Merger remedies in the EU and US

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Remedies (often the divestiture of assets) can be offered by one or more of the parties to a merger to an investigating competition authority in an effort to meet the anti-trust concerns that the authority has identified. If the authority accepts them, it clears the transaction and the merging parties can proceed, as long as they comply with the conditions imposed.

This chapter summarises and compares, through recent case developments, the approaches of the EU and US competition authorities to merger remedies. The relevant authorities are the European Commission (Commission) (in the EU), and the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (Antitrust Division) (in the US).

This chapter considers the following:

- The competition authorities, in particular:
  - the basic procedure in relation to merger remedies; and
  - published guidelines.
- An overview of the categories of remedies available, including a discussion of:
  - the key principles that the authorities follow;
  - the preference of the authorities for structural remedies.
- The authorities' approach to divestiture remedies, including:
  - the principal differences between them;
  - an examination of the key provisions of a divestiture remedy.
- The authorities' approach to conduct remedies.
- A brief consideration of future developments concerning merger remedies.

The chapter also considers recent examples of cases involving both the Commission and the US competition authorities, and the role the courts play in approving consent decrees (*see boxes, Case examples of merger remedies* and *The court's role in reviewing the consent decrees of the Department of Justice*).

THE COMPETITION AUTHORITIES

This section considers the authorities':

- Procedure on merger remedies.
- Published guidance on merger remedies.

Procedure on merger remedies

The Commission and the US anti-trust authorities possess similar authority to impose merger remedies to address competition issues.

In the EU, the parties must notify mergers, acquisitions and joint ventures of a certain size to the Commission (*Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (Merger Regulation)*). A transaction raises competition concerns if it could significantly impede effective competition (in particular, the creation or strengthening of a dominant position). In that case, the parties can offer remedies to the Commission to attempt to resolve those concerns and obtain clearance. If accepted, the commitments are formally attached to the Commission's clearance decision as conditions. These conditions do not need to be reviewed by a court before they become effective. However, they can be part of an appeal against the entire decision to the EU Court of First Instance. If the parties fail to comply with one or more of the conditions, the clearance becomes automatically void.

In the US, certain mergers and acquisitions (including joint ventures) must be notified to the Antitrust Division and the FTC (*Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (15 U.S.C. § 18a)*). The authorities can attach conditions to an approval of a merger to preserve and restore the state of competition as it existed before the proposed transaction. The authorities apply the same analytical approach to merger reviews. However, their approach to merger remedies differs in some respects.

Once the FTC decides to accept the merger remedies, it files an administrative complaint and simultaneously agrees to settle the case through a consent decree with the merging parties. The FTC then publishes the consent decree for public comment. After the public comment period, typically 30 days, the FTC makes a final order. There is no court involvement.

In contrast to the FTC, the Antitrust Division often permits the parties to make fix-it-first privately negotiated structural changes without a formal consent decree (*see below, Divestiture remedies: Differences between the authorities' approach*). If a formal consent decree is needed, the Antitrust Division files a complaint with the federal district court and agrees to settle the case through a consent decree. The acquiring (or in some cases both the acquiring and acquired firm) enters into an agreement that it will not oppose entry of the order by the court. The district court resolving the complaint must approve the consent decree and make a final judgment (*see box, The court's role in reviewing the consent decrees of the Department of Justice*).

Guidance on merger remedies

The Commission's existing guidance on merger remedies is contained in its 2001 Notice on remedies acceptable under Regulation (EEC) No. 4064/89 and Regulation (EC) No. 447/98 (*OJ 2001 C68/03*) (Merger Remedies Notice) (*available at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001XC0302(01):EN:HTML*).

However, to take into account the changes to the Merger Regulation since 2001 and to better reflect current merger control practice, the Commission has issued a draft revised Notice (Draft Remedies Notice) (*see ec.europa.eu/comm/competition/mergers/legislation/draft_remedies_notice.pdf*). This is currently going through the consultation process with a view to being adopted before the end of 2007.

The Commission has also produced:

- Best Practice Guidelines: Explanatory Notes on the Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation (*available at ec.europa.eu/comm/competition/mergers/legislation/bp2.htm*).

- Model Texts for Divestiture Commitments (available at *ec.europa.eu/comm/competition/mergers/legislation/mt1.htm*).

The US anti-trust authorities have provided guidance on their approaches to merger remedies through a number of documents, including:

- Statement of the FTC's Bureau of Competition on Negotiating Merger Remedies 2003 (FTC Statement) (*available at www.ftc.gov/bc/bestpractices/bestpractices03040.pdf*).

- FTC Bureau of Competition's Study of the Commission's Divestiture Process (Divestiture Study) (*available at www.ftc.gov/os/1999/08/divestiture.pdf*).

- FTC Frequently Asked Questions About Merger Consent Provisions (*available at www.ftc.gov/bc/mergerfaq.shtm*).

- Antitrust Division Policy Guide to Merger Remedies 2004 (Antitrust Division Policy Guide) (*available at www.usdoj.gov/atr/public/guidelines/205108.pdf*).

There is a large degree of convergence between the approach of the competition authorities. In particular, the Antitrust Division Policy Guide is largely consistent with the FTC Statement. However, there are some notable differences in approach in relation to certain aspects of divestitures (*see below, Divestiture remedies: Differences between the authorities' approach*). It is possible that the Antitrust Division may use more traditional remedies than the FTC because its consent decrees are subject to judicial review (*see box, The court's role in reviewing the consent decrees of the Department of Justice*).

REMEDIES - GENERAL

The Commission generally distinguishes between three types of remedies (*paragraph 17, Draft Remedies Notice*):

- Divestitures (for example, of a plant or business unit).

- Other structural remedies, such as granting access to key infrastructure or inputs to other parties on non-discriminatory terms.

- Commitments relating to the merged entity's future behaviour, such as contractual obligations.

The US anti-trust authorities also distinguish between structural remedies and conduct remedies.

Key principles

Broadly speaking, the Commission and the US competition authorities follow these key principles when considering merger remedies:

- Structural remedies are preferred to conduct remedies (*see below, Preference for structural remedies*).

- A divestiture must:

  - include all assets necessary for the purchaser to be an effective long-term competitor;

  - be of an existing business entity, unless a remedy can or must be structured in other ways to ensure the buyer has the appropriate assets to be successful;

  - include rights to critical intangible assets.

  (*See below, Divestiture remedies: Key provisions of consent decree or commitments: Scope of the divested business.*)

- Conduct relief is appropriate in limited circumstances, such as:

  - in addition to a structural remedy;

  - where a structural remedy is not possible.

  (*See below, Conduct remedies.*)

Preference for structural remedies

Divestitures are by far the Commission's preferred way to eliminate competition problems. Other structural commitments may also be suitable, if they are equivalent to divestitures in their effects.

Commitments relating to the future behaviour of the merged entity (for example, an undertaking not to raise prices or bundling products) are acceptable only exceptionally and in very specific circumstances, such as to deal with certain conglomerate effects. They are rarely sufficient to address competition problems resulting from horizontal overlaps. The main concern with behavioural remedies is their effective implementation and monitoring. Unlike structural remedies, monitoring is necessary to ensure that the parties do not reduce or eliminate the remedies' effectiveness. Neither the Commission nor competitors may be able to es-

CASE EXAMPLES OF MERGER REMEDIES

The following are examples of cases in which the Commission and the US competition authorities were both involved in investigating the same mergers. They highlight both the convergence between and the differences in approach of those authorities to merger remedies.

General Electric Co./Instrumentarium

General Electric (GE) acquired Instrumentarium (a Finnish company). The Antitrust Division and the Commission investigated the combination in relation to various overlaps in medical equipment (including the patient monitoring and C-arm businesses).

Both authorities required divestiture of a part of Instrumentarium's patient monitoring business. The Antitrust Division also required a divestiture of the acquired C-arm business (C-arms are used for imaging of the human body for medical purposes). In contrast, the Commission took no action in relation to the C-arm business. This difference was probably attributable to factual differences in market conditions between the jurisdictions.

There was also an issue as to whether the merged firm could close the interface between anaesthesia machines and a third party's patient monitors. The Antitrust Division found no basis to take action. However, the Commission required GE to:

- Maintain an open interface.
- Share information about the interface.
- Take other actions designed to maintain the status quo.

Although the details of the settlements differed somewhat, the description of the patient monitoring business to be divested was exactly the same under both decrees. The Antitrust Division consent order acknowledged the need for the Antitrust Division to co-operate with the EC. The Antitrust Division final judgment included language to ensure consultation with the Commission regarding the appointment and monitoring of a single divestiture trustee, if one became necessary (*see Case No COMP/M3083, Commission Decision of 2 September 2003; Final Judgment, available at www.usdoj.gov/atr/cases/f202500/202573.htm*).

Linde/BOC

The German company Linde acquired the British company BOC. The Commission (*Case No COMP/M.4141, Commission Decision of 6 June 2006*) and the FTC (*In the Matter of Linde AG and The BOC Group PLC, FTC Docket No. C-4163, Decision and Order, 29 August 2006, available at www.ftc.gov/os/caselist/0610114/0610114c4163LindeBOCDOPubRecV.pdf*) both reached the conclusion that the transaction gave rise to concerns in the global market for the wholesale supply of helium.

The Commission and the FTC closely co-operated in their assessment of the parties' two alternative remedies, ultimately both rejecting the same remedy in favour of the other. The FTC insisted on an up-front buyer (*see Divestiture remedies: Key provisions of consent decree or commitments: Up-front buyer*). The Commission did not. In addition, the parties agreed to divest a number of discrete businesses in separate, identified geographic markets in Europe and the US, reflecting the factual differences in market conditions between the two jurisdictions. Finally, the Commission, but not the FTC, was concerned that Linde, through acquiring BOC, would become a partner in a number of Asian joint ventures controlled by Air Liquide and BOC. This would bring about structural links between the two leading European players. To address concerns over potential co-ordinated effects, the parties agreed to sever these structural links to a significant extent.

Inco/Falconbridge

The Canadian mining company Inco acquired Falconbridge. The Commission (*Case No COMP/M.4000, Commission Decision of 4 July 2006*) and the Antitrust Division both reached the conclusion that the transaction gave rise to concerns, leading to a near-monopoly position, in the global markets for the supply of:

- High purity nickel for the production of super alloys.
- High purity cobalt for the production of super alloys used in safety critical applications (for example, aircraft engines).

In parallel outcomes, both authorities insisted on the parties divesting Falconbridge's Nikkelverk refinery in Norway together with related assets, including Falconbridge's custom feed procurement entity and its marketing and commercial organisations. This would entirely remove the overlap in the concerned markets. The buyer had to be a company active in metal mining and/or processing, with sufficient nickel resources to sustain the viability of the refinery. Both authorities insisted on a fix-it-first solution (*see Divestiture remedies: Differences between the authorities' approach*).

They ultimately both approved the sale of the business to LionOre. The Antitrust Division also required that any payment by LionOre to Falconbridge for the divested business by way of LionOre stock be limited to less than 20% of LionOre's shares (*see Competitive Impact Statement, available at www.usdoj.gov/atr/cases/f216800/216868.htm*).

tablish with the requisite degree of certainty whether the parties meet the conditions of the commitment in practice (*paragraph 69, Draft Remedies Notice*).

(*See also below, Conduct remedies: The Commission.*)

The US anti-trust authorities also generally prefer structural remedies, such as divestitures. The Antitrust Division considers that structural remedies (*page 8, § III.A, Antitrust Division Policy Guide*):

- Are relatively clean and certain.
- Avoid the need for costly government entanglement in the market.
- Are more difficult for the parties to circumvent than conduct remedies.

Cross-border

The Antitrust Division strongly disfavours conduct-based remedies because it finds the necessary monitoring to be cumbersome and costly (*page 22, Antitrust Division Policy Guide*). However, it has approved conduct remedies in certain circumstances (*see below, Conduct remedies: The Antitrust Division*).

The FTC also prefers structural remedies. However, it has accepted alternatives to the traditional divestiture of an operating business with greater frequency in recent years (*see below, Conduct remedies: The FTC*).

DIVESTITURE REMEDIES

The Commission and the US competition authorities both stress that the success of a divestiture depends on the:

- Scope of the divestiture (*paragraph 23, Draft Remedies Notice; page 9, Antitrust Division Policy Guide; page 10, FTC Statement*).
- Successful preservation of the business before its actual transfer (often under a hold separate agreement and the supervision of a hold-separate trustee).

The divestiture must result in a viable business that:

- Can compete effectively and independently of the merging parties.
- Is operated by a suitable buyer that has the capacity and incentive to compete effectively with the merged entity.

Differences between the authorities' approach

Although there is a considerable amount of convergence between the authorities, there remain some notable differences in relation to certain aspects of divestitures. For example, the Antitrust Division can permit parties to mergers that present competition difficulties to "fix-it-first" by making privately negotiated structural changes to remedy the competitive issue. This often avoids the need for a formal consent decree that must be approved by a federal district court. In contrast, the FTC virtually always requires consent decrees. However, it often requires the identification of an up-front buyer (*see below, Key provisions of consent decree or commitments: Up-front buyers*).

The Commission requires the submission of formal commitments. It permits "fix-it-first" structural solutions. However, these have been rare and only used where the identity of the purchaser was crucial for the effectiveness of the proposed remedy (for example, where only one purchaser had the necessary know-how and presence in neighbouring markets (*Metso/Aker Kvaerner (Case No COMP/M.4187, Commission Decision of 12 December 2006)*). An up-front buyer solution with specific requirements for a suitable buyer is generally considered acceptable (*paragraph 57, Draft Remedies Notice*) (*see below, Key provisions of consent decree or commitments: Up-front buyers*).

There are also a number of differences in approach to certain other aspects of divestitures, including crown jewel provisions and hold separates and trustees. These are considered more fully below.

Key provisions of consent decree or commitments

The key provisions typically found in a consent decree or set of commitments concern the:

- **Scope of the divested business.** The FTC and Antitrust Division stress the importance of the scope of the divested assets to ensuring the success of a divestiture in remedying competition concerns. They prefer divestiture of a pre-existing business entity, rather than packages of assets that are "cobbled together" (*§ III.C, Antitrust Division Policy Guide; pages 4 to 6, FTC Statement*). The authorities view the transfer of intangible assets such as IP rights as important to ensure that the buyer of divested assets effectively replaces competition lost as a result of the merger (*§ III.D, Antitrust Division Policy Guide; page 5, FTC Statement*). In some cases, the FTC requires the merging parties to provide the buyer with additional freedom to operate under IP rights retained by the merging parties, where it fears the buyer would not otherwise be viable.

  In addition, the US authorities consider the extent to which the viability of the divested business may suffer from dependence on parts of the business retained by the merging party. In that case, they require additional conduct remedies to support the divestiture (*see below, Conduct remedies*).

  The Commission requires divested activities to consist of a viable business divested as a going concern, which if operated by a single purchaser can compete effectively with the merged entity on a lasting basis. It may be necessary to include activities related to markets where the Commission did not identify competition concerns if this is required to create an effective competitor in the affected markets (*paragraph 23, Draft Remedies Notice*). For example, in *Universal/BMG Music Publishing (Case No COMP/M.4404, Commission Decision of 22 May 2007)*, the Commission was concerned that Universal's acquisition of BMG's music publishing business would give Universal the ability and incentive to raise prices for online rights to Anglo-American song repertoires. To remove the Commission's concerns, Universal committed to divest a number of important catalogues, covering Anglo-American copyrights and contracts with authors. Although the competition concerns only related to online rights, to ensure that the buyer would be a viable competitor, the commitments covered the complete range of copyrights, including mechanical, performance, synchronisation and print rights.

  In addition, the business must be able to operate as a standalone entity. This means that the Commission does not consider a possible (or even prospective) purchaser's resources at the stage of assessing the remedy. However, if an agreement is concluded with a prospective purchaser during the Commission's investigation, the Commission will consider the business's viability in the hands of that purchaser (*paragraph 30, Draft Remedies Notice*). A conditional clearance decision may be adopted and a purchaser subsequently identified that may not need some of the assets or personnel included in the divested business. In that case, the Commission may, on request, approve a reduced divestiture package if this does not affect the divested business's viability and competitiveness (*paragraph 31, Draft Remedies Notice*).

THE COURT'S ROLE IN REVIEWING THE CONSENT DECREES OF THE DEPARTMENT OF JUSTICE

There are certain conditions for a consent decree of the Department of Justice (Antitrust Division) to be entered by a federal district court. These are that the (*Tunney Act (15 U.S.C. § 16 (2006)*):

- Antitrust Division provide a "competitive impact statement" describing its remedy.
- Proposed order is published for public comment.
- Court review the proposed remedy and any comments and decide that entering the order is in the public interest.

It is possible that the Antitrust Division uses more traditional remedies than the FTC because it is subject to this judicial review.

The Tunney Act, as amended in 2004, states that the court "shall" consider the following factors in its review:

- Competitive impact.
- Duration of the remedies.
- Alternative remedies considered by the Antitrust Division.
- The impact on the general public and those specifically affected by the decree.
- Any other factors that affect the adequacy of the decree.

Until recently, there was an issue over the impact of these amendments to the Act (particularly the change of "shall" rather than "may"). This was debated in the *SBC/AT&T* and *Verizon/MCI* mergers, during the lengthy and extensive Tunney Act review of the consent decrees (*see United States v SBC Communications Inc. and AT&T Corp., Civ No. 05-2102 (DDC)* and *United States v Verizon Communications Inc. and MCI Inc., Civ. No. 05-2103 (DDC)*).

In those cases, the Antitrust Division had entered into consent decrees with the parties in 2005 requiring modest divestments of connectivity in individual office buildings. When the US District Court for the District of Columbia in reviewed them in 2006, *amici curiae* (that is, interested third parties) argued that the 2004 amendments expanded the court's scope of review. They argued that they required the court to make affirmative, independent findings of whether the mergers are in the public interest. In contrast, the Antitrust Division argued that the court should merely review the issues identified in the Antitrust Division's complaint.

There was concern in some quarters that unfettered judicial review would create greater uncertainty regarding the Antitrust Division settlement proceedings. However, the court read the amendments to effect minimal changes in the review process, concluding that courts still cannot review the adequacy of the complaint, nor can they reject a proposed decree for failure to address harms not alleged by the government (*U.S. v. SBC Commc'ns, No. 05-2102, 2007 WL 1020746 at *9-17 (D.D.C. 29 March 2007)*).

Therefore, the pre-amendment standard for Tunney Act review, which simply required that the government provide a reasonable explanation and that the settlement fall within the public interest, appears to remain substantially intact.

- **Crown jewels**. Crown jewel provisions require the merging parties to sell a larger or more attractive set of assets if they are unable to find a buyer for the original divestiture package within a specified time period. The FTC endorses the effectiveness of these provisions and recommends their inclusion in consent decrees (*pages 31 to 32, FTC Divestiture Study*). In practice, it has used them infrequently in recent years, but will consider them in appropriate cases.

  The Antitrust Division does not approve of crown jewel provisions because they (*pages 36 to 37, § IV.H., Antitrust Division Policy Guide*):

  - represent acceptance of either:
    - less than effective relief at the outset; or
    - more relief than is necessary to remedy the competitive problem.
  - permit potential purchasers of the divested assets to manipulate the process (they may intentionally delay negotiating for the agreed divestiture assets so that they can later purchase the crown jewels at an attractive price).

  The Commission, like the FTC, may require the parties to propose a second alternative divestiture if they are not able to implement their preferred divestiture option, because of, for example:

  - third parties' pre-emption rights;
  - uncertainty as to the transferability of key contracts or IP rights; or
  - the uncertainty of finding a suitable purchaser.

  This crown jewel must (*paragraph 45, Draft Remedies Notice*):

  - be at least as effective as the parties' preferred divestiture in creating a viable competitor;
  - not involve any uncertainties as to its implementation; and
  - be capable of being implemented quickly.

For example, in *Johnson & Johnson/Pfizer (Case No COMP/M.4314, Commission Decision of 11 December 2006)*, Johnson & Johnson agreed, among others things, to terminate the vertical relationship between its subsidiary ALZA and GlaxoSmithKline relating to the supply of nicotine patches. It offered to divest ALZA's international nicotine patch business, except for the US, Canada and South Korea. If this divestiture did not take place within a specified time after clearance, Johnson & Johnson agreed to divest ALZA's global nicotine business.

However, in practice crown jewels are relatively rare in EU merger control and often an up-front buyer is used instead *(see below)*.

- **Acceptable buyer.** The Commission and the US competition authorities consider the suitability of a buyer to depend on its ability and incentive to make the divested business an active and successful competitor (*paragraph 43, Draft Remedies Notice; page 32, Antitrust Division Policy Guide; pages 8 to 10, FTC Statement*). The FTC cites the buyer's knowledge and experience, commitment, and size as being of paramount importance when selecting a buyer (*page 34, Divestiture Study*).

  The Commission considers, in addition, that the buyer (*paragraph 48, Draft Remedies Notice*):

  - must have sufficient financial resources;
  - should be independent of and unconnected to the parties;
  - must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the business to be divested.

  The Commission may sometimes also insist that the buyer be an industrial, rather than a financial, purchaser (for example, where a given market requires a certain degree of recognition by customers for a buyer to be able to translate the business to be divested into a competitive force on the market) (*paragraph 49 and footnote 51, Draft Remedies Notice*).

- **Up-front buyer.** The FTC often requires the identification of an up-front buyer and the execution of an acceptable agreement with that buyer before it accepts the proposed consent order (*page 11, FTC Statement*). This depends on the specific facts of the divestiture. An example is the *Linde AG/BOC Group* merger, which would have reduced the number of participants in the relevant markets from five to four. The FTC required divestiture of both Linde AG's liquid oxygen and nitrogen business in identified geographic markets and its bulk refined helium assets (*In the Matter of Linde AG and The BOC Group PLC, FTC Docket No. C-4163 (29 August 2006)*). For the liquid oxygen and nitrogen business, the FTC required merely that Linde AG divest within six months. For the refined helium assets, the FTC required an up-front buyer because the helium assets to be divested did not constitute a stand-alone business and needed key third-party consents for the asset transfer.

  In contrast, the Antitrust Division virtually never requires an up-front buyer, allowing the merging parties to close their deal and find a buyer afterwards. The Antitrust Division will include, in a consent decree, provisions for:

  - the Antitrust Division approval of the buyer; and
  - a hold separate order (for the divested assets to be held separate and maintained for a certain period) (*see below, Hold separates and trustees*).

  The Commission may require an up-front buyer, but tends to do so less frequently than the FTC. It will typically insist on an up-front buyer where there (*paragraphs 54 and 55, Draft Remedies Notice*):

  - are considerable obstacles for a divestiture (for example, third party rights or uncertainties as to finding a suitable purchaser); or
  - is a high risk of degradation of the divestment business meaning the transfer of the business needs to be accelerated.

  The Commission may also sometimes require an up-front buyer where the remedy relates to a carved out rather than stand-alone business and where the carve-out is particularly difficult.

  In the case of *Omya/Huber (Case No COMP/M.3796, Commission Decision of 19 September 2006)*, the Commission insisted on having an up-front buyer. This was because of:

  - the importance of the identity of the purchaser (it had to be an industrial purchaser that already had financial resources and proven expertise in the supply of coating calcium carbonates); and
  - the need for a speedy divestiture.

- **Hold separates and trustees.** The Commission and the US anti-trust authorities require a divested business to be preserved until its actual transfer to the buyer. The agreements that the parties enter into must provide that the assets and employees of the to-be divested business will be held separate from the retained business. Hold-separate and employee non-solicitation provisions are standard in conditional Commission clearance decisions and FTC and Antitrust Division consent decrees.

  The anti-trust authorities can make use of hold-separate monitors and trustees to oversee the held separate business and ensure that it operates independently from the merged company. The monitor or trustee is responsible for the:

  - management of the business;
  - implementation of the hold-separate and ring-fencing obligations.

  The Commission and the FTC consider a hold-separate monitor or trustee to be an effective way to ensure the competitive vitality of a to-be divested business (*page 19, FTC Statement*).

In contrast, the Antitrust Division typically does not regard these monitors as effective and states that they should be used only where there is a considerable risk to the value of the assets (*pages 39 to 40, Antitrust Division Policy Guide*). Recently, the Antitrust Division diverged from this position in the merger of Mittal Steel Co NV and Arcelor SA, apparently concluding that the unusual circumstances in which an operating monitor is required were present (*see United States v Mittal Steel Co NV, Hold Separate Stipulation and Order, available at www.usdoj.gov/atr/cases/f217400/217494.htm*). The Antitrust Division ordered Arcelor to divest one of its North American steel companies, Dofasco Inc. (on the assumption that it could be sold given the provisions of the foreign trust in which it was held, an assumption that later proved to be incorrect). The Antitrust Division required Mittal to appoint an operating monitor acceptable to the Antitrust Division to preserve Dofasco's value while divestiture efforts were pending, giving it complete managerial responsibility for Dofasco and for overseeing compliance with the hold separate order.

In addition to the hold separate trustee, the Commission generally requires the appointment of a monitoring trustee and a divestiture trustee to assist with supervising and, where necessary, implementing the commitments. The monitoring trustee will oversee:

- the safeguards for the business to be divested during the interim period (including supervising the hold-separate trustee);
- in carve-out cases, the splitting of assets and the allocation of personnel; and
- the parties' efforts to find an acceptable buyer and to transfer the business.

The monitoring trustee also acts as a contact point for any requests by third parties or potential buyers in relation to the commitments, and regularly reports to the Commission on the parties' compliance with the commitments (*paragraph 116, Draft Remedies Notice*).

The divestiture trustee may or may not be the same person or institution as the monitoring trustee. Such a trustee is used where the parties fail to find a suitable purchaser for the to-be divested business within a certain time period following conditional clearance (typically, six months). The divestiture trustee is given an irrevocable and exclusive mandate to dispose of the business within a specific deadline (typically, three months) at no minimum price. It can include the terms and conditions that it considers appropriate for a convenient sale.

CONDUCT REMEDIES

The Commission and the US anti-trust authorities usually prefer divestiture to a suitable buyer (*see above, Remedies - general: Preference for structural remedies*). However, they are prepared to consider other remedies in certain circumstances. This section considers the approach of each of the authorities in turn.

The Commission

Although the Commission usually prefers divestiture to a suitable buyer, it can accept other remedies, such as:

- **The removal of links with competitors.** Links between parties and competitors, particularly minority shareholdings, can contribute to the competition concerns raised by the merger. The Commission usually prefers the parties to divest these shareholdings (*see above, Remedies - general: Preference for structural remedies*).

  However, exceptionally, the Commission may accept a waiver of rights linked to minority shareholdings as an alternative. An example is the case of *Toshiba/Westinghouse (Case No COMP/M.4153, Commission Decision of 19 September 2006)*, in which the Commission investigated Toshiba's acquisition of Westinghouse, both active in the nuclear sector.

  Although the parties' activities were largely complementary, the Commission expressed concern over Toshiba owning Westinghouse while at the same time holding a minority share (together with General Electric and Hitachi) in the nuclear fuel assembly supplier GNF. Westinghouse, Areva and GNF were the largest suppliers worldwide of nuclear fuel assemblies.

  To eliminate the risk that Toshiba could impede competition through the joint venture, it agreed to modify its contractual arrangements with its partners in GNF relating to:

  - board representation;
  - veto rights; and
  - access to certain confidential information.

- **Certain access remedies.** The Commission has accepted commitments granting access, either to facilitate competitors entering the market or to avoid foreclosure. Examples include access to:

  - pay-TV platforms;
  - airport slots;
  - energy via gas release programmes or electricity auctions;
  - IP rights;
  - information necessary for the interoperability of competitors' products.

  The Commission only accepts these commitments if it concludes that competitors will probably use them. These access remedies are often complex and require monitoring to render them effective. However, they typically include measures that allow third parties themselves to enforce the commitments through a fast-track dispute resolution mechanism, which avoids the Commission's permanent monitoring (*paragraph 66, Draft Remedies Notice*).

Cross-border

The Commission has accepted remedies such as these, both as a stand-alone commitment and in support of a divestiture commitment. In *Evraz/Highveld (Case No COMP/ M.4494, Commission Decision of 20 February 2007)*, the Commission was concerned over the parties' combined market position at all levels of the supply chain for vanadium, a metal primarily used in the production of alloys. To remove these concerns, the parties agreed to make certain divestitures that would reduce the parties' strong position in vanadium feedstock and remove all overlaps between Evraz and Highveld with respect to vanadium oxides and vanadium finished products. In addition, Evraz committed to maintain and strengthen its existing vanadium feedstock supply relationships with the vanadium-processing industry.

However, the Commission is reluctant to accept non-divestiture remedies which concern promises by the parties to abstain from certain future behaviour (*see above, Remedies - general: Preference for structural remedies*).

The Antitrust Division

The Antitrust Division also strongly disfavours conduct-based remedies (*see above, Remedies - general: Preference for structural remedies*). However, in those rare cases where implementation of structural remedies would diminish existing competitive efficiencies, it does approve stand-alone conduct-based remedies such as (*pages 22 to 24, Antitrust Division Policy Guide*):

- Firewalls.
- Fair dealing provisions.
- Transparency provisions.

In addition, the Antitrust Division has used:

- Conduct remedies to address concerns with possible vertical foreclosures (*for example, see the consent order in U.S. v. Northrop Grumman Corp. and TRW, 68 Fed. Reg. 1861 (1/14/03)*).
- Licence agreements instead of divestitures. For example, the Antitrust Division required Moneyline Telerate to license two of its software platforms to a third party before being acquired by Reuters in 2005 (*Press Release, Department of Justice, Reuters Ltd. and Moneyline Telerate Restructure Proposed Deal to Alleviate Justice Department's Antitrust Concerns (May 24, 2005)*).

The Antitrust Division, like the FTC, also uses conduct remedies to support the success of the structural relief (*pages 18 to 20, Antitrust Division Policy Guide*) (*see below, the FTC: Conduct restrictions ancillary to divestiture*).

The FTC

While generally preferring structural remedies, the FTC has accepted alternatives to the traditional divestiture of an operating business with greater frequency in recent years. For example:

- **Co-operation and equal treatment terms.** The FTC declined to demand divestitures in the creation of United Launch Alliance (ULA), a joint venture between Boeing and Lockheed Martin, despite various competitive concerns. The FTC's concern with the deal was based on both the:
  - significant difficulties in entering the market for launch services;
  - potential loss of competition between Boeing and Lockheed for future launches.

  In addition, the Department of Defense had raised additional concerns including the possibility that:
  - ULA would favour its parent companies' space vehicle businesses;
  - Boeing and Lockheed might attempt to raise additional barriers to entry in the launch services market; and
  - competitively sensitive information from third parties would be shared among ULA, Boeing and Lockheed to the detriment of competition in related markets, such as the market for space vehicles.

  The FTC drafted a narrowly tailored consent order that addressed national security and industry specific concerns and sought to maintain competition in the markets for launch services and space vehicles by requiring that (*In the Matter of The Boeing Co., Lockheed Martin Corp., and United Launch Alliance, File No. 051-0165 (3 October 2006)*):
  - ULA co-operate on equivalent terms with all providers of government space vehicles;
  - Boeing and Lockheed Martin provide equal consideration to support to all launch services providers; and
  - all three entities safeguard competitively sensitive information obtained from other space vehicle and launch service providers.
- **Relinquishing rights over companies.** When Boston Scientific acquired Guidant in 2006, the FTC made use of a novel conduct remedy. While divestiture of the key overlapping assets to an up-front buyer was the primary focus of the consent agreement, an additional concern was that Boston Scientific owned a substantial minority interest in another company, Cameron. Cameron was developing products that may compete in the future with products already offered by the newly combined Boston Scientific/Guidant entity. Rather than forcing a divestiture, the consent decree required that Boston Scientific relinquish its rights to receive information from or exercise control over Cameron and appoint an independent proxy to exercise any such rights in the best interests of BSC as an investor and not as a competitor (*In the Matter of Boston Scientific Corp. and Guidant Corp., FTC Docket No. C-4164 (21 July 2006)*).
- **Granting third party rights.** In 2005, the FTC challenged Aloha Petroleum's purchase of the gasoline assets of Trustreet Properties, which would have reduced the number of gasoline marketers with access to a refinery or import terminal in Hawaii from five to four. The FTC agreed to approve the transaction without a divestiture when Aloha Petroleum announced it would enter into a 20-year throughput

agreement allowing a third party substantial rights to use Hawaii's only import terminal (*see Press Release, Federal Trade Commission, FTC Resolves Aloha Petroleum Litigation ((6 September 2005)*).

- **Conduct restrictions ancillary to divestiture.** In the *Boston Scientific* case, for example, the FTC also imposed conduct restrictions ancillary to divestiture, including restricting contact between employees of the divested and retained businesses that operate in a single workplace, to support the success of the structural remedy.

- **Non-discrimination provisions.** Like the Antitrust Division, the FTC has used these to address concerns with possible vertical foreclosures (*see the consent in In the Matter of America Online, Inc. and Time Warner, FTC Docket No. C-3989 (17 April 2001)*).

- **Licence agreements in lieu of divestiture.** For example, in the *Johnson & Johnson/Guidant* merger, the FTC was concerned with competition in the market for drug eluting stents, which are used to treat coronary artery disease. The FTC alleged that the transaction would cause significant harm by eliminating Guidant as a third potential competitor with the ability to offer drug-eluting stents on a rapid exchange system. Guidant was the only potential market entrant with access to the rapid exchange patents in the US. Although the FTC concluded that the addition of a third competitor would probably increase competition and reduce prices, no divestiture was required. Instead, the consent order required that Johnson & Johnson grant a fully-paid, non-exclusive, irrevocable licence allowing Abbott, another company that was developing drug-eluting stents, access to the rapid exchange technology. This maintained the potential for three significant competitors in the market. (*In the Matter of Johnson & Johnson, FTC Docket No. C-4154 (21 December 2005).*)

  The FTC used a similar remedy for Cephalon's acquisition of Cima Labs in 2004, requiring Cephalon to grant a licence to sell a generic version of the breakthrough cancer pain drug Actiq to a third party (*In the Matter of Cephalon Inc. and Cima Labs Inc., FTC Docket No. C-4121 (20 September 2004)*).

FUTURE DEVELOPMENTS

Although it is difficult to set out in certain, the following are likely future trends concerning the Commission and the US competition authorities' approaches to merger remedies:

- The authorities will continue to focus on structural remedies.

- In evaluating proposed divestitures, the authorities will continue to place great emphasis on the viability of the divested business.

- The authorities (perhaps the FTC more than the Antitrust Division or the Commission), may look to more creative non-structural remedies.

- Despite the general similarities in their approach to merger remedies, the FTC and the Antitrust Division will continue to diverge on some aspect of their approach, due in part to the role of the court in approving Antitrust Division consent decrees.