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Chapter 2

Merger Remedies in the US and Europe

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I. Introduction

The issue of regulatory remedies often lies at the very heart of the merger planning process. Companies considering acquisitions of competitors must understand not only the lines of business that antitrust enforcers may target for remedies, but must also assess their own ability to complete a divestiture of those potentially adverse overlapping assets under the conditions that will be imposed on them, and the potentially adverse economic impact on the value of the transaction that can arise from being forced to implement a merger remedy. Target companies must be able to assess the relative attractiveness of competing offers, two key elements of which will be the ability of the acquirer to complete the transaction, and the length of time it will take to do so. Both parties will take the possibilities of merger remedies into account when negotiating the antitrust risk-shifting provisions in the acquisition document. By understanding the merger review processes the transaction will face, and in particular the remedies processes, parties to acquisitions will be able to make more informed judgments about the level of risk that a transaction poses, and the potential economic impact to the transaction that a merger remedy could create.

This chapter focuses primarily on the recent developments in merger remedies in the United States and the European Union. To place the remedies discussion in context, we first provide a brief overview of the merger review processes in the US and in Europe, and the applicable legal issues that give rise to merger remedies. We next summarise the enforcement authorities' "best practices", which provide substantial guidance to merging parties as to the nature and scope of remedies that the authorities will expect to be tendered by the parties. Application of those best practices is illustrated by a review of recent merger remedies decisions and the European Commission's recently published revised Notice on Remedies Acceptable under Council Regulation No 139/2004 and under Commission Regulation No 802/2004 (the "EC Merger Remedies Notice"). Along the way, we offer some practical tips and observations based on first hand experiences with the merger remedies process.

II. The Merger Review Process

A. Which US Agency Reviews - Does It Matter?

In the U.S., the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ") serve as the primary federal authorities responsible for evaluating a transaction's competitive significance. Each has the power to prescribe remedial measures if, after a detailed review of the merits, it believes that the transaction, in whole or in part, is likely to be anticompetitive. The determination of which agency reviews a particular transaction depends primarily on the industry that is the subject of the acquisition - the FTC, for example, generally reviews transactions involving the energy (oil and gas), health care, automobile, and chemical industries, while the DOJ generally reviews steel, transportation and telecommunication industry mergers. Historically, the choice of which US agency reviewed the transaction did not matter to the point of being "outcome determinative" - that is, most transactions would have turned out the same way had they been reviewed by the other agency.

Under the Bush Administration, however, at least some transactions that were not challenged by the DOJ (such as *Whirlpool/Maytag*), may well have been challenged had they been at the FTC. And looking ahead, there may well be an outcome difference, because of the combination of (a) the D.C. Circuit's decision in *FTC v. Whole Foods*, 533 F.3d 869 (D.C. Cir. 2008), and its implications for the application of Section 13(b) of the FTC Act to merger injunction actions, and (b) the FTC's proposal to expedite its administrative trial timelines (73 Fed. Reg. 58832 (Oct. 7, 2008)). Arguably, the FTC will face a lower burden in court than the DOJ when seeking a preliminary injunction, and merging parties that find themselves in front of the FTC will have to consider that as part of their overall strategy, including when to engage in a remedies discussion.

B. The Post-Consent Process for Merger Remedies

The *SBC/AT&T* case also serves as a reminder that the consent of the reviewing authorities to a merger remedy is not the end of the process. The Antitrust Procedures and Penalties Act (the "Tunney Act"), 15 U.S.C. §§ 16(b)-(h), requires the DOJ to file with the District Court and publish in the Federal Register, the complaint, the proposed consent judgment and a Competitive Impact Statement describing, among other things, the nature of the proceeding, the alleged violations that gave rise to the antitrust challenge, an explanation of the consent agreement and a description of the remedies available to private injured parties. The filing must be published in the Federal Register for 60 days, after which the DOJ must publish its response to any written comments submitted by the public. The District Court then must determine, in light of the public comments and advocacy by the public before the Court, whether the DOJ's remedy adequately addresses the competitive harm identified in the accompanying complaint. While Tunney Act proceedings are often pro forma, the *SBC/AT&T* proceeding was hotly contested, with the Court ultimately upholding DOJ's negotiated remedy in a decision that articulated

the proper role for the Court in a Tunney Act proceeding. Civ. Action No. 1:05CV02102 (EGS) (D.D.C. 2006).

The FTC post-consent process similarly seeks public comments, but does not involve court review. After provisionally accepting a consent decree, the FTC will place the proposed order, the complaint, and an Analysis to Aid Public Comment (the counterpart to the DOJ's Competitive Impact Statement) on the public record for 30 days, and will also publish the materials in the Federal Register. After the comment period, the FTC reserves the right to accept, modify or withdraw approval for the provisional consent order, although in practice it has never withdrawn an order that has been provisionally accepted.

In Europe, the European Commission ("EC") is responsible for evaluating a transaction's competitive significance, and agreeing to remedial measures. According to the European Court of First Instance, remedies have to eliminate entirely the competition concerns and have to be comprehensive and effective from all points of view. While the parties offer the commitments, the Commission ensures their enforceability by making the authorisation of the merger subject to compliance with the commitments.

In the EC procedure, the parties may decide to offer commitments in the first or the second investigation phase. Because an in-depth market investigation is only carried out in Phase II, however, commitments offered in Phase I must be sufficient to clearly rule out 'serious doubts' within the meaning of Article 6(1)(c) of the Merger Regulation. Pursuant to Article 10(2) of the Merger Regulation, the Commission has to take a clearance decision as soon as the serious doubts referred to in Article 6(1)(c) are removed as a result of commitments submitted by the parties. This rule also applies to commitments proposed in Phase II proceedings before the Commission issues a Statement of Objections. If the Commission reaches the preliminary view that the merger leads to a significant impediment to effective competition and issues a Statement of Objections, the commitments must be sufficient to eliminate such a significant impediment to effective competition.

III. Competition Authority's Analysis of Mergers - How Merging Parties Get to the Remedies Process

To aid practitioners in understanding the remedy process, each of the competition authorities has published guidelines designed to increase visibility into the respective authority's remedies decision making. The guidelines allow parties to a prospective merger to weigh the potential risks of entering into a transaction that is likely to involve a remedy.

Given the increasing level of convergence in merger enforcement generally, it should come as little surprise that the stated goals included in each of the competition enforcement authorities' respective guidelines are remarkably similar. The Federal Trade Commission's Bureau of Competition Statement on Negotiating Merger Remedies (the "FTC Statement") provides that the goal in promulgating merger remedies is "to prevent the anticompetitive effects likely to result from a merger that the Commission has determined is unlawful". Similarly, in its Antitrust Division Policy Guide to Merger Remedies (the "DOJ Guide"), the DOJ states that its goal in promulgating remedies is to "restore competition". And in the EC Notice, it identified a goal of "rendering [a] concentration compatible with the common market".

The authorities seek to restore the status quo ante in promulgating merger remedies, but to do so, they must identify the portions of a transaction that are likely substantially to reduce competition. The authorities thus engage in a detailed, fact-based analysis into current competitive conditions in the relevant market, the post-merger conditions likely to prevail, the efficiencies the merger will likely generate, and the prospects for entry, post-merger, to constrain the merging parties' ability to raise price or reduce output. The authorities will challenge transactions that are likely to eliminate actual, direct and substantial competition; that tend to create a monopoly in a relevant market; that increase the likelihood that one party to the merger will exercise market power; that reduce the incentive to innovate; that will likely result in higher prices for consumers; and in which entry by other firms would not be timely, likely or sufficient to deter or counteract the anticompetitive effects described above. A detailed discussion of the merger analysis process is beyond the scope of this chapter, but suffice to say that each transaction presents a unique set of facts and competitive concerns. Cases can be straightforward, e.g., the FTC's review and challenge of Jarden Corporation's acquisition of K2 Inc. (top two competitors in national markets for research, development, manufacture and sale of monofilament fishing line - divestiture of all assets related to the manufacture and sale of four types of monofilament fishing line required), or more complex, e.g., the DOJ's review of AT&T's acquisition of Dobson Communications (combination of largest and ninth largest mobile wireless telecommunications service providers in the U.S. required analysis of multiple geographic markets, with remedies required only in certain of the overlap markets). At some point in the process, however, it becomes evident that the merging parties will need to either tender a remedies proposal, or consider litigating.

IV. Merger Remedies Best Practices

A. Overview

As the DOJ Guide notes, DOJ consents to remedies that have a "logical nexus" to the alleged violation and that "preserve[s] the efficiencies created by [the] merger...without compromising the benefits that result from maintaining competitive markets".

As a general rule, remedies can be divided between structural and conduct remedies. The authorities overwhelmingly prefer the use of structural remedies - conduct remedies tend to entangle the authorities and the courts in the operations of a market or the parties on an ongoing basis, resulting in additional and often substantial costs. As the EC Notice succinctly states, structural remedies do not "require medium or long-term monitoring measures". In fact, of the approximately fifteen mergers identified in the most recent FTC Bureau of Competition Antitrust Enforcement Activities Report (the "Enforcement Report"), resulting in a consent order since January 1, 2007, only two involved predominantly conduct related remedies.

B. Structural Remedies

In both the U.S. and in Europe, implementing structural remedies generally takes the form of forcing a sale of physical assets, and/or intellectual property rights, to an approved, third-party buyer. The DOJ Guide describes structural remedies as "clean and certain" and generally able to "avoid costly government entanglement in the market".

The FTC, DOJ and the EC agree that the most effective structural remedy involves the sale of assets that, pre-divestiture, operated as a viable, competitive and stand-alone business; such a package is generally thought to contain all the components necessary to

operate autonomously under new ownership, and best facilitate the re-creation of the premerger competitive environment. (In the context of a joint venture, the EC Merger Remedies Study has shown that departing the JV was an effective remedy.) The purchase of a competitive, fully functional business may, but will not necessarily, be more attractive to a potential buyer - the buyer will not have to invest significant amounts of capital and manpower, beyond the purchase price, to make the business a viable, stand alone, competitor, but it also may not perceive significant synergies as being available from integrating partial business assets into its own operations.

C. Conduct Remedies

The FTC, DOJ and EC have identified a number of conduct remedies that can be used to alleviate the prospective anticompetitive effects of a merger. The EC cases discussed below tend to focus on access remedies, which include the granting of access to key infrastructure, networks, and technology, including patents, know how or other IP rights. The DOJ has also identified several types of conduct remedies, including supply agreements, firewalls, fair dealing provisions, and transparency provisions. But stand-alone conduct relief almost never occurs in horizontal cases unless the underlying industry is subject to close government oversight, or as in the **News Corporation Limited** ("*Newscorp*") transaction, where the competitive harm derived more from the denial of rights to an intangible input needed to compete.

In *Newscorp/Telepiű*, Case COMP/M.2876, the EC used a conduct remedy, in part, to ensure competitive access to all essential elements of a pay-TV network. Newscorp proposed to acquire both Telepiű, a pay T.V. platform operating predominantly in Italy, and Stream, a pay T.V. platform also operating in Europe. The EC claimed that, among other things, the merger would result in a near monopoly in the pay T.V. market in Italy. It also noted that very few competitors existed, and that the costs of entering the business, including programming and subscriber acquisition costs, were extreme. The EC required the parties to make available to other providers access to (1) necessary content, (2) the relevant technical platforms, and (3) all necessary technical services, before it would allow the merger to proceed. Additionally, the EC limited the duration to which the parties could enter into exclusive contracts with programming providers.

Although the EC also required the parties to divest Telepiű's digital and analog terrestrial broadcasting business (a structural remedy), the divestiture was tangential and designed to prevent the merged company from potentially becoming dominant in the digital broadcasting business, as well as the pay T.V. business. The EC actually used the conduct portion of the remedy to alleviate the competitive concerns in the primary pay T.V. market. Because the acquisition of programming served as the most significant barrier to entry, and other potential competitors such as cable and free-to-air providers existed, the EC required the merged entity to essentially make programming readily available to other potential providers.

The FTC has also utilised conduct remedies to alleviate the anticompetitive concerns of prospective transactions. The Boeing Company and Lockheed Martin Corp were the only two competitors in the satellite launch services market, and comprised two of the three competitors in the space vehicle market. In addition to the extremely high levels of concentration in each market, the FTC noted that development and design of products in both markets required many years and billions of dollars in costs, making entry virtually impossible. Accordingly, the FTC charged that the transaction would significantly reduce competition in both markets. The parties, however, agreed to take certain steps to address competitive concerns, including agreeing to nondiscrimination requirements in choosing and working with Launch Service and Space Vehicle contractors and agreeing to various firewalls.

Although the two companies provided the overwhelming majority of services in both markets, the FTC nonetheless allowed the transaction to proceed without requiring a structural remedy. As Commissioner Harbour explained, the transaction implicated significant national security interests, and resulted in significant efficiencies by combining the technical expertise of two companies highly regarded by the Department of Defense ("DoD"), the agency that would be overseeing the production of various products. Further, the FTC remedies "addressed the ancillary competitive harms that DoD identified as not inextricably tied to the national security benefits".

Pure conduct remedies still remain the exception; more common merger settlements involve primarily a structural remedy, perhaps coupled with some form of on-going support to ensure immediate competitive viability by the divestiture buyer. Thus, in *Schering-Plough/Akzo Nobel*, for example, the FTC agreed to a structural remedy - divestiture of all assets required to develop, manufacture and market certain vaccines used to treat poultry, coupled with the signing of a transition services agreement under which the merged firm would provide vaccines for a period of two years. The transition services agreement enables the divestiture buyer to be immediately competitive, albeit with the support of the merged firm, while it develops and deploys its own assets including, where relevant, obtaining the necessary approvals of government authorities (such as the FDA). A similar model was recently followed by the FTC in *Reed Elsevier/ChoicePoint.*

D. The Increasing Use of Up-Front Buyers

Aside from the specific contours of the merger remedy (the package of assets to be divested), the authorities view the identity of the divestiture buyer to be crucial to the success of the remedy. The authorities agree that it makes little competitive sense to allow the merged entity to divest a business to a party that lacks the resources, plans, or incentive to compete. Divestment to such a business fails to advance the authorities' agenda of restoring competition to pre-merger levels, and could actually serve to enhance the merged entity's post-merger market power. The authorities, therefore, have more frequently insisted on "up-front" buyers who have had the opportunity to conduct due diligence, and to negotiate for themselves the package of assets that they believe is adequate to enable them to compete successfully.

Whether the merger remedy involves an up-front buyer or not, the parties are required to seek the competition authority's approval of the prospective divestiture buyer. This allows the authority to vet the buyer to ensure that it meets certain threshold requirements. The authority will review the buyer's business plans for the divestiture business, and will assess whether the buyer has the necessary resources to compete effectively. Competition authorities are well-aware that once the divestiture is completed, unwinding or reversing the effects of an ill-fated divestiture is generally impossible, and only civil penalties against the merged party can then be obtained. While such penalties may have a salutary effect on reducing future non-compliance, they do nothing to address the authority's original objective to restore the competitive status quo ante in the specific case at hand.

Keeping those guiding principles in mind, the authorities have identified several general characteristics of qualified buyers:

- buyers must have demonstrated their ability to achieve the remedial purposes by participating in related product

markets or adjacent geographic markets, in up-stream or down-stream markets, or by previously expressing an interest in entering the market;

- ability to exercise market power, though fringe competitors may be acceptable;
- buyers should be independent of and unconnected to the parties; and
- buyers should possess the financial resources to develop the divested business into an active competitive force.

In roughly half of the FTC mergers resulting in consents since the beginning of 2007, the FTC has insisted that the merging parties divest to a *specific* buyer, a trend that is likely to continue in the future. The DOJ and the EC, and recently the UK's Office of Fair Trading ("OFT") have also required divestiture to up-front buyers.

For example, in Reed Elsevier's recent acquisition of ChoicePoint, Inc., the FTC required Reed Elsevier to divest to Thomson Reuters Legal Inc. all assets relating to ChoicePoint's Auto Track XP and Consolidated Lead Evaluation and Reporting electronic public records service, services used to provide electronic public records to law enforcement. The FTC required the divestiture specifically to Thomson Reuters because it already had a large and experienced sales force with existing relationships in the relevant market, and would be best positioned to use the divested resources to compete effectively with Reed Elsevier's LexisNexis business.

Since January 1, 2007, all of the pharmaceutical transactions challenged by the FTC have required divestiture to a specific purchaser:

- In *AGroup/Abrika Pharmaceuticals*, the merged entity was required to divest to Cobalt Laboratories all rights and assets necessary to produce generic israpidine.
- In *Hospira Inc./Mayne Pharmaceuticals*, the merged party was required to divest to Barr Pharmaceuticals all rights and assets necessary to produce hydromorphone, nalbuphine, morphine and deferoximine.
- In *Johnson & Johnson/Pfizer*, the parties were required to divest all rights and assets relating to Pfizer's Zantac H-2 blocker business to Boehringer Ingelheim, and Pfizer's Cortizone anti-itch business, Pfizer's Unisom night-time sleep aid business and Johnson & Johnson's Balmex diaper rash business to Chattem, Inc.
- In *Mylan Laboratories/Merck Pharmaceuticals*, the parties were required to divest all rights and assets relating to generic flecainide acetate tablets, generic acebutolol hydrochloride capsules, generic guanfacine hydrochloride tablets, generic nicarpidine hydrochloride capsules, and generic sotalol hydrochloride to Amneal Pharmaceuticals.
- In *Schering-Plough/Organon Biosciences N.V.*, the parties were required to divest all assets required to develop, manufacture and market various poultry vaccines to Wyeth.

It should be noted that, in addition to the enforcement authorities' preference for an up-front buyer, the merging parties may also prefer the certainty that an up-front buyer offers. Where the buyer is unknown, the authorities will insist on a package of divestiture assets that would enable any of a number of potential purchasers to compete effectively. With an up-front buyer, however, the parties will have had the benefit of due diligence and a negotiated deal, so that the specific package of assets to be divested will have been identified in advance. With highly qualified up front buyers, that package of assets may be less than would be required by less well-positioned buyers. For example, in *Reed Elsevier/ChoicePoint*, the FTC required divestiture of a stated list of assets to Thomson Reuters, but then defined a longer list of "Supplemental Assets" that Reed Elsevier would have to make available to a potential buyer in the event that the divestiture to Thomson Reuters did not occur.

Though the DOJ employs up-front buyer requirements less often than the FTC, it did so recently in *UnitedHealth Group/Sierra Health Services*. There, the DOJ required the merged entity to divest the SecureHorizons Medicare Advantage HMO plans to Humana. Although not a significant player in the particular geographic market, Humana had significant experience in the industry, had the financial capabilities to enter and compete and had the incentive to do so. Other smaller firms existed, but DOJ felt that those firms faced substantial cost, reputation, and distribution disadvantages that would prevent them from expanding membership and acting as a competitive constraint to the merged firm, which would have had a 94% market share. Humana was seen as the one buyer that would effectively remedy the effects of the merger.

The OFT recently accepted its first up-front buyer provision in a consent agreement settling concerns arising from Air France KLM group's proposed acquisition of VLM Airlines N.V., the two major competitors for business passengers on the London City Airport -- Amsterdam Schiphol Airport route. The OFT noted that after the merger, "carriers in the AF-KLM group [would have] account[ed] for over 70 percent of weekly flights". And based on its experience in previous airline mergers, there was insufficient evidence to suggest that rival airlines could replace the lost competition. The OFT, however, noted that Eastern Airlines Limited would serve as an acceptable buyer because it already flew business passengers in the U.K. and was well-situated to increase flights on the specific route, and thus the OFT required Air France KLM to divest airline slots to Eastern at both airports.

E. Timeline to Complete Required Divestitures

Historically, the authorities permitted relatively lengthy periods for the merging parties to complete a divestiture - often as long as 6-12 months or even beyond. The authorities have come to the view, however, that these longer periods run too much risk of interim harm to the divestiture business. Indeed, from the authorities' perspective, one of the significant advantages to up-front buyers is that the divestiture concludes within a matter of days following the underlying merger, and generally must occur within 10-15 days at the outside. That eliminates the need for more formal Hold Separate and Asset Preservation Orders that otherwise would be commonly required.

In the absence of an up-front buyer, however, the recent practice is to require that the remedies be implemented within a relatively short time period - generally not more than 120 days. The DOJ order in *Verizon/Rural Cellular* required divestitures to be completed within 120 days; the order in *Pearson/Reed Elsevier* required divestitures be completed within 90 days. Divestiture timelines this short require that the parties have identified potential purchasers, and be into due diligence, more or less contemporaneously with their signing the consent order, as otherwise they are likely to miss the divestiture deadline.

F. Untimely and Unsuccessful Divestitures

When parties sign the enforcement authority's consent documents, they are committing themselves to complete the divestitures within the time required, and otherwise to fulfill their decree obligations. Occasionally, circumstances arise where it is necessary to seek an extension of the divestiture deadline, and where there is sufficient good cause to do so, the authorities will consent (as has happened recently in the DOJ's decree in *Thomson/Reuters* and in the FTC's decree in *Linde/BOC*). Eventually, however, the authorities will require the use of a divestiture trustee if it is concerned that the

parties are unable or unwilling to complete the required divestiture in a timely manner, and virtually all orders include a divestiture trustee provision, even if there is an up-front buyer.

Where the order requires some level of on-going interaction between the merged party and the divestiture buyer, decrees will now typically include provision for a monitor trustee as well, who can oversee the on-going interactions between the parties. The EC Merger Remedies Notice, for example, includes such a provision, and they are commonplace in many FTC orders now.

But even the most well-planned merger remedy will sometimes fail, as happened in the *Boston Scientific* case. There, the FTC required Boston Scientific to provide to Hewlett Packard as an up-front buyer, its technology, licenses and know-how relating to Boston Scientific's intravascular ultrasound catheters devices. According to the FTC's challenge, ultimately upheld by the District Court, Boston Scientific refused to provide its latest catheters to HP, withheld intellectual property for its "automatic pullback device" and interfered with HP's own efforts to develop similar technology. HP eventually withdrew from the business. While the FTC did collect $7 million in civil penalties, because the agency ultimately did not succeed in addressing the competitive harm from the underlying merger in *Boston Scientific*, it now seeks more stringent assurances to prevent such an occurrence in future cases.

G. The EC Merger Remedies Notice

On October 22 the EC published the long awaited revised notice on remedies acceptable under the EC Merger Regulation, as well as corresponding amendments of the merger implementing regulation. The EC Merger Remedies Notice comes after a series of decisions by the European courts and an extensive study on the effective design and implementation of merger remedies in Commission cases ("Remedies Study"). It further follows a public consultation that was held on the basis of a draft notice in 2007.

The main changes of the reform include the introduction of a form for submitting information on remedies in the merger procedure ("Form RM"), clarifications on the burden of proof, detailed guidance on various kinds of remedies and several substantive criteria as well as clarification on the role of the trustee.

Some highlights of the revised remedies package:

- As a consequence of the Court of First Instance judgment in EDP (case T-87/05), the EC has now acknowledged that "it is for the Commission to establish whether or not a concentration, as modified by commitments validly submitted, must be declared incompatible with the common market because it leads, despite the commitments, to a significant impediment of effective competition" (EC Merger Remedies Notice, paragraph 8). This reverses the EC's previous position, which placed the burden on the merging parties.
- The EC now not only requires an explicit exclusion of the assets or personnel that shall not be divested but will only accept such exclusions "if the parties can clearly show that this does not affect the viability and competitiveness of the business" (paragraph 29). It is questionable whether this allocation of burden of proof is in line with the principles laid out above.
- For several years the Commission has asked the parties to use model texts for divestiture commitments for the submission of their suggested remedies and the trustee mandates. These template texts have been extended and standardised over time. In the new remedies package they have been upgraded to form part of the Commission's official guidance through explicit reference in the Revised Notice (paragraph 21). Section 3 of the Form RM even requires that the parties offering commitments "identify any deviations of the commitments offered from the pertinent Model Commitments texts published by the Commission's services, as revised from time-to-time, and explain the reasons for the deviations".
- Several provisions have been added or expanded in the Revised Notice, most of which more or less reflect developments in the remedies practice of the Commission since 2001 - partly influenced by the Remedies Study. These include detailed guidance on:
  - carve-out remedies (i.e. the legal and physical separation of the assets of the divested business from the parties' retained business);
  - re-branding remedies (i.e. remedies where the exclusive license to a brand is granted for a number of years, during which time the licensee is expected to develop its own new brand);
  - non re-acquisition (i.e. the prohibition on the divesting company to re-acquire the divested business within a certain time period, normally 10 years);
  - the suitability of purchasers;
  - fix-it-first remedies (i.e. cases where the parties identify and enter into a legally binding agreement with a buyer outlining the essentials of the purchase during the Commission procedure);
  - the duration of other remedies; the review clause (i.e. a clause in the commitments allowing the Commission to waive certain commitments at the request of the parties); and
  - the role of monitoring trustees (i.e. a trustee appointed by the parties to oversee the parties' compliance with the commitments, in particular with their obligations in the interim period and the divestiture process).

The EC Merger Remedies Notice and the amended merger implementing regulation have been published in the EU Official Journal entered into force October 23, 2008. While merging parties and practitioners will need to accumulate experience before any final judgments can be made, it seems clear that the revised remedies package will add cost and complexity to an already difficult, tedious and expensive remedies procedure. Nonetheless, the experience of the US authorities suggests that clear guidance to the merging parties can facilitate the crafting of even complex remedies that will be viewed as acceptable. Particularly where the segment to be remedied is a small portion of a large, and overall acceptable, transaction, a clearer, even if complex, roadmap may have its advantages.

V. Conclusion

Competition authorities have become increasingly sophisticated about the merger remedies process, and have accumulated enough experience to understand - and insist on - merger remedies with the highest likelihood of success. Merging parties facing the prospect of having to remedy some aspect of their transaction need to understand how the remedy process will work in their case, and the timelines that they likely will face in completing a remedy. Moreover, knowing which businesses have to be sold is only half the story - if there is no approvable buyer in sight (and in the current environment, a buyer who can fund the transaction), then even a well-designed remedy might not gain approval.

From a competition policy standpoint, there remains some question whether the rare failure (*Boston Scientific*) from among so many merger remedies, should be viewed as unacceptable, given the multiplicity of reasons why divestitures succeed, or fail. If the authorities seek to have a "zero failure" rate, they are likely to impose on every transaction what amounts to a tax, in the form of

greater divestiture procedural requirements, the divestiture of assets beyond what is necessary to remedy the identified competitive harm, or possibly even the discouragement of largely beneficial transactions. The rare *Boston Scientific* case should not overwhelm the fact that, in modern times, merger remedies are far more successful than ever before, and the processes already in place are quite robust, as parties who have been involved in the process can readily attest.

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Dr. Werner Berg, LL.M. is a partner in the Brussels office of Crowell & Moring`s Antitrust Practice Group. For over 10 years, he has provided antitrust counsel to industry-leading multi-national companies in connection with both merger and non-merger matters, before the European Commission, the German Bundeskartellamt and the German Landeskartellämter as well as various other national competition authorities in Europe and beyond, with recognised expertise in mergers, abuse of dominance procedures and antitrust-IP related issues. Dr. Berg is recognised as a rising star by Legal 500 Europe and recommended in European Legal Experts since 2003. Dr. Berg is a regular author of competition law-related articles and has contributed to four of the leading treatises on European law on mergers, cartels, damage claims, state monopolies, health and consumer protection. He teaches European Merger Control at the Academy of European Law since 2002 and German Merger Control at Queen Mary College in London since 2007.

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