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May, 2006

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Thomas J. Horton, *University of South Dakota School of Law*

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A comparison of merger remedies in the US and the EU

by Thomas J. Horton, Thelen Reid & Priest LLP

In October 2005, the European Commission released its Merger Remedies Study. The EC's findings followed the release of formal merger remedies guides and statements in the US by the Antitrust Division and the Federal Trade Commission, as well as in Canada by the Canadian Competition Bureau. The various regulatory statements emphasise that merger remedies falling short of the divestiture of a viable ongoing business will face increased scrutiny going forward on both sides of the Atlantic Ocean. This article compares the key similarities and differences in the likely future acceptance of merger remedies in Europe and the US.

Competitors seeking to merge in the US and the EU increasingly are utilising structural and conduct remedies to resolve regulatory concerns about the potential anti-competitive impacts of their consolidations. Throughout the last decade, in both the US and Europe, the competition regulatory authorities have welcomed and encouraged creative merger remedies as a reasonable compromise between blocking potentially pro-competitive and efficiency-enhancing mergers and permitting anti-competitive increases in market concentrations.

As the pace and creative scope of merger remedies have increased, regulators and commentators on both continents appropriately have questioned whether such remedies truly are effective in maintaining aggressive competition in consolidating industries. Such concerns have led to formal studies of merger remedies in the US by the Federal Trade Commission ('FTC'), in 1999, and, more recently, in 2005, in Europe by the European Commission ('EC')[1].

In many important respects, the FTC and EC Studies reached parallel conclusions. Overall, both concluded that in a number of cases, merger remedies, especially those including the divestiture of a viable ongoing business, have been successful in resolving anti-competitive concerns and maintaining post-merger competition. On the other hand, both studies also found that a substantial percentage of merger remedies have not achieved their desired objectives for a host of reasons. For example, the EC observed "The key findings of the study are the identification of the different types and frequency of serious design and/or implementation issues affecting unaddressed".[2]

The formal regulatory studies have spurred the competition and antitrust authorities in the US, Canada and Europe to issue statements and guidelines as to how they will evaluate proposed merger remedies going forward.[3]

The good news for merging companies in both the US and Europe, as well as in Canada, is that the regulatory authorities are likely to continue accepting proposed merger remedies as an alternative to blocking the consolidations. The bad news is that the review of proposed remedies falling short of the divestiture of a viable on-going business is likely to be much more stringent, especially in Europe. On both continents, the regulators also are likely to closely monitor and limit any ongoing post-divestiture relationships that 'may increase the vulnerability of the buyers of the divested assets, particularly in those cases in which the divested assets comprise less than an on-going business'.[4]

The FTC and EC Merger Remedies Studies

Both the FTC's 1999 Study and the EC's 2005 Study represent valuable and necessary efforts to objectively assess the competitive success of merger remedies previously approved by the regulators, and to identify particular areas of concern going forward. Overall, both studies concluded that in a majority of cases, the companies acquiring divested assets were able to enter the relevant market and provide ongoing competition. For example, the FTC observed that its "Study supports the view that divestitures have been successful remedies for anti-

Both the FTC and the EC emphasised that the ideal merger remedy includes the divestiture of a viable on-going business. For example, the FTC stated that "divestitures of on-going businesses succeeded at a higher rate than divestitures of selected assets".[7] Similarly, the EC cautioned: "The scope of the divested business determines to a large extent whether this new operator will be viable, capable of being operated independently from the divested parties ('stand-alone') and constitute, in the hands of a suitable purchaser, an effective and lasting competitive force *vis-à-vis* the parties and other competitors".[8]

Based on their findings, both the EC and the FTC studies include substantial and detailed recommendations to expedite and fortify the divestiture process, and to combat potential post-merger strategic behaviour by the sellers of divested assets against the buyers.

Comparative merger remedies

Divestitures of ongoing businesses are favoured in the US, Canada and Europe

Following the studies, the Antitrust Division, the FTC, the CCB, and the EC all have formally stated that the surest way to gain expedited approval of a potentially anti-competitive consolidation is to present the agencies with 'the divestiture of an existing business entity that has already demonstrated its ability to compete in the relevant market'.[9] For example, the FTC Statement notes "A proposal to divest a demonstrably autonomous, on-going business unit comprising the entire business of one of the parties to the merger will, in all likelihood, expedite the divestiture process".[10]

Similarly, the CCB Information Bulletin admonishes "Divesting a stand-alone functioning business increases certainty that the remedy will be effective since the entity has proven its ability to compete in the market and survive independently". The Bureau applies greater scrutiny to partial divestitures since there is limited or no proven track record that the components of the business will be able to operate effectively and competitively.[11]

Finally, the EC in its Best Practice Guidelines expressly points to the FTC Study's Findings as to "the importance of the divestiture of an on-going business for the success of the remedy", and mandates that "the Divestment Business is considered to be an existing entity that can operate

on a stand-alone basis".[12]

One important difference between the US and Europe going forward may be that the EC may be more demanding than the DOJ or FTC in requiring divestitures exceeding the scope of the overlapping businesses. The EC Study cautioned "that the straightforward approach of divesting solely the overlapping businesses has at times resulted in insufficient consideration of these critical commercial issues pertaining to the key requirement of viability of the divested businesses without which its competitiveness can be seriously impaired".[13] The EC alerted its staff "that acceptance of divesting 'just the overlap' to resolve horizontal competition concerns could be risky if a number of common problems relating to the scope of the divested business were not addressed thereby failing to create a viable competitor".[14]

Conduct remedies and post-merger regulatory oversight are likely to be more acceptable to the EC

A potential major difference between the US and EC competition regulatory authorities' acceptance of future merger remedies may lie in their differing attitudes towards conduct remedies and ongoing relationships between the sellers and purchasers of divested assets. In the US, the DOJ's Guidelines warn that "conduct remedies generally are not favoured in merger cases because they tend to entangle the Division and the courts in the operation of a market on an ongoing basis, and impose direct, frequently substantial, costs upon the government and the public that structural remedies can avoid".[15]

Both the FTC's Statement and the DOJ's Guidelines emphasise that where conduct relief such as a supply agreement is appropriate, the relief should be "short-term".[16] The DOJ's and FTC's current positions stem from their dual concerns that sellers are likely to engage in strategic behaviour towards the buyers of divested assets, and that the close ties created by such agreements between competitors 'can serve to enhance the flow of information or align incentives that may facilitate collusion or cause the loss of a competitive advantage'.[17]

The EC, on the other hand, is far less concerned about the competitive dangers of ongoing supply or licensing agreements,[18] and more concerned about their actual effectiveness in allowing the asset purchaser to grow into an effective competitor. The be useful in facilitating the effective carve-out of assets between the parties' retained and divested businesses".[19]

Unlike the DOJ and the FTC, which are wary of potential ongoing regulatory entanglements, the EC appears to be much more willing to play an intensive post-merger oversight role. The EC's Study "found that the Commission could neither rely solely on market forces during the divestiture process, nor on the purchaser, to steer the carve-out process in a way that would ensure an adequate competition outcome".[20] Consequently, the EC finds it 'desirable' that 'monitoring trustees are appointed in all divestiture remedies'.[21]

Additional potential differences

A number of additional potential differences in the treatment and acceptance of merger remedies in the US and Europe beyond the scope of this article may exist going forward. For instance, the EC is more likely to order 'crown jewel' divestitures than its American regulatory counterparts.[22] Additionally, the EC may prefer to receive divestiture packages that are attractive "to as many 'suitable purchasers' as possible [ ] at the design stage," and is likely to play an assertive role in the ultimate selection of a purchaser. The American authorities, on the other hand, are more likely to prefer the early identification of a single upfront buyer.[23] A potential wild card may be the recent ability of merging parties in the US to seek judicial approval for their proposed merger remedies in federal district courts.[24]

Notes:

1. See 'Staff of the Bureau of Competition, Federal Trade Commission, A Study of the Commission's Divestiture Process' (1999)('FTC Study'); and 'Merger Remedies Study' (public version), DG Comp, European Commission (October 2005)('EC Study').
2. EC Study, at 139.
3. See 'Antitrust Division Policy Guide to Merger Remedies' (October 2004)('DOJ Guide')(available at www.usdoj.gov/atr/public/guidelines/205108.htm); 'Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies' ('FTC Statement')(available at www.ftc.gov/bc/bestpractices/bestpractices030401.htm); 'Canadian Competition Bureau' ('CCB')

www.europa.eu.int/comm/competition/mergers/legislation/remedies.htm). The findings and recommendations in the EC Study supplement the EC's existing Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and The Trustee Mandate Under The EC Merger Regulation. ('Best Practice Guidelines').

[4] FTC Study at II.B.4. See also DOJ Guide at III. E.; FTC Statement ('Additional Order Provisions'); CCB Information Bulletin at II.B(i)(22); and EC Study at IV.B.1(11).

[5] FTC Study at II.B.

[6] EC Study at 168 (V.D. 2 at ¶8).

[7] FTC Study at II.B.3. The FTC added: "The general notion that the sale of an on-going business is more likely to be successful in establishing a competitor than the sale of less than an entire business seems intuitively obvious and is consistent with the reasons for Congressional concern about a lack of organic integrity of divested businesses." Id.

[8] EC Study at p. 23 (II.A at ¶3). "The inadequate scope of the divested business was the most frequent of all design and/or implementation problems identified in the Study."

[9] DOJ Policy Guide at III.C. ("divestiture of an existing business entity is preferred").

[10] FTC Statement at 2.

[11] CCB Information Bulletin at II.i (¶16)

[12] EC Best Practice Guidelines at ¶ 18 fn.6. The EC found that "all 'ineffective' and 'partially effective' divestiture remedies suffered from problems related to the scope of the divested business." The EC added that "inadequacies in the scope of the divested business consisted mainly in the omission of key assets that were necessary for the viability and competitiveness of the divested business (i.e. the ability to constrain the merger entity's market power post-merger)." Id. at p. 140. The EC observed that more than just the "overlapping assets" may be necessary to "constitute the 'critical mass' necessary to create a viable divested business." Id. at 23.

[13] EC Study at 141 ¶8.

[14] EC Study at 35 ¶30.

[15] DOJ Guidelines at III.E.

[16] For example, the FTC states that "[i]n some cases, the buyer may need additional, short-term assistance from the parties, particularly in those cases in which less than the entire business of example of a potentially appropriate conduct provision is a short-term supply agreement." DOJ Policy Guide at III.E.1.

[17] DOJ Policy Guide at n. 26.

[18] The EC observed that transitional "arrangements were not considered problematic if the links they created did not continue beyond reasonable time limits. However, a number of cases showed, even longer transitional periods may be accepted if such arrangements were necessary for the successful implementation of the remedies. One re-branding case suggested that if transition is made too quickly...this risked destroying part of the commercial (and competitive) value of the divested business." EC Study at 141-42.

[19] EC Study at 152 ¶66.

[20] Id. at 151 ¶60. The Study added that "[t]he use of oversight mechanisms, such as hold-separate managers and monitoring trustees, was shown to be extremely valuable in helping to monitor the preservation processes and to create the right incentives for the correct and timely carve-out of the divested businesses." Id.

[21] EC Study at 158 ¶96(1). The EC Study devotes dozens of pages to the duties and responsibilities of divestiture trustees. Indeed, the EC expressly observes that "Proper oversight by the trustee is all the more important since purchasers – particularly the smaller firms and new entrants – were often not able to safeguard their interests by enforcing vital provisions in their SPAs with the sellers". Id. at 152 ¶65. On the other hand, the DOJ's Guidelines and the FTC's Statement treat the appointment of a trustee as an 'extraordinary remedy' necessitated by such circumstances as a "defendant [being] unable to complete the sale within the period prescribed by the decree." or in "the very rare instance in which the Division believes that the defendant is likely to mismanage the assets during the typical divestiture period and thereby impair the likelihood that the divestiture will restore effective competition". Id. at IV. I. 1-3.

[22] Compare e.g. ECC Study at 144 ¶26 ("the Study identified at least eight non-JV remedies (10% of all divestiture remedies) where an alternative divestiture, or crown-jewel commitment, could have potentially improved the remedy..." and DOJ Guides at IV.G. ("Crown jewel provisions are strongly disfavoured").

[23] EC Study at 141 ¶10 ("In the Commission's

IV.D. ("The Division will not compare the relative fitness of multiple potential purchasers and direct a sale to that purchaser it deems the fittest. The appropriate remedial goal is to ensure that the selected purchaser will be an effective, viable competitor in the market...not that it will necessarily be the best possible competitor.").

[24] See Thomas J. Horton, 'Negotiating Merger Remedies with the Antitrust Division and Litigating the Proposed Fix', Ohio State Bar Association's 39th Annual Antitrust Institute: Litigating Antitrust Cases (October 28, 2005), at 2.1. ("[I]n recent cases such as United States v. Franklin Electric Co. 130 F. Supp. 2d 1025 (W.D. Wis. 2000); Federal Trade Commission v Libbey, 211 F. Supp. 2d 34 (D.D.C. 2002); and FTC v. Arch Coal, Inc. 329 F. Supp. 2d 109 (D.D.C. 2004), proposed merger remedies have figured significantly in the actual litigation and the court's final decisions").

Author:
Thomas J. Horton
Thelen Reid & Priest LLP
701 Eighth Street, NW
Washington, DC 20001
US
Tel: +1 202 508 4000
Fax: +1 202 508 4321
Email: thorton@thelenreid.com
Website: www.thelenreid.com