The Antitrust Agencies’ Recent Merger Challenges: Is the Remedial Tail Wagging the Dog?

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In reviewing mergers and acquisitions, the Federal Trade Commission (FTC or Commission) and Department of Justice Antitrust Division (DOJ or Division) devote significant attention and resources to scrutinizing proposed remedies designed to maintain or restore competition anticipated to be lost from a given transaction. Those efforts are to be commended in that the agencies generally allow efficiency-enhancing transactions to proceed, as modified, to the benefit of consumers and the merging parties.¹

Recently, however, the remedial tail may be wagging the enforcement dog, as the agencies appear to pursue increasingly demanding remedies to the mergers and acquisitions that cross their desks. That is, pursuit of more stringent remedies appears to be driving the outcome in an increasing number of cases. Several sizeable transactions have foundered for lack of an acceptable remedy. Meanwhile, the use of upfront buyers has increased significantly, with both agencies now requiring them in the vast majority of settled cases, increasing the time it takes to get from announcement to closing.

Coincident with this increased scrutiny is a call from some corners for even more vigorous merger enforcement by the agencies. This must come as a shock to the several would-be merging parties who, over the past fifteen months, have walked away from transactions valued at north of $125 billion in the face of

continued investigation or challenge. For that matter, the agencies themselves must be surprised (and perhaps dismayed) that their significant efforts in blocking what they believed to be anticompetitive transactions are deemed too little by some commentators.

This article addresses the current state of merger remedies, with a particular focus on the agencies’ openness to remediying large or complex transactions. Section I summarizes recent cases in which the agencies rejected proposed remedies and ultimately prevented the transactions from being consummated. Furthermore, it presents evidence showing a significant uptick in the agencies’ use of upfront buyers. Section II explores potential explanations for this uptick and the increased scrutiny of mergers more generally. Finally, Section III concludes with some recommendations for both the agencies and merging parties appearing before them.

I. Recent Merger Challenges

The antitrust agencies are as busy as they have been in quite some time, reviewing both greater numbers of deals and more complex transactions. The agencies are taking significantly longer to review transactions, with the average duration of significant merger investigations reaching 9.7 months in 2015. The agencies are also challenging transactions at a significantly higher rate than in the past. At a conference last month, former Assistant Attorney General (AAG) Bill

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2 This includes the Comcast/Time Warner Cable, Applied Materials/Tokyo Electron, Electrolux/General Electric, and Halliburton/Baker Hughes transactions investigated by the DOJ, as well as the Sysco/US Foods, Staples/Office Depot, and Superior Plus/Canexus transactions investigated by the FTC.

3 See Dechert LLP, DAMITT: How Long Does It Take to Conduct Antitrust U.S. Merger Investigations?, https://www.dechert.com/DAMITT/ (finding average duration increased from 7.1 months in 2011-13 period to 7.7 months in 2014 and 9.7 months in 2015). Dechert’s Antitrust Merger Investigation Timing Tracker, or DAMITT, is a tool used to measure the time from transaction announcement until resolution of the investigation for Hart-Scott-Rodino Act-reportable transactions resulting in a closing statement, consent order, complaint challenging the transaction, or abandonment for which the agency takes credit.

4 See, e.g., Paul T. Denis & Michael L. Weiner, Merger Investigations Set Records in 2015, COMPETITION LAW 360, Jan. 25, 2016 (“The seven complaints filed in 2015 were more than double the number of complaints filed in either 2013 or 2014.”); William McConnell, Big Government Is Slowing Down Deals More Than Ever, THESTREET, Apr. 28, 2016,
Baer touted the fact that “the Antitrust Division has embraced its role as the cop on the merger beat” and noted that during the seven-plus years of the Obama Administration the Division “successfully challenged or secured the abandonment of 39 mergers—a dramatic increase from the 16 successful challenges or abandonments during the eight years of the previous administration.”

In reviewing several recent, high-profile transactions, the DOJ and FTC have rejected remedy proposals made by the merging parties, including some that appeared to be fairly significant in size and scope, choosing instead to continue to investigate or to file suit to stop the transaction from being consummated. Disagreements between merging parties and the antitrust agencies over the proper scope of a particular merger remedy are certainly not new; those occur routinely in the course of merger investigations. What appears to be new is: (1) the messaging by the agencies (particularly the DOJ) about their tolerance for far-reaching or complicated remedies; (2) a greater comfort level at both agencies with litigating the fix, rather than continuing remedy negotiations; and thus (3) a greater percentage of transactions abandoned or successfully challenged following failed remedy discussions between the agencies and the merging parties.

A. Recent DOJ Matters

The Halliburton/Baker Hughes matter provides the most recent and in many ways most informative example of the Division’s current stance on merger remedies. In April 2016, after a seventeen-month investigation, the DOJ filed suit

https://www.thethreshold.com/story/13538826/1/government-oversight-on-mergers-is-taking-longer-than-ever-delaying-deals.html (“Each administration since Ronald Reagan has challenged a larger proportion of mergers, TheStreet has discovered.”) (finding proportion of transactions challenged by the antitrust agencies increased from 1.01% in the Reagan Administration to 2.84% in the Obama Administration).


It should be noted that this analysis is based on publicly available information and thus cannot rule out the (perhaps in some cases, distinct) possibility that the fixes proposed by the merging parties were insufficient to remedy the lost competition—by any objective measure.

to prevent the combination of “two of the three largest providers of oilfield services in the world.”\(^8\) The complaint identified twenty-three specific relevant markets in which the effects of the proposed transaction would be “particularly acute.”\(^9\) The complaint also charged that competition “would be diminished in the overall business of oilfield services, where there would be one fewer globally-integrated provider competing for the most substantial projects and driving innovation to new solutions.”\(^10\)

The DOJ took issue—loudly and forcefully—with the remedy that the merging parties had proposed. In the complaint, it was characterized as “among the most complex and riskiest remedies ever contemplated in an antitrust case.”\(^11\) In addition to several alleged shortcomings of the proposed remedy, including ones going to the sufficiency and independence of the businesses the parties offered to divest, the complaint argued that the remedy “would also impose an unprecedented burden on the Court and the United States, as it would require oversight of the global separation and transfer of thousands of assets and employees” in the oilfield services industry.\(^12\)

In a press conference announcing the filing of the DOJ complaint, AAG Baer provided additional color regarding the proposed transaction, as well as the proposed remedy. As Baer explained, overseeing the parties’ fix “would turn the Antitrust Division into an energy sector regulator, rather than a law enforcement agency.”\(^13\) Deputy Assistant Attorney General (DAAG) David Gelfand added

\(^8\) Id. para. 1.
\(^9\) See id. paras. 11, 17-64.
\(^10\) Id. para. 11.
\(^11\) Id. para. 9. According to the complaint, Halliburton proposed divesting “a collection of assets selected from various Halliburton and Baker Hughes business lines in an attempt to remedy the many antitrust concerns that have been raised by the [DOJ] and by antitrust authorities in other countries.” Id. para. 8.
\(^12\) Id. para. 10.
that firms pursuing problematic transactions often believe “if a big enough remedy is offered, an agreement can be reached with the enforcement agencies to allow the deal to proceed. That simply is not true.”\(^{14}\) Shortly after the filing of the DOJ complaint, Halliburton and Baker Hughes terminated their merger agreement, with Halliburton paying its would-be merger partner a $3.5 billion termination fee.\(^ {15}\)

In *Applied Materials/Tokyo Electron*, the merging parties faced a similar fate, undergoing a nineteen-month investigation and ultimately abandoning the transaction in April 2015 in the face of resistance from the DOJ to their proposed remedy. The Division was concerned that the parties, two of the largest suppliers of equipment used in manufacturing computer chips, were “some of the only companies with the capability, knowledge and financial resources to continue innovating in the market.”\(^ {16}\) The parties proposed a remedy designed to address not only DOJ concerns, but also those of other jurisdictions reviewing the deal, which included South Korea, Japan, and China. Ultimately, however, the Division concluded that the remedy “did not come close to solving the competitive problem.”\(^ {17}\) As a result, the parties terminated their merger agreement.\(^ {18}\)

\(^{14}\) Jeff Bliss, *Comment: Changing US Antitrust Environment Needs to Be Factored into Deal Assessment*, MLEx, May 2, 2016. *See also id.* (“Gelfand said the agency brought the Halliburton-Baker Hughes suit as part of its effort to respond ‘to increasing concentration in already concentrated industries.’”).


\(^{16}\) Leah Nylen, *DOJ Innovation Concerns Led to Block of Tokyo Electron-Applied Materials Deal, Official Says*, MLEx, June 1, 2015 (quoting DAAG Nancy Rose).

\(^{17}\) *Id.* To be sure, identifying a remedy to address the loss of innovation competition—apparently DOJ’s primary concern in this matter—is more challenging than remedying the loss of current competition. Nonetheless, there are remedial options for the former situation, including the
In a third recent case, Electrolux ultimately failed to complete its proposed acquisition of the appliance business of General Electric (GE) in the face of DOJ opposition.\textsuperscript{19} The Division filed suit in July 2015 to block the transaction, alleging that it would combine two of the three largest manufacturers of major cooking appliances.\textsuperscript{20} In the lead-up to the litigation, the Division rejected a remedy proposed by the parties reportedly because it failed to include any “meaningful divestments.”\textsuperscript{21} According to an Electrolux attorney, however, the proposal would have left the divestiture buyer “in a very substantial position” in the market immediately. The attorney believed that the only settlement the Division would have found acceptable would have been a complete divestiture of Electrolux’s U.S. business, which would have destroyed the efficiencies the parties hoped to achieve with the transaction.\textsuperscript{22} In December 2015, during the course of the federal district court trial, GE pulled the plug on the sale of its appliance unit, opting instead to invoke its right to terminate the merger agreement and collect its break-up fee.\textsuperscript{23}


\textsuperscript{19} Dechert represented GE in that matter prior to the author joining the firm.

\textsuperscript{20} Complaint paras. 20-26, United States v. AB Electrolux, No. 1:15-cv-01039 (D.D.C. July 1, 2015) (alleging markets for ranges, cooktops, and wall ovens sold to contract-channel customers).

\textsuperscript{21} See Liz Crampton, \textit{Electrolux Settlement Offer Included No Meaningful Divestitures, Government Official Says}, MLEX, Nov. 6, 2015 (“Under the terms of the proposal, Electrolux found a buyer that would distribute appliances manufactured by Electrolux under a different brand name . . . .”).


B. Recent FTC Matters

The FTC also has been challenging transactions that it deemed insufficiently remedied by the parties’ proposed fixes. As Chairwoman Ramirez noted in recent Congressional testimony addressing the agency’s 2015 merger enforcement efforts, “This high level of active merger litigation confirms that the Commission will go to court if necessary to prevent mergers that are likely to reduce competition and result in higher prices, reduced quality, or less innovation. Notably, in several of these cases, the merging parties offered potential fixes that the Commission rejected as inadequate to preserve competition.”

In February 2015, the FTC sued to enjoin the Sysco/US Foods merger, alleging that the combination of the two largest food distributors in the United States would harm both national and local customers of “broadline foodservice distribution services.” A few weeks before the FTC filed suit, Sysco had reached an agreement with the third-largest food distributor, Performance Food Group (PFG), under which it would sell to PFG eleven food distribution centers (with annual revenues of $4.6 billion) and associated assets. The FTC’s complaint argued that the parties’ proposed remedy was insufficient to counteract the competitive harm that would result from the merger, citing, among other things, the small number of distribution centers PFG would have relative to the merged entity.

During a scheduling conference in the parallel administrative litigation at the FTC in March 2015, the presiding administrative law judge (ALJ) urged the parties to engage more meaningfully on a potential settlement. The merging parties complained that the Commission representatives had not provided sufficient guidance on the scope of an acceptable remedy, having simply rejected


26 Id. paras. 83-85.
as inadequate the proposed divestiture of eleven distribution centers to PFG. This prompted the ALJ to push agency staff to specify an acceptable agreement, noting that the merging parties “need to have something on the table.”

The FTC made no counteroffer, and, in June 2015, the district court granted the FTC’s motion for a preliminary injunction. In so doing, the court concluded that the divestiture to PFG was insufficient to remedy the likely anticompetitive effects of the merger. Among other things, the court faulted the relatively small number of distribution centers PFG would have—a particular concern for its ability to compete for large, national customers. As the court noted, even PFG, in its internal business documents, viewed the eleven distribution centers as insufficient to allow it to compete on a national basis. Sysco terminated the merger agreement shortly after the court’s ruling, paying break-up fees of $300 million to US Foods and $12.5 million to PFG.

More recently, in Staples/Office Depot, the Commission successfully challenged the merger of the two largest sellers of office supplies to large business-to-business (B-to-B) customers in the United States. During the FTC’s investigation, and continuing thereafter, the merging parties proposed a remedy involving the assignment to an office-supplies wholesaler of certain contracts with so-called diversity vendors. Such vendors, which are typically owned by minorities, women, or veterans, partner with Staples and Office Depot to fulfill customer contracts. The parties proposed assigning up to $1.25 billion of such


29 Id. at 75 (citing communication from PFG board member to PFG President & CEO cautioning, “We need the package size to be bigger to have any chance of winning and to ever compete nationally.”).

contracts to Essendant, Inc., which would assume the parties’ role in supporting the diversity vendors. Notwithstanding the proposed remedy, the Commission voted last December to challenge the transaction in court. As Staples noted publicly, the Commission rejected the proposed remedy without making a counteroffer.31

Staples reached an agreement in February 2016 to sell Essendant diversity vendor contracts representing more than $550 million in revenues (for approximately $22.5 million).32 The Commission, however, argued in court that the proposal was inadequate, citing, among other things, the lack of assets included in the divestiture, the fact that Essendant does not currently sell directly to B-to-B customers, and Essendant’s post-merger need to rely on Staples to fulfill customer contracts for the diversity vendors.33

In May 2016, the district court judge—the same one who had been overseeing the DOJ’s challenge to the Electrolux/GE merger before it was abandoned—granted the FTC a preliminary injunction in its case against the office supply vendors.34 As is well known to readers of this publication, counsel for the parties opted not to present a defense or call any witnesses after the FTC presented its case-in-chief. The court thus had little trouble concluding that the parties had failed to meet their burden to demonstrate that their proposed remedy

would counteract the anticompetitive effects of the merger.\textsuperscript{35} Shortly after the court decision, the parties abandoned their transaction, with Staples paying Office Depot a break-up fee of $250 million.\textsuperscript{36}

C. Increased Use of Upfront Buyers

In addition to rejecting proposed remedies in the matters discussed above, the agencies have required upfront buyers in an increasing portion of cases resolved through divestiture. The FTC historically has required upfront buyers in certain situations to mitigate risks that the divestiture package is inadequate to maintain or restore competition, that there will be no acceptable divestiture buyer, or that the package is subject to significant deterioration prior to sale by the merged entity.\textsuperscript{37} The Division, however, until recently had not pursued upfront buyers with the same frequency as the Commission.

A review of the merger consents involving divestitures entered by the FTC and DOJ over the past five years shows a sharp increase in the percentage of cases in which the agencies required an upfront buyer. The uptick in the frequency of such buyers was particularly acute for the DOJ, which went from requiring them in only nine percent of consents in 2011 to seventy-one percent of consents in 2015. The numbers for the FTC, which was already requiring upfront buyers in a majority of cases in 2011 and 2012, increased to 100 percent and ninety-four percent in 2014 and 2015, respectively. Across the two agencies, the use of

\textsuperscript{35} Id. at *25 n.15.


upfront buyers increased from thirty-three percent of consents in 2011 to eighty-seven percent of consents in 2015.  

Not surprisingly, the increase in upfront buyers has coincided with longer investigations across both agencies. The average duration of significant merger investigations increased from 7.1 months for the years 2011 through 2013 to 7.7 months in 2014 and 9.7 months in 2015. Importantly, in 2015, consents requiring upfront buyers took on average 2.4 months longer than consents requiring post-order buyers. 

II. EXPLANATIONS FOR THE AGENCIES’ INCREASED SCRUTINITY OF MERGER REMEDIES

In looking for explanations for the antitrust agencies’ increased scrutiny of proposed mergers over the past few years, one must start with the most obvious one: the challenged transactions simply were competitively problematic, and the parties’ proposed remedies were insufficient (for various reasons) to address the competitive concerns raised by the agencies. If that fully explained where the agencies are today, then the inquiry might end there. However, listening to comments made by agency leaders over the past couple years—in the context of specific cases and in more general statements—one cannot help but conclude that there is something driving them other than the size, complexity, and types of mergers that they have been reviewing.

At the DOJ, although he has largely moved on from the Antitrust Division to serve as Acting Associate Attorney General,40 Bill Baer’s influence on that agency’s approach to enforcement generally and merger remedies in particular cannot be overstated. That influence is likely a leading explanation for both the

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38 See Dechert LLP, supra note 3. The author calculated the agency-specific numbers cited above using the DAMITT database.

39 See id.

40 Subsequent to his elevation to the number-three position at DOJ, Baer has participated in multiple Division meetings with parties to pending transactions. See Jeff Bliss, Aetna, Humana Offer Divestitures to Senior DOJ Officials Skeptical of Any Fix for Deal, MLEX, July 11, 2016; Jeff Bliss, Anthem, Cigna Hear Skepticism about Deal and Divestitures from DOJ’s Baer, MLEX, June 25, 2016.
DOJ’s increased scrutiny of mergers and its more frequent use of upfront buyers. At various public appearances, AAG Baer voiced strong skepticism concerning the remedy proposals he was seeing:

When we find a merger between rivals that risks decreasing competition in one or more markets, we are invariably urged to accept some form of settlement, typically modest asset divestitures and sometimes conduct commitments or supply agreements. We thoroughly review every offer to settle, but we have learned to be skeptical of settlement offers consisting of behavioral remedies or asset divestitures that only partially remedy the likely harm. . . . Where complex transactions pose antitrust risks in multiple markets, our confidence that Rube Goldberg settlements will preserve competition diminishes. . . . Our skepticism about remedies in merger cases is well placed.41

Baer offered that assessment shortly before the Division filed its lawsuit to enjoin the Halliburton/Baker Hughes transaction and presumably also had that one in mind when making those comments. Perhaps the Halliburton/Baker Hughes transaction truly was an unfixable one. However, Baer’s concerns about overseeing a far-flung divestiture in that matter would seem to stand in fairly stark contrast with what the FTC does routinely in pharmaceutical mergers: use third-party monitors to oversee complex transfers of pharmaceutical assets, including employees, research programs, and manufacturing equipment. Those transfers are done on a product-by-product basis, with any given merger involving several such transfers.42

42 Although still under investigation by the FTC at the time of this article’s publication, the Teva/Allergan transaction is the latest and likely the most significant example of this routine practice. According to press reports, the remedy in this matter may total $2 billion in divestitures across several buyers. See, e.g., Carl O’Donnell, Teva Pharm Finalizing Asset Sales to Clear
In fact, the Commission is so comfortable with its use of monitors and its approach to remedying problematic pharmaceutical mergers that, in its ongoing merger remedy study, it is forgoing collecting any external information regarding the effectiveness of its pharmaceutical remedies beyond the information it already has collected from the various monitors it appointed in the mergers at issue.43

Further, the Division’s recent insistence on upfront buyers is likely related directly to Baer’s experience at the FTC during the late 1990s, when that agency was conducting its previous merger remedy study.44 As Baer explained at a recent conference, “Some of you will recall that taking a harder look at remedies was a particular focus of mine in the 1990s as Director of the Bureau of Competition at the FTC. It remains so today.”45 The result of that “harder look” was a significant increase in the DOJ’s use of upfront buyers.

Meanwhile, FTC officials have largely been signaling a consistency in their approach to evaluating merger remedies. As Bureau of Competition (BC) Director Debbie Feinstein recently noted, “We have always carefully scrutinized proposed remedies and proposed buyers—upfront and post-order—and nothing has changed.”46 At the same time, the FTC has clearly become more comfortable

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45 Bill Baer, Remarks at the Global Competition Review Fourth Annual Antitrust Law Leaders Forum (Feb. 6, 2015), https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-global-competition-review-fourth. See also Bill McConnell, A Hard Look at the Right Fix, THE DEAL PIPELINE, Dec. 19, 2014 (“A number of attorneys said the DOJ has adopted the longstanding FTC policy of requiring merging parties to find upfront buyers when a divestiture is required. The practice picked up steam when Baer . . . took over the DOJ’s Antitrust Division at the beginning of 2013.”).

46 Jeff Bliss, US Antitrust Enforcers Skeptical of Remedy Proposals for High-Profile Deals in 2015, MLEX, Dec. 23, 2015. See also Bliss, supra note 14 (“Whenever you ask about aggressive enforcement it’s, ‘Are you bringing more cases than you used to?’ Well, I don’t think so.”) (quoting Debbie Feinstein).
litigating merger cases in general, and, if necessary, litigating the fix in particular. In that respect, the FTC’s significant and high-profile victory in *Sysco* appears to have emboldened the agency to hold a firmer line on remedying proposed mergers. Since that win, former BC Deputy Director Steve Weissman reported that the agency “has seen companies in mergers come forward with better proposals for fixes to competition issues . . . . ‘The ability to litigate cases gives credibility and really cuts out a lot of the back-and-forth.”  


48 Dechert represented Albertsons in that matter prior to the author joining the firm.


Hertz—obviously, not the outcome the FTC was seeking in trying to ameliorate the effects of the original transaction. Still, although some Advantage locations remain shuttered, and in other markets the assets went to incumbent firms, the bulk of the divested assets are still in the market and competing independently for rental car customers. The Hertz/Dollar Thrifty order is under review by the FTC as part of its ongoing merger remedy study; presumably, the agency is taking a hard look at what caused FSNA’s business failure and what, if anything, the agency could have done to avoid such an outcome.

In Albertsons/Safeway, the outcome was even worse from the FTC’s perspective. To resolve the FTC’s concerns raised by that transaction, Albertsons agreed in January 2015 to divest 168 supermarkets to four Commission-approved buyers. The bulk of the divestitures went to Haggen, Inc., which acquired 146 stores in Arizona, California, Nevada, Oregon, and Washington. At the time of the divestitures, Haggen was a regional supermarket chain with eighteen stores in Washington and Oregon. Then, over the course of a six-week period starting in mid-August 2015, Haggen (1) announced the closure (or pending closure) of all but thirty-seven of its stores, (2) sued Albertsons for allegedly undermining its ability to operate the divested supermarkets, and (3) filed for Chapter 11.


52 Interestingly, in its application to sell Advantage to Catalyst, FSNA argued that it was “forced” to file for bankruptcy after Hertz exercised its right to terminate its entire fleet leasing arrangement with FSNA’s operating subsidiary, Simply Wheelz LLC. See Petition of Franchise Services of North America, Inc. for Prior Approval of the Sale of Simply Wheelz D/B/A Advantage, In the Matter of Hertz Global Holdings, Inc., Dkt. No. C-4367, at 7 (Jan. 7, 2014), https://www.ftc.gov/sites/default/files/documents/cases/140107hertzapplication.pdf.

bankruptcy. In the bankruptcy proceedings, Albertsons re-acquired over fifty of the 146 divested stores from Haggen, as well as fourteen legacy Haggen stores.

At a recent conference, the head of the FTC’s Compliance Division acknowledged the Albertsons/Safeway remedy had failed. However, he noted that “there was little reason to suspect that things would play out the way they did,” given Haggen’s experience in operating supermarkets, its “fairly persuasive business plan,” and its backing by SuperValu, a grocery wholesaler. Although it still has no clear answers for the outcome in this case, the FTC continues to evaluate what may have caused it.

A final potential influence on the agencies’ current approach to evaluating merger remedies are the recent calls for more aggressive merger enforcement. Perhaps not surprisingly, many of these missives come from academia, where one law professor goes so far as to proclaim “the death of antitrust.” However, questions about the amount and type of antitrust enforcement the agencies should pursue have been raised by several others, including the White House. An April 2016 report issued by the President's Council of Economic Advisors states that


55 See id. (“So we are looking at where perhaps we missed something, or whether it was something that someone did—whether it was an outside event that started this downward spiral, or whether it was a question of timing—and we don’t have all those answers.”) (quoting Daniel Ducore).

56 See Wilts, supra note 54.

57 See id. (“So we are looking at where perhaps we missed something, or whether it was something that someone did—whether it was an outside event that started this downward spiral, or whether it was a question of timing—and we don’t have all those answers.”) (quoting Daniel Ducore).

“[t]here is ongoing debate over the effectiveness of merger remedies in preserving the competitive pre-merger conditions” and notes that some observers question the government’s ability to craft effective merger remedies.\textsuperscript{59} Even \textit{The Economist}—not the most interventionist of media outlets—has questioned the concentration levels in many American markets generally and the use of divestitures to remedy problematic mergers in particular:

Who does not prefer the rifle to the blunderbuss, the scalpel to the axe? Such sophistication allows regulators to demand clever remedies, such as the disposal of subsidiaries. But with their heads deep in data and court rulings that set fine precedents, the scientists of antitrust are able to sidestep some troubling questions. If markets are truly competitive, why do so many companies now claim they can retain the cost synergies that big deals create, not pass them on to consumers? Why do investors believe them? Why have returns on capital risen almost everywhere?\textsuperscript{60}

As mentioned above, complaints that the DOJ and FTC are not being sufficiently aggressive in enforcing the antitrust laws, including in particular Section 7 of the Clayton Act, must leave the agencies wondering what more they can or should be doing. FTC Commissioner Maureen Ohlhausen has responded publicly to such complaints. In a June 1, 2016 speech, she took issue with, among other things, the notion that the agencies should depart from their current


approach to remediying problematic transactions, wherever feasible, rather than seeking to block them altogether:

[Properly calibrated divestitures are effective mechanisms both for protecting competition and for allowing merging parties to realize efficiencies. The agencies closely scrutinize the effectiveness of their remedies. Indeed, the FTC is currently doing a retrospective study of its remedial orders in ninety mergers between 2006 and 2012, building on its 1999 divestiture study. The FTC will continue to refine the sophistication of its antitrust toolkit in light of new learning. But to do away with divestitures would not only be unworkable, it would harm the agencies’ enforcement mission.]

Commissioner Ohlhausen further noted that calls to litigate in virtually every merger case are unrealistic, given that the agencies actually have to convince a federal court to enjoin the transaction at issue.

More recently, Nancy Rose, the Division’s DAAG for economic analysis, expressed her frustration with various reports and statistics cited in support of the argument that concentration is rising in the United States and that more vigorous antitrust enforcement is necessary. Noting that the available statistics fail to offer a full picture of competition in any given market, Rose cautioned against extrapolating too much from the numbers cited by proponents of greater antitrust scrutiny.

61 Maureen K. Ohlhausen, Comm’r, Fed. Trade Comm’n, Does the U.S. Economy Lack Competition, and If So What To Do about It?, Remarks at Hogan Lovells, Hong Kong 11 (June 1, 2016), https://www.ftc.gov/public-statements/2016/06/does-us-economy-lack-competition-if-so-what-do-about-it (citation omitted). See also id. at 10 (“Efficiencies are real and, depending on the industry, scale can be critical to effective competition. In short, better enforcement does not always mean more enforcement.”).

62 See id. at 10-11.

63 See Leah Nylen, “Sometimes Numbers Don’t Tell the Story,” DOJ’s Rose Says, MLEX, July 8, 2016 (“At the level many of these statistics that I’ve seen presented, it doesn’t really tell us much about even the level of competition within an industry.”).
III. Conclusion

The current state of affairs—with the agencies taking very hard looks at proposed remedies to problematic transactions and more often than not requiring upfront buyers as part of any divestiture—will in all likelihood continue for the foreseeable future. There is simply no reason to believe that the agencies will change their approach during the remainder of the current administration. Although Bill Baer has moved on from the Division, his successor, Renata Hesse, is expected to be just as aggressive in pursuing merger remedies. Looking in particular at the Division’s increased use of upfront buyers, this is likely a one-way ratchet. That is, barring a significant policy change in a future administration, DOJ will continue with the current approach of requiring such buyers in most cases.64

Given that current and likely future reality, merging parties and their counsel would be well advised to keep several things in mind as they approach the agencies with any potentially problematic transaction. As an initial matter, although this is typically part of any pre-merger antitrust analysis, it is critical to assess the likelihood that a remedy of some kind will be required to obtain clearance. If so, is there a workable remedy that will satisfy the reviewing agency and not destroy the value of the transaction? Here, given the current enforcement environment, merging parties need to anticipate increased agency resistance to anything less than a comprehensive remedial fix. In particular, complex remedies requiring third-party monitoring, cherry picking of assets, and viability questions about the divested assets all increase the risk of the reviewing agency ultimately rejecting a proposed fix to a transaction. This heightens the (already significant) need for both buyers and sellers to carefully manage the antitrust risk in their

64 Looking ahead to the next administration, if Hillary Clinton is elected President this November, one would expect a continuation of the agencies’ current merger enforcement policies. See, e.g., Jeff Bliss, A Hillary Clinton Administration Likely Would Continue Obama Merger Enforcement Policies, Pozen Says, MLEX, Apr. 13, 2016 (quoting former AAG Shari’s Pozen). The author is unable (and, in any case, unwilling) to make any predictions about what merger enforcement would look like in a Trump Administration.
merger agreement, including importantly obligations relating to any remedy sought by the agency.

For transactions expected to be reviewed by the DOJ, parties should build in additional time for obtaining an upfront buyer, in the increasingly likely event that one is required as part of any divestiture. This means parties will need to identify potential divestiture buyers, go through the process of selling the divested assets, and negotiate with DOJ staff over the viability of the divestiture package and suitability of the divestiture buyer much sooner than they otherwise would have.

Merging parties also should be mindful of the agencies’ increased comfort with litigating the fix if they are not satisfied with any proposed remedies. The more frequently the agencies prevail in such cases, the less concerned they will be about the litigation risk of having to explain to a court why a certain remedy is inadequate—particularly in the relatively favorable venue of the D.C. federal district court. Parties will need to be ready to defend the adequacy of their proposed remedies, including the scope of any divestiture and the qualifications of the buyer, before the court. This also requires a merger partner that is prepared and (perhaps more importantly) obligated to go the distance over the remedy.65

In conclusion, the author respectfully offers some suggestions to the agencies, who find themselves reviewing increasing numbers of, and increasingly complex, transactions. Most importantly, the agencies should reject the unjustified calls for more vigorous antitrust enforcement from certain quarters. Putting aside the various methodological shortcomings of the recent claims that the American economy lacks sufficient competition or that antitrust enforcement is lax, which were readily addressed by FTC Commissioner Ohlhausen,66 it is

65 A discussion of which party bears the burden of proof on the adequacy of a remedy is beyond the scope of this article. Needless to say, however, if the court assigns this to the merging parties as part of their rebuttal to the government’s case-in-chief, it will be all the more difficult for the parties to prevail on this issue.
66 See Ohlhausen, supra note 61, at 5-13 (criticizing, among other things, commentators’ reliance on concentration levels and profits—particularly at aggregated, economy-wide levels—to discern
difficult, if not impossible, to square such claims with the reality facing merging parties today. If anything, the vigor of antitrust enforcement—particularly in the merger context—is at its highest level in quite some time.

Based on the author’s experience at the FTC, the staff of the Compliance Division and ultimately the Commission already imposes stringent requirements on merger remedies. The same appears to be true at the Division. It is perfectly understandable, in response to a failed remedy or two, for an agency to seek greater assurances that proposed remedies will in fact be effective in maintaining or restoring competition. The FTC certainly is stinging from the remedial outcomes in the Hertz/Dollar Thrifty and Albertsons/Safeway matters—regardless of the exact causes of the outcomes in those cases. Nonetheless, neither the FTC nor the DOJ should heed the unjustified calls for more aggressive merger enforcement. Such a response would in all likelihood reduce consumer welfare by preventing even more efficiency-enhancing transactions from being consummated and/or result in the unnecessary expenditure of agency resources and tax dollars litigating mergers that are susceptible to appropriate remedies.

Rather, the agencies should continue to demonstrate the flexibility in fashioning remedies that they have shown in the recent past, including during the current administration. Whether it involves the licensing of intellectual property or the waiver of a non-compete agreement in lieu of a more traditional monopoly power, and noting the extensive enforcement efforts recently pursued by the FTC and DOJ).


divestiture of assets, or the market testing of a failing-firm defense, or a divestiture that does not necessarily line up perfectly with the relevant markets at issue, the agencies have shown a willingness to pursue less traditional merger remedies. Hopefully, it is that more flexible approach, rather than the increasingly stringent one we have seen more recently, that will prevail during the remainder of this administration (and under the next one, whoever may be leading it).

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70 See Competitive Impact Statement at 2-3, 8, United States v. US Airways Grp., Inc., No. 1:13-cv-01236 (D.D.C. Nov. 12, 2013), https://www.nysba.org/Sections/Antitrust_Law/Resources/Resource_PDFs/2014/Annual_Meeting/US_v_US_Airways_statement.html (consent order involving divestiture of various gates and slots at seven airports) (“The proposed remedy will not create a new independent competitor . . . . Instead, it promises to impede the industry’s evolution toward a tighter oligopoly by requiring the divestiture of critical facilities to carriers that will likely use them to fly more people to more places at more competitive fares. In this way, the proposed remedy will deliver benefits to consumers that could not be obtained by enjoining the merger.”). See also Baer, supra note 5 (discussing “substantial” competitive benefits realized from the remedy obtained in the US Airways/American Airlines matter). Dechert represented US Airways in that matter prior to the author joining the firm.