devoted to oversight and enforcement.⁵² While the regulation engaged in by these agencies differs from that which the antitrust agency might do, the indisputable costs of adopting this approach must be recognized. Moreover, these cost implications are exacerbated by the fact that the expertise and structures of the antitrust agencies are not those of a regulator, but rather they are designed for the purpose of case-specific investigations. Developing the necessary capabilities may require institutional changes, at further cost in terms of time, dollars, and foregone alternatives.

5. Noncompliance and Arbitration

The reporting and non-compliance problems that accompany traditional regulation are also likely to attach to behavioral remedies. For example, since the antitrust agencies do not have the resources of sector regulators to monitor and oversee compliance, behavioral settlements rely largely on the reporting of problems by adversely affected parties to reveal non-compliance. That implies that the effectiveness of anti-retaliation clauses are potentially limited by the risks confronting the "victims" who come forward (e.g., jeopardizing their commercial relationships). Costly arbitration and side

⁵² Federal Energy Regulatory Commission, *Fiscal Year 2012 Congressional Performance Budget Request*, at 2 & 4, available at <http://www.ferc.gov/about/strat-docs/FY12-budg.pdf>; Federal Communications Commission, *Fiscal Year 2012 Budget Estimates Submitted to Congress*, at 39 & 69 (Feb. 2011), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0214/DOC-304636A1.pdf.

deals between the merged firm and rivals can also discourage reporting of non-compliance.

In anticipation of the disputes that are sure to arise, settlements may rely on arbitration. As demonstrated by the Google-ITA and Comcast-NBCU consent decrees, however, arbitration is likely to be costly, may well be ineffective, and seems likely to delay the realization of benefits from the restraints. Importantly for investment decisions, the element of predictability is also likely to be sacrificed under arbitration. This concern was captured in the court's reaction to the arbitration requirement in the Comcast-NBCU settlement:

... the Government, at the public hearing, freely admitted that "[w]e can't enforce this decree." In addition, it is undisputed that neither the FCC nor the Department of Justice has any experience yet in administering either course of arbitration in the online-video-distribution context (citation omitted).⁵³

It should also be noted that arbitration often outsources regulatory decisions involving a substantial amount of discretion to a process that is unfamiliar to either regulation or antitrust, posing a challenge to competition policy. Moreover, with the government taking itself out of the picture, there is no party at the arbitration table that represents the public/competition interest.

6. Term of the Remedy and Dynamic Markets

As previously noted, effective consent orders require foresight to anticipate future market conditions, firm operations and parameters, and even the regulatory system in place. The difficulty of crafting a consent order in the face of such imponderables is

⁵³ United States v. Comcast Corp., No. 1:11-CV-00106, at 6-7 (D.D.C. Sept. 1, 2011) (memorandum order).

arguably greater in nascent or dynamic markets such as those at issue in Comcast-NBCU and Google-ITA. Indeed, the 2004 REMEDIES GUIDE clearly recognized these problems, stating that “...even where ‘effective,’ efforts to regulate a firm’s future conduct may prevent it from responding efficiently to changing market conditions.”⁵⁴

Moreover, it is not clear how a limited-term remedy addresses entrenched market power – such as Comcast’s or Google’s dominance – or even how the term of the remedy should be chosen to allow for needed entry and innovation. For example, in Google-ITA, a relative short consent order “window” decreases the probability that entrants will scale high entry barriers and increases the risk that incumbents scale back investment or even exit the market.⁵⁵ Indeed, behavioral remedies that are intended to foster the entry or growth of competitors should be viewed with skepticism, as they depend not only on independent decisions by non-parties, but over time will be subjected to exogenous forces that are difficult to predict.

A behavioral remedy must therefore navigate the twin risks of not committing itself sufficiently into the future, versus imposing restraints that will lock the parties (and the market) into a static or incorrect set of assumptions. The latter could unduly shape or constrain how competition develops, or constrain entry and innovation. Avoidance of these risks requires the agency, at a minimum, to devote resources to the ongoing

⁵⁴ 2004 REMEDIES GUIDE, *supra* note 2, at 8.

⁵⁵ The Division notes in its Competitive Impact Statement that “Five years will provide those OTIs that do not wish to be dependent on Defendants’ P&S system a sufficient period of time to switch to an alternative system.” *United States v. Google, Inc.*, 76 Fed. Reg. 21,020, 21,023 (DOJ April 14, 2011) (competitive impact statement).

monitoring of the industry so that it might go back to court if adjustments to the order seem appropriate.

A further important issue over time is that the agency itself changes – in its leadership, in its policies, and in its approaches. As a result, there is less certainty about the actual future effect of a behavioral remedy than there is with respect to divestiture. The latter is a one-off event, unlikely to be reviewed or reversed, whereas a behavioral remedy is an on-going matter between the agency and the merged firm. Apart from any effort by the latter to relax the restraint, the agency itself may change its view of the consent order or face constraints on its ability to enforce it. These possibilities make any consent order currently imposed subject to considerable uncertainty about its future effect. In all these respects, too, behavioral remedies have much in common with traditional regulation. Difficulties with forecasting, forward-looking parameters, commitment, and predictability are all familiar problems in the regulatory process.

B. Major Issues for Enforcement

Behavioral remedies raise a number of additional issues specifically with respect to enforcement. Many of these flow not from the similarities between antitrust and regulatory enforcement, but from their differences. Three of these are: (1) procedures and control rights, whereby antitrust authorities limit themselves to checking the lawfulness of a firm's conduct, while regulators have more extensive powers by which they can constrain the firm's conduct; (2) timing of oversight, whereby antitrust enforcers intervene *ex post* but regulators intervene *ex ante*, sometimes for protracted periods of

time; and (3) information-intensiveness and continued relationship, which is characteristic of regulators but not of antitrust enforcers.⁵⁶

1. Blending of Prosecutorial and Regulatory Functions

A major question is how an antitrust authority will effectively blend prosecutorial and regulatory functions. The 2011 REMEDIES GUIDE indicates that the “evaluation and oversight” of all remedies will be placed within the Office of the General Counsel (OGC), which oversees the litigation divisions that, in turn, oversee consent decree compliance and violations.⁵⁷ The practical implication of this allocation of resources is that personnel could be in a position of answering to two different bosses – those in charge of cases in litigation, and those monitoring consent orders. While this arrangement presents opportunities for cross-fertilization, so that experience can inform the choice and term of remedy in future cases, it could also confound incentives and priorities. But even those opportunities may be limited by the constraints surrounding confidential investigations and the internal conflicts that are bound to arise when individuals on an OGC monitoring/compliance team are assigned to other on-going cases supervised elsewhere in the Division.⁵⁸

2. Coordination with Regulatory Agencies

In cases where a sector regulator also has statutory authority to review a merger, behavioral remedies raise the question of inter-agency coordination and cooperation. The

⁵⁶ This useful paradigm is taken from Motta, et al., *supra* note 12, at 626-627, citing Patrick Rey, *Towards a Theory of Competition Policy* (IDEI, Univ. of Toulouse Working Paper No. 121, 2001), available at <http://idei.fr/doc/by/rey/towards.pdf>.

⁵⁷ 2011 REMEDIES GUIDE, *supra* note 2, at 33.

⁵⁸ At a more microscopic level, litigating attorneys in a government agency are likely to disfavor being compliance “officers,” since it is generally not a good way to build a reputation or move up in the ranks.

2011 REMEDIES GUIDE explains that the presence of sector regulation might make the implementation of antitrust remedies more efficient.⁵⁹ However possible that may be, the court's skepticism over the arbitration requirement and enforceability of the consent decree in Comcast-NBCU caution against any such presumption. Indeed, agency coordination may also create tensions.

For example, regulators such as the FCC and FERC will almost always impose behavioral remedies if a merger cannot otherwise be found to be in the public interest. The antitrust agency must then decide whether to take a similar approach or pursue structural remedies that could nullify, or even require the agency to mount a legal challenge to the regulatory conditions. The procedural inefficiency and conflicts that could result from such disparities could put pressure on the antitrust agency to opt for behavioral remedies. The coordination question is complicated by Supreme Court decisions in *Trinko* and *Credit Suisse*, which could be read to imply that if a regulatory agency has authority to regulate competition, then the DOJ is preempted, even if there is an antitrust savings clause in the authoritative statute.⁶⁰

3. Testing Behavioral Remedies

The 2011 REMEDIES GUIDE recognizes the importance of developing remedial best practices. Without a track record associated with behavioral remedies – particularly the more invasive measures contemplated in the 2011 REMEDIES GUIDE – the goal of developing best practices presents something of a Catch-22. Namely, without good data on the effectiveness of such remedies over time, these remedies remain largely untested,

⁵⁹ 2011 REMEDIES GUIDE, *supra* note 2, at 20-21.

⁶⁰ 540 U.S. 398 (2004) and 551 U.S. 264 (2007).

but without attempting their use, no data can be collected. The policy prescription in most such cases is to “go slow.” However, as noted earlier, the DOJ imposed behavioral remedies in three major cases within an 18-month period, one of which involved a complex and relatively novel case of coordinating remedies with a regulatory agency. And those remedies were soon codified in a new policy guide.

This rapid progression of events raises a number of concerns in light of the fact that the 2011 REMEDIES GUIDE makes no substantive provisions for evaluating the newly endorsed behavioral remedies. It simply notes that compliance with prohibited and affirmative acts can be “monitored” by the staff.⁶¹ In contrast, the REMEDIES GUIDE addresses in considerable detail implementation issues relating to structural remedies, largely because of accumulated experience and the benefit of organized retrospectives. The absence of a similar implementation framework for behavioral remedies could have a significant impact on their effectiveness in light of two important issues.

First, it is not yet clear how aggressively behavioral remedies will be enforced and how potential conflicts between agencies will be resolved, particularly as agency leadership and priorities change over the span of the consent order. Second, there is relatively little experience with monitoring how well a behavioral remedy restores competition and a scarcity of retrospectives on the use of behavioral remedies. For example, a major type of behavioral remedy is the non-discrimination condition, which is designed to replace competition lost as a result of the merger by requiring the merging parties to give rivals access to or interoperate with certain segments of their system. Experience with maintaining an “open” system for a period of years dictated in a consent

⁶¹ 2011 REMEDIES GUIDE, *supra* note 2, at 34.

decree, however, is relatively limited.⁶² Without a track record on how open systems perform post-remedy – and with substantial evidence from regulated industries that highlights the difficulties associated with open access regimes – proceeding cautiously is the best policy course.

4. Antitrust “Capture”

A systemic shift toward behavioral antitrust remedies imposed by antitrust enforcers is likely to highlight issues involving agency interactions with firms. On one hand, effective monitoring and oversight of behavioral remedies may result in a better-informed government with respect to the industries and issues being monitored. That outcome, however, assumes that agency resources are optimized to provide for adequate oversight and monitoring, there is a focus on developing best practices, and there is an ideological consistency across political and agency leadership.

On the other hand, the increased interaction between large private companies and government enforcers necessitated by behavioral remedies could increase the risk that the antitrust agency is “captured” by the economic interests of merging parties. While U.S. antitrust agencies have been commendably free of such influence, it should be recognized that for the antitrust agencies, there is little glory in compliance, but for the merged company, the incentives are quite different. Finding ways around the harsher aspects of a consent order may be worth a great deal to the client, who can justify expending significant resources on minimizing its impact on profits. Merging parties might therefore

⁶² For further discussion, see Joseph Farrell, Hunter K. Monroe & Garth Saloner, *The Vertical Organization of Industry: Systems Competition Versus Component Competition*, 7 J. ECON. MANAGE. STRATEGY 143 (1998). For a broader discussion of systems competition, see Gregory Gundlach & Diana Moss, *Introduction*, in *Symposium: New Perspectives on Systems Competition*, 56 ANTITRUST BULL. 1 (2011).

lobby in settlement proceedings for certain types of behavioral restraints because they allow the merged firm to more easily pursue profit-maximizing behavior.

V. Observations and Policy Recommendations

Whether the types of behavioral remedies set forth in the 2011 Remedies GUIDE and implemented in consent decrees in three recent merger cases will gain a lasting foothold remains to be seen. To this point there is no evidence on the efficacy and effectiveness of these remedies, and so it is premature to decide whether they will prove successful in restoring the competition lost in such mergers. This White Paper has nonetheless identified a number of issues that warrant attention and prompt some concern. Based on this early analysis, a number of observations and policy recommendations would seem justified.

- ***To the extent possible, structural remedies should be applied. In limited cases where such remedies are difficult to craft, behavioral remedies may be acceptable.*** Structural remedies have advantages in terms of clarity, cost, and certainty, and have withstood the test of experience. They should arguably always be used in horizontal merger cases. Under certain circumstances, it is true that structural remedies may be difficult to implement. These include, but are not limited to, vertical mergers where efficiencies are large and can clearly be separated from anticompetitive actions by such remedies, cases involving dominant firms with control over essential networks or patented technologies, and instances where identifying a package of “winning” assets and acceptable buyers is difficult. Ordinarily, however, structural remedies are to be preferred for all the reasons documented in this White Paper.
- ***The decision to employ behavioral remedies should be based on a multi-factor test.*** Injunctions are most likely a more effective deterrent to anticompetitive mergers, for the reason that parties are less likely to propose a merger that they believe will be challenged than if they anticipate a likelihood of reaching a satisfactory settlement. Once it is determined that a merger is anticompetitive, a compromise that permits the merger in return for behavioral remedies should come only after considering complete rejection of the transaction and other structural remedies. This judgment should be based on an in-house consensus by well-informed litigators on the probability of success at various levels of the legal system. Thus, the case for behavioral remedies will be strongest where the chances of prevailing in court are deemed very small, the importance of

establishing a principle of antitrust enforcement is insubstantial, and the need to preserve agency resources for more important activities is great.

- ***Given the problems inherent with arbitration, the government should look toward other methods for policing compliance with – and increasing the likelihood of successfully enforcing – a consent decree.*** A primary method of ensuring compliance with a consent order is often to put the burden on complainants to “tell us if there is a problem.” Complainants can avail themselves of arbitration to air and settle disputes, but at some expense and uncertainty regarding the ability to appeal a decision. The need voluntarily to come forward under circumstances where retaliation is possible also undermines a compliance process that depends on victims to surface in public. This problem is likely to be complicated in mergers where both an antitrust and regulatory arbitration process is available to address disputes. If a consent order is to serve its declared purpose, better mechanisms are needed to ensure compliance and replace the competition that was lost by virtue of the merger.
- ***Thorough implementation, monitoring, and evaluation provisions should be built into a behavioral remedy.*** Compliance conditions generally state that the parties will be required to provide the government with a variety of information on request. This places the parties in a passive role in the compliance process. Future consent decrees should go farther and outline specific actions to be taken by the parties, such as the filing of periodic market monitoring and compliance reports (along with supporting data). This provides the government and the public with information on the state of the markets affected by the merger and will facilitate retrospectives on the effectiveness of behavioral remedies. Market monitors may also be required, at the merging parties’ expense, to independently evaluate and report on the role of the merged firm in the market. Mechanisms for funding market monitoring include an HSR-type filing fee that is incorporated into the consent decree.
- ***Updated guidelines on vertical mergers are essential.*** Vertical merger guidelines were last updated in 1984 and do not accurately reflect either current economic understanding or the agencies’ enforcement stance on vertical mergers. If behavioral remedies are to play a larger role in restructuring transactions that involve vertical issues, then there would be considerable benefit from the guidance and transparency offered by updated vertical merger guidelines that clarify the types of competitive concerns that a remedy must address.⁶³
- ***One obvious and important improvement to non-discrimination and fair dealing provisions is to base them on a “commercially and competitively reasonable” standard.*** Incentives to pursue normal business behavior and evade non-discrimination restraints pose significant challenges. This problem is exacerbated by the use of “commercially reasonable” provisions in consent orders. For a

⁶³ See Langenfeld, *supra* note 14.

merged firm that possesses market power, for example, monopoly pricing might fall within the confines of such language. A “commercially and competitively reasonable” standard would be an improvement, although it would not avoid the endemic problem of monitoring and enforcement.

- ***“Comparability” standards set forth as part of non-discrimination conditions could result in a degradation of innovation.*** Antitrust agency personnel are unlikely to be equipped to make a judgment as to whether a complex technology provided by the parties is appropriately “comparable.” Such a determination would challenge even the best engineers, particularly in emerging or dynamic markets. Holding a merged company to such a standard is likely to invite evasion of the restraint and slow innovation.
- ***The term of a remedy should be based on demonstrable progress toward the desired goal of competition or innovation.*** Terms that fix the length of time the consent decree will be in force are inherently arbitrary because of the uncertainty associated with dynamic markets and the difficulty of forecasting future market conditions. Since both inadequate and excessive time periods run the risk of defeating the purpose of the remedy, some criteria are needed to demonstrate achievement of desired goals. This may include whether expected innovation is occurring and/or new products brought to market.
- ***Behavioral remedies should be tested under the auspices of a dedicated program within the Antitrust Division’s Office of General Counsel.*** Provisions for monitoring in the 2011 REMEDIES GUIDE are likely to be inadequate or ineffective for collecting the type and volume of data and information required to test behavioral remedies and facilitate retrospectives. Much like the antitrust agencies have collected and evaluated evidence relating to the implementation of structural remedies, a similar effort will be required for behavioral remedies.
- ***The 2011 REMEDIES GUIDE should be re-evaluated relatively soon.*** The revisions should be placed on the Antitrust Division’s agenda for re-evaluation in 2015, in the light of experience with the effectiveness and administration of on-going consent orders. A program for generating supportive in-house and external analyses should be adopted early on.