# REALIGNING MERGER REMEDIES WITH THE GOALS OF ANTITRUST

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## I. Introduction

The current focus on antitrust enforcement is supported by an important dialogue on evidence of declining competition in the U.S. economy.[2] We do not yet know the full extent to which rising concentration, slowing rates of startups, and widening inequality gaps are the product of the lax antitrust enforcement that has prevailed in U.S. for three decades. As this story continues to unfold, it remains clear that merger enforcement should be high on the antitrust agenda. The U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) are in a unique position to learn from their past experience in merger enforcement, particularly as to the effectiveness of their remedies. This commentary highlights the importance of merger remedies in the broader debate over the role and goals of antitrust. It argues that a number of themes are converging to create an inflection point in remedies policy.

One theme is a clearer emphasis on the role of antitrust in protecting competition and promoting consumer welfare through the process and goals of law enforcement. Remedies policy should be aligned with the mission and workings of antitrust, namely through the crafting of effective remedies that deter anticompetitive conduct.[3] A second development is the expanding body of evidence on the success and failure of past merger remedies. Merger "retrospectives" and agency guidance reveal the limitations of both conduct (i.e., behavioral) and structural fixes. This evidence and experience should be reflected in remedies policy.

A third theme is the expanding number of cases where the agencies blocked or forced the abandonment of a merger because an effective remedy could not be found. This highlights the fact that the government's move to block a merger is in itself an effective remedy. We may see more of this, given the more frequently encountered problem of "too big to fix." We begin with some context for revisiting merger remedies by summarizing the major

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[2] *See A National Competition Policy: Unpacking the Problem of Declining Competition and Setting Priorities Moving Forward*, AMERICAN ANTITRUST INSTITUTE (Sept. 28, 2016), http://www.antitrustinstitute.org/sites/default/files/AAINatlCompPolicy.pdf.

[3] For a full discussion of using merger remedies to promote general deterrence, *see* Steven C. Salop, *Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare*, 81 Fordham L. Rev. 2647 (2013).

elements of the current debate over antitrust and lessons learned from sector regulation, where remedies are also important. The analysis then moves to the three themes described above: merger remedies as the product of the law enforcement process; growing agency evidence and experience with remedies; and the limitations of remedies in light of more recent cases.

## II. Antitrust in Context – Framing the Broader Debate Around Merger Remedies

### A. The Changing Ideological Spectrum

Policy surrounding merger remedies is embedded in the broader current debate over the appropriate role for antitrust enforcement in protecting competition and consumer welfare, promoting economic growth, facilitating equity in the distribution of wealth and income, and spurring innovation. The varying answers to these questions have stretched the ideological spectrum around antitrust in the U.S., bringing into focus three current perspectives—conservative, populist, and progressive.

Conservatives generally argue that antitrust enforcement should take a light hand. They give considerable deference to claims that mergers and some forms of restrictive conduct promote cost savings, quality control, consumer benefits, and other efficiencies. Conservative ideology uses a broad lens through which to view the effects of potential or actual competitive abuses. For example, mergers or conduct that purportedly generate efficiencies are believed to be pro-competitive, even if they harm consumers through higher prices, lower quality, or less innovation.[4]

Conservative thinking has strongly influenced merger remedies. Numerous large horizontal mergers in highly concentrated markets have been allowed, with and without remedies, even though such transactions were presumptively illegal under Section 7 of the Clayton Act. Conservative thinking is also evident in vertical merger policy where the agencies have given significant weight to the complex and often difficult to prove efficiencies claims arising from vertical integration.[5] As discussed later, this has resulted in the use of conduct remedies in a number of high profile vertical mergers.

At the other end of the spectrum is more recent populist sentiment. Populists focus on alleged inadequacies of the antitrust laws and the consumer welfare standard. This appears to be motivated by the view that the consumer welfare standard captures only the adverse price effects of mergers and anticompetitive conduct. Populists propose substantial reforms, including expanding the consumer welfare standard to more closely resemble the public interest standard used by sector regulators.[6] Relatively new to the debate and with a major focus on monopoly, populists have not opined extensively on merger remedies.

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[4] The conservative view is rooted in Chicago-School thinking, which interprets the consumer welfare standard more as a total welfare standard, under which potential violations are evaluated on the basis of their effect on the totality of consumer and producer surplus.

[5] Note merger-related efficiencies can include cost savings and/or consumer benefits. The latter are particularly difficult to substantiate as merger-specific and cognizable but have nonetheless been accepted by the agencies in numerous merger proceedings, particularly airlines.

[6] *See, e.g.*, Alexei Alexis, *Hipster Antitrust Comes Under Senate Spotlight*, BLOOMBERG LAW. (Dec. 13, 2017), https://www.bna.com/hipster-antitrust-comes-n73014473208/.

In the middle of the spectrum is progressivism, which encourages vigorous enforcement under the full scope of the existing law and the prevailing consumer welfare standard. Progressives highlight the ability of the consumer welfare standard to address both price and non-price dimensions of competition such as quality and innovation. Any source of market power (e.g., buyer or seller) is also reachable under the standard, which allows antitrust to evaluate concerns in output and input markets, including labor.[7] The progressive view also acknowledges that antitrust enforcement is an important tool in a "toolkit" that includes other policies for promoting competition and protecting consumers. Relative to progressivism, therefore, conservatism has arguably resulted in under-enforcement of the antitrust laws, whereas populism seemingly seeks to use the antitrust laws in ways for which they were not designed.

On the question of merger remedies, progressive thinking recognizes the limitations of regulatory-style conduct fixes and structural remedies that target narrow sets of assets. In promoting vigorous enforcement, progressives support the "structural presumption" that a merger in a highly concentrated market will almost certainly harm competition and consumers. The most effective remedy for mergers in such cases may therefore be for the government to move to block the merger.

### B. Learning From the Antitrust-Regulation Partnership

The debate over merger remedies is informed by the role of antitrust as part of the broader toolkit of policy instruments that promote competition and consumer welfare. This includes trade, regulation, labor, consumer protection and privacy, education, and small business policy. There is a particularly important and established partnership between antitrust enforcement and sector regulation that can usefully inform remedies policy. Each works in different ways—antitrust through law enforcement, and sector regulators (as administrative agencies) through promulgating and implementing standards and rules that govern *how* the underlying laws will be enforced.

Antitrust and regulation often work in tandem to reach to competitive issues that the other cannot address.[8] For example, the Federal Energy Regulatory Commission can find strategic withholding of generation capacity for the purpose of driving up electricity prices a violation of "just and reasonable" rates.[9] Capacity withholding that does not involve exclusion of rivals or an anticompetitive agreement, however, is not reachable under the antitrust laws.

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[7] *See, e.g.*, *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?* Hearing Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition and Consumer Rights, 115th Cong. (2017) (statement of Diana L. Moss, President, American Antitrust Institute), http://www.antitrustinstitute.org/sites/default/files/Moss_SJC%20Sub-comm%20Hearing_Consumer%20Welfare_12.13.17.pdf.

[8] The differences between antitrust and regulation are significant, procedurally and substantively. *See e.g.*, Diana L. Moss, *Antitrust Versus Regulatory Merger Review: The Case of Electricity*, 32 REV. IND. ORG. 32 241 (2008).

[9] This was the root problem during the California energy crisis of 1999-2000. *See, e.g.*, ATTORNEY GENERAL BILL LOCKYER, ATTORNEY GENERAL'S ENERGY WHITE PAPER: A LAW ENFORCEMENT PERSPECTIVE ON THE CALIFORNIA ENERGY CRISIS (2004), https://oag.ca.gov/sites/all/files/agweb/pdfs/antitrust/publications/energywhitepaper.pdf. See also 16 U.S. § 791a (2018).

Antitrust and regulation also employ different standards, which can capture a variety of adverse effects. Antitrust focuses exclusively on promoting competition and consumer welfare. Regulation also pursues harm to competition, but also other objectives under a public interest standard, including reliability of service, safety, diversity (e.g., media), and even employment. The Federal Communication Commission's now rescinded net neutrality rules reflected the goals of a broader public interest agenda to promote an open Internet, competition, and diversity in content and distribution.[10]

Antitrust and sector regulators can diverge significantly on merger remedies. Regulation almost universally employs conduct remedies that encompass complex rules and requirements, often involving long-term commitments that necessitate ongoing interaction between the regulator and regulated firm.[11] As administrative agencies, sector regulators are well suited to oversight and compliance enforcement, which may allow them to monitor markets and shape future agency policy. But such remedies also open the door to regulatory capture and market distortions from "second-best" fixes.[12] In contrast, the antitrust agencies have historically favored structural remedies. These involve a one-time fix through a permanent reduction in firm's incentive or ability to exercise market power. They also place significantly less burden on the agencies and courts, which are not well suited to monitoring and compliance.

## III. Merger Remedies and Deterrence Value

### A. Antitrust Remedies Deter Illegal Anticompetitive Conduct

The antitrust agencies enforce the antitrust laws through a process of discovery, investigation, and deterrence of violations. The agencies have a number of remedies at hand, including injunctions and disgorgement in civil cases, fines and incarceration in criminal cases brought by the DOJ, and civil penalties for decree violations. Enforcement against anticompetitive agreements (e.g., cartels) through Section 1 of the Sherman Act is perhaps the best illustration of antitrust as law enforcement, where the optimal deterrence value of penalties is a central focus.

A small but important case illustrates the concept of antitrust as law enforcement. The DOJ's settlement in Gunnison Energy and SG Interests, Inc. levied minimal damages on two companies for rigging bids for natural gas leases on public land in Colorado. Dozens of public comments highlighted the inadequacy of the penalty. Judge Matsch agreed. He denied a motion for entry of a final judgment under the Antitrust Policies and Procedures Act

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[10] Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738 (Apr. 13, 2015). In contrast, antitrust cannot police restrictive conduct involving Internet access until after it occurs. And even then, the subtlety of some forms of exclusion might fall outside the ambit of antitrust. *See, e.g.*, AMERICAN ANTITRUST INSTITUTE, REPEAL OF NETWORK NEUTRALITY ELIMINATES IMPORTANT ANTITRUST-REGULATION PARTNERSHIP, DEPRIVES COMPETITION AND CONSUMERS OF NEEDED SAFEGUARDS (Dec. 22, 2017), http://www.antitrustinstitute.org/sites/default/files/AAI_Net%20Neutrality%20Repeal%20Comm_F.pdf.

[11] *See, e.g.,* Ohio Edison Co., et al., 81 FERC¶ 61,110 (1997), https://ferc.gov/industries/electric/gen-info/mergers/mergers-1997.asp. The Commission's policy in the 1990s generally required that merging utilities open their transmission systems to access by rivals.

[12] See, e.g., R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best,* 24 REV. ECON. STUD. 11 (1956).

("APPA" or the "Tunney Act"),[13] noting "There is no basis for saying that the approval of these settlements would act as a deterrence [sic] to these defendants and others in the industry . . . ."[14]

### B. Mapping the Deterrence Value of Remedies to Merger Enforcement

The role of antitrust enforcement in deterring anticompetitive behavior maps directly over to merger remedies, at least as to "specific deterrence," or deterring future violations by a defendant.[15] Once an enforcement action for a violation under Section 7 has been brought, an effective remedy must be found. The DOJ's 2011 remedies guidelines state that a remedy "must effectively preserve competition in the relevant market," which should be "understood to include the concept of restoring competition or enhancing consumer welfare."[16] A remedy must therefore address the elements through which consumer welfare can be diminished by an illegal merger, including adverse price effects and other non-price dimensions of competition, such as reduced quality and innovation.

As an integral part of law enforcement, an effective remedy should deter anticompetitive behavior after a merger is consummated. However, the major differences among merger remedies raise questions about whether they actually deter illegal behavior. For example, in some cases, the most effective remedy is the agency's request for a permanent injunction to block a merger. Short of this, the agencies have used behavioral and structural remedies to address competitive concerns. But in many cases, such remedies do not align closely with the goal of deterrence, revealing a divergence from antitrust as law enforcement.

Federal judges have expressed reservations about the deterrence value of remedies in only a limited number of Tunney Act reviews.[17] Otherwise, consent orders have been routinely approved. It goes without saying that judicial review of a consent order under the Tunney Act should not be the first line of defense to a merger remedy that falls afield of the goal of law enforcement. Effective remedies that deter anticompetitive conduct should be considered far earlier in the enforcement process. The current Assistant Attorney General for Antitrust, Makan Delrahim, recently signaled a move in this direction, noting of conduct remedies "[i]nstead of protecting the competition that might be lost in an unlawful merger, a behavioral remedy supplants competition with regulation."[18]

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[13] 15 U.S.C. § 16(e)(1) (2018).
[14] United States v. SG Interests I, Ltd., No. 12-cv-00395-RPM, 2012 WL 6196131, at *6 (D. Colo. Dec. 12, 2012).
[15] *Supra* note 3.
[16] U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 2 (June 2011), http://www.justice.gov/atr/public/guidelines/272350.pdf.
[17] United States v. Comcast Corp., 808 F. Supp. 2d 145, 149 (D. D.C. 2011).
[18] Makan Delrahim, Asst. Att'y Gen., Dep't of Justice, Antitrust Div., Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.

## IV. Realigning Merger Remedies with the Goals of Antitrust

### A. The Tension in Agency Remedies Policy

Agency policy regarding the goals of merger remedies has remained consistent over time. For example, the 2011 DOJ remedies guidelines explain, "The touchstone principle for the Division in analyzing remedies is that a successful merger remedy must effectively preserve competition in the relevant market."[19] The guidelines note that remedies include blocking a merger or settling to avoid a contested litigation. But when a merger is allowed to proceed with a remedy, consumer welfare must be protected.[20] This approach to merger remedies is consistent with antitrust as law enforcement, namely to deter future anticompetitive behavior.

While the DOJ and FTC have consistently articulated the goals of merger remedies, the agencies' policies governing *how* remedies achieve them have changed over time. This reflects an ongoing tension in the balancing of theory and practice. For example, the DOJ's 2004 remedies guidelines stated that structural remedies were preferred to behavioral fixes. Those guidelines state, "They [structural remedies] are relatively clean and certain, and generally avoid costly government entanglement in the market. A carefully crafted divestiture decree is 'simple, relatively easy to administer, and sure' to preserve competition."[21]

Between 2009 and 2011, however, the DOJ had challenged a number of high profile vertical merger cases and settled them largely with conduct remedies. These included Comcast-NBCU, Live Nation-Ticketmaster, and Google-ITA.[22] In 2011, the DOJ rewrote the remedies guidelines to put less emphasis on structural and more emphasis on conduct remedies. Presumably this codified the agency's approach to vertical merger enforcement at the time, which gave considerable deference to efficiencies claims arising from vertical integration. Even so, the 2011 remedies guidelines state that merger-related efficiencies are of secondary importance to restoring competition, explaining that a remedy "preserve[s] the efficiencies created by a merger, to the *extent possible*, without compromising the benefits that result from maintaining competitive markets."[23]

### B. The Growing Divide Between Conduct and Other Remedies

The DOJ's policy transition in the 2011 remedies guidelines raised many questions. For example, the behavioral remedies contained in numerous consent orders are well known to

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[19] U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 1 (June 2011), http://www.justice.gov/atr/public/guidelines/272350.pdf.

[20] *Id.* at 4.

[21] U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 7-8 (October 2004) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 (1961)), http://www.justice.gov/atr/public/guidelines/272350.pdf.

[22] *See* [Proposed] Final Judgment at §§ IV-VI, United States v. Comcast Corp., No. 1:11-cv-00106 (D. D.C. Jan. 31, 2011), https://www.justice.gov/atr/case-document/proposed-final-judgment-76; [Proposed] Final Judgment, United States v. Ticketmaster Entm't, Inc., No. 1:10-cv-00139 (D. D.C. June 29, 2010), https://www.justice.gov/atr/case-document/proposed-final-judgment-248; [Proposed] Final Judgment, United States v. Google, Inc., No. 1:11-cv-00688 (D. D.C. Apr. 8, 2011), https://www.justice.gov/atr/case-document/file/497661/download.

[23] U.S. Dep't of Justice, *supra* note 16, at 4 (emphasis added).

be fraught with problems that directly affect their deterrence value.[24] They articulate prohibited, permitted, and required conduct—requirements that do nothing to change the merged firm's incentives to exercise market power and encourage circumvention of the rules. Conduct remedies also depend on smaller market participants, under the weak protection of anti-retaliation provisions, coming forth to lodge complaints about non-compliance.

Conduct remedies are thus oriented around a "design" standard, i.e., compliance with the requirements of the remedy. This stands in stark contrast to structural remedies that are shaped around a "performance" standard, or an "obligation in terms of ultimate goals that must be achieved."[25] Conduct remedies thus carry a higher risk of failure, a risk that is more likely to be shouldered by consumers, not the merging parties.[26] One reason for this is that conduct remedies require ongoing monitoring and enforcement by the agencies and the courts, which are not, as noted earlier, well suited to act as regulators.

For example, in the Tunney Act review in Comcast-NBCU, Judge Leon expressed misgivings about the effectiveness of the proposed behavioral remedy, stating, "because of the way the Final Judgment is structured, the Government's ability to 'enforce' the Final Judgment, and, frankly, this Court's ability to oversee it, are, to say the least, limited."[27] Judge Leon went on to say and that "the Government, at the public hearing, freely admitted that '[w]e can't enforce this decree.'"[28] In the merger of ABInBev-Miller Coors, numerous parties filed amicus briefs as part of the Tunney Act review process. They emphasized the drawbacks of the conduct remedy in the consent order, which is designed to constrain ABInBev-Miller Coor's powerful incentives to favor the distribution of their own products over smaller rivals.[29] These cases reflect the concern that an unenforceable or hard-to-monitor consent order has questionable deterrence value.

Because structural remedies permanently change the merged firm's ability or incentive to exercise market power they require less, if any, ongoing monitoring and enforcement after a successful transition of divested assets to a viable buyer. But some structural remedies are not bulletproof either. For example, the FTC has experienced problems with some structural

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[24] *See* John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 ANTITRUST BULL. 979, 994, 1010 (2012). *See also,* John E. Kwoka Jr., *Does Merger Control Work? A Retrospective on Enforcement Policy, Remedies, and Outcomes* 78 ANTITRUST L. J. 619, 636 (2013); Delrahim, *supra* note 18.

[25] *See, e.g.*, Steven C. Salop, *Modifying Merger Consent Decrees to Improve Merger Enforcement Policy*, 31 ANTITRUST 15 (2016).

[26] *See, e.g.*, Bill Baer, Responses of Assistant Attorney General Bill Baer to Questions Submitted for the Record Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy, and Consumer Rights Hearing: "Oversight of the Enforcement of the Antitrust Laws" (Mar. 9, 2016), https://www.judiciary.senate.gov/imo/media/doc/Baer%20Responses%20to%20QFRs.pdf; D. Bruce Hoffman, Acting Director, Bureau of Competition, U.S. Fed. Trade Comm'n, It Only Takes Two to Tango: Reflections on Six Months at the FTC, 6-7 (Feb. 2, 2018), https://www.ftc.gov/system/files/documents/public_statements/1318363/hoffman_gcr_live_feb_2018_final.pdf.

[27] United States v. Comcast Corp., 808 F. Supp. 2d 145, 149 (D. D.C. 2011).

[28] *Id.* (brackets in original).

[29] *Court Asks Justice Department to Respond to All Amicus Briefs in ABI-SABMiller Merger*, ALCOHOL L. REV. (Jan. 18, 2018), http://alcohollawreview.com/justice-department-clear-abinbev-purchase-of-sabmiller-with-conditions/.

remedies involving divestitures of targeted assets. In the merger of retail grocers Safeway and Albertsons, the FTC-approved sale of almost 150 stores to a regional west-coast grocer (Haggen) led to the failure and shuttering of the divested stores only a few months later.[30] In Hertz-Dollar Thrifty, the buyer of the divested assets (Advantage Rent-a-Car) filed for bankruptcy soon after the sale.[31] And despite divestitures in the UnitedHealth-Sierra and the Aetna-Prudential mergers, analysts have documented post-merger premium increases.[32]

### C. Incorporating Agency Experience and Learning Into Policy

Lawmakers have not been shy about highlighting instances in which merger remedies have been ineffective. At a December 2017 Senate Judiciary Committee hearing on the consumer welfare standard, for example, Senator Richard Blumenthal highlighted concerns over the Comcast-NBCU consent order, suggesting re-opening the Comcast-NBCU investigation to consider extending the behavioral conditions or perhaps unwinding the transaction.[33] Senator Blumenthal's statement highlights the importance of agency learning as a vital component of rebalancing the goals and effectiveness of merger remedies.

Merger retrospectives, or studies of post-merger outcomes, are being performed with more frequency than ever before.[34] They demonstrate that in many cases consummated mergers have harmed consumer welfare through higher prices. And empirical "meta-analysis" of a large number of merger retrospectives demonstrates that divestitures often fail to resolve competitive problems.[35] These are needed tools for improving merger enforcement, including the effectiveness and deterrence value of merger remedies. Proposed legislation by Senator Amy Klobuchar would formalize the needed collection and study of post-merger data to improve the effectiveness of merger remedies.[36]

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30 Press Release, Fed. Trade Comm'n, FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger (Jan. 27, 2015), https://www.ftc.gov/news-events/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger; Brent Kendall, *Haggen Struggles After Trying to Digest Albertsons Stores*, WALL ST. J. (Oct. 9, 2015), http://www.wsj.com/articles/haggen-struggles-after-trying-to-digest-albertsons-stores-1444410394.

31 Press Release, FSNA, Franchise Services of North America Inc. Announces Bankruptcy Filing by Simply Wheelz LLC (Nov. 4, 2013), http://www.fsna-inc.com/newspdfs/115201391920.PDF.

32 *See, e.g.,* Guardado, Jose R, Emmons, David W. & Kane, Carol K, *The Price Effects of a Large Merger of Health Insurers: A Case Study of UnitedHealth-Sierra*, 1 HEALTH MGMT POL'Y 16 (2013); Leemore Dafny, Mark Duggan, & Subramaniam Ramanaraynan, *Paying a Premium on your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012).

33 *See* Ted Johnson, *Senator Asks DOJ to Take Another Look at Comcast-NBCUniversal Merger*, VARIETY (Dec. 13, 2017), www.heritage.org/technology/commentary/time- repeal-the-ftcs-common-carrier-jurisdictional-exemption-among-other.

34 *See, e.g.,* John Kwoka, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S POLICY (2015). See also, e.g., Orley C. Ashenfelter Daniel S. Hosken Matthew C. Weinberg *The Price Effects of a Large Merger of Manufacturers: A Case Study of Maytag-Whirlpool*, Working Paper 17476, NATIONAL BUREAU OF ECONOMIC RESEARCH. (Oct. 2011) http://www.nber.org/papers/w17476.pdf (finding price increases for dishwashers and relatively large price increases for clothes dryers, but no price effects for refrigerators or clothes washers); and Nathan H. Miller & Matthew C. Weinberg, *Mergers Facilitate Tacit Collusion: Empirical Evidence from the U.S. Brewing Industry* (Mar. 25, 2015) (finding that while the Miller-Coors joint venture resulted in merger-specific cost reductions, average retail prices increased post-consummation, likely because of tacit collusion).

35 Kwoka, *supra* note 24.

36 Merger Enforcement Improvement Act, S. 1811, 115th Congress § 3 (2017).

To the agencies' credit, both the DOJ and FTC appear receptive to periodically studying their remedies and updating their guidance. The FTC has performed two major studies of its divestiture remedies – one in 1999 and an update in 2017.[37] The latter study revealed important observations, including that targeted asset divestitures are much less effective than line of business divestitures. The report noted "all of the divestitures involving an ongoing business succeeded. Divestitures of limited packages of assets in horizontal, non-consummated mergers fared less well . . . ."[38]

As discussed above, a number of failed FTC merger remedies have revealed the limitations of structural remedies. It remains to be seen how, however, how the implications of the FTC's recent divestiture study are incorporated into future enforcement or how any change in DOJ remedies policy will be reflected in agency guidance. Will there be more attempts to block illegal mergers and increased reliance on structural remedies? Will we see more line-of-business divestitures, as opposed to sales of targeted assets, in FTC enforcement actions where remedies are taken? If DOJ's challenge to the AT&T Time-Warner acquisition is any indication, the answer appears to be yes.

## V. Testing the Limits of Merger Remedies: The Problem of "Too Big to Fix"

A number of recent, large horizontal mergers have been successfully blocked by the agencies or abandoned in the face of government opposition. These include: Staples-Office Depot, Sysco-US Foods, John Deere-Precision Planting, GE-Electrolux, Applied Materials-Tokyo Electron, Halliburton-Baker-Hughes, and Anthem-Cigna.[39] These deals share a number of characteristics: highly concentrated markets, poor prospects for new entry, the absence of viable buyers of potential divestiture assets, and complex business organizations. They illustrate that some deals really are "too big to fix" and should be blocked outright.

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[37] FTC'S MERGER REMEDIES 2006-2012, A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf; A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS, BUREAU OF COMPETITION (Aug. 1999), https://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf.

[38] FTC's Merger Remedies 2006-2012, *supra* note 37, at 1.

[39] *See* Press Release, Fed. Trade Comm'n, *After Staples and Office Depot Abandon Proposed Merger FTC Dismisses Case from Administrative Trial Process* (May 19, 2016), https://www.ftc.gov/news-events/press-releases/2016/05/after-staples-office-depot-abandon-proposed-merger-ftc-dismisses; Press Release, Fed. Trade Comm'n, *Statement of FTC Bureau of Competition Director Debbie Feinstein on Sysco and U.S. Foods' Abandonment of Their Proposed Merger* (June 29, 2015), https://www.ftc.gov/news-events/press-releases/2015/06/statement-ftc-bureau-competition-director-debbie-feinstein-sysco; Complaint, *United States v. Deere & Co.*, No. 1:16-cv-08515, at 16 and 18 (N.D. Ill. Aug. 31, 2016), https://www .justice.gov/opa/file/889071/download; Press Release, U.S. Dep't of Justice, *Electrolux and General Electric Abandon Anticompetitive Appliance Transaction After Four-Week Trial* (Dec. 7, 2015), https://www.justice.gov/opa/pr/electrolux-and-general-electric-abandon-anticompetitive-appliance-transaction-after-four-week; Press Release, U.S. Dep't of Justice, *Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy* (Apr. 27, 2015), https://www .justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department; Complaint at 2, 30, 32, 36, United States v. Halliburton Co., No. 1:16-cv-00233-UNA (D. Del. Apr. 6, 2016), https://www .justice.gov/opa/file/838651/download; Complaint at 25, United States v. Anthem, Inc., No. 1:16-cv-01493 (D.D.C., Jul. 21, 2016), https://www.justice.gov/atr/file/903111/download; *see also*, United States v. Anthem, Inc., No. 17-5024, at 12- 13 (D.C. Cir. Apr. 28, 2017), https://www.justice.gov/atr/case-document/file/971316/download.

Notwithstanding the fact that a merger in a highly concentrated market is presumptively illegal, resource-constrained enforcers are often enticed into fixes proposed by the parties "up front" as part of the merger deal. They should resist the pressures to settle.

There are a number of reasons why a remedy with the most deterrence value may be for the government to move to block a merger. First, viable buyers of divestiture assets may be impossible to find, particularly in highly concentrated markets. Several cases illustrate this problem, including the Safeway-Albertsons and the Hertz-Dollar Thrifty mergers, where buyers failed to maintain the assets and subsequently exited the market. In mergers that were successfully blocked by the government, including Sysco-US Foods, Staples-Office, and Halliburton-Baker Hughes, viable buyers of possible divestiture assets did not exist.

The lessons from the foregoing cases are clear. Divestitures to incumbents in the market would essentially be a game of "musical chairs," or shifting assets from one market incumbent to another. This risks maintaining, or even increasing, post-merger levels of concentration. Divestiture(s) to a potential market entrant would more effectively dilute higher market concentration or tighter vertical integration that follows large mergers. But such a buyer would need to function independently (without the help of the merging parties), successfully maintain the assets, and quickly re-inject the competition lost by the merger. Such entrants may be hard to find, or event nonexistent.

Second, the complexity of a remedy is likely to correlate with the complexity of a merger. A potential buyer will inherit a diverse package of assets from players that are deeply entrenched in the market. This often involves significant involvement in R&D and distribution, in addition to production and marketing. Structural remedies in such situations are often accompanied by conduct remedies such as limited term supply agreements to increase the chances of a successful transition from the merged company to the buyer. Remedies may also include licensing and access provisions to ensure that the buyer has continued access technology or distribution controlled by the merged company.

A complex remedy is compounded by other problems that may be overlooked by enforcers. For example, managers must simultaneously integrate two large business ecosystems post-merger, while simultaneously undoing key businesses by spinning off assets. Moreover, they must concurrently make good on their promises to deliver cost savings and consumer benefits. Completing these tasks presses on the bounds of managerial competency at the same time they create significant changes that are likely to affect profit-incentives, relationships between affiliates, and other key operational factors. Collectively, these factors affect post-merger operations, conduct, and strategy.

There is a commensurately higher risk that a complex merger remedy will not be executed successfully. The government's experience in Comcast-NBUC, Live Nation-Ticketmaster, and even in ABInBev-Miller Coors highlight this risk. The Monsanto-Bayer and AT&T Time-Warner mergers also raise these concerns, adding to the list of deals that are "too big fix."[40] Complex remedies are therefore likely to conflict directly with the government's

[40] See, e.g., Letter from American Antitrust Institute, Food & Water Watch, and National Farmers Union to the U.S. Department of Justice *Re: Proposed Merger of Monsanto and Bayer* (Jul. 26, 2017), http://antitrustinstitute.org/sites/default/files/White%20Paper_Monsanto%20Bayer_7.26.17_0.pdf. *See also*

requirement that an effective remedy preserve competition and protect consumers. A remedy with the most deterrence value therefore might well be to move to block the deal.

## VI. Conclusion

This commentary has taken on the question of merger remedies at a time when concerns over declining competition in the U.S. have intensified the debate over the role of antitrust enforcement. It recognizes the importance antitrust as law enforcement. By extension, effective merger remedies should achieve the goals of law enforcement, namely to fully restore competition and deter any anticompetitive post-merger conduct.

A growing body of evidence points in the direction of needed change in remedies policy. This includes recognizing problems with conduct remedies that focus on compliance and not on performance. Likewise, structural remedies should be revisited in ways that recognize the greater effectiveness of line of business divestitures, rather than targeted assets. Finally, when the government is unable to fashion an effective remedy that will deter anticompetitive post-merger conduct, the only effective remedy is to move to block the merger. Of course, the agencies need resources that will enable them to resist pressures to settle and to go to court, if necessary, to protect competition and consumers.

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Letter from American Antitrust Institute, Food & Water Watch, and National Farmers Union to the U.S. Department of Justice *Re: Monsanto-Bayer Merger: Competitive Concerns Surrounding Traits-Seeds-Chemicals Platforms, Digital Farming, and Farm Data* (Oct. 3, 2017), http://www.antitrustinstitute.org/sites/default/files/AAI-FWW-NFU_MON-BAY%20addendum.pdf.