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Disentangling Consummated Mergers – Experiences and Challenges – Note by the United States

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More documents related to this discussion can be found at https://www.oecd.org/daf/competition/disentangling-consummated-mergers-experiences-and-challenges.htm

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United States

1. Legal framework for the review of consummated mergers

1. The Department of Justice and the Federal Trade Commission (collectively, "the Agencies"), state and district attorneys general, and private parties can challenge mergers and acquisitions. Most merger challenges are brought under Section 7 of the Clayton Act. Section 7 of the Clayton Act, the anti-merger law, prohibits mergers and acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.

2. The Agencies, state and district attorneys general, and private parties also can sue a merged firm alleging that the acquisition allowed the firm to unlawfully acquire or maintain a monopoly in violation of Section 2 of the Sherman Act.[1] Mergers can also be challenged under Section 1 of the Sherman Act, which prohibits agreements that unreasonably restrain trade or commerce.

3. In the United States, the same federal law applies to both consummated and unconsummated mergers, and there is no statute of limitations on when the Agencies can initiate a merger challenge.[2] The Agencies, state and district attorneys general, and private parties all have standing to challenge both consummated and unconsummated mergers. Historically, most U.S. merger enforcement involved consummated mergers.[3] During the first several decades following the passage of the Clayton Act, plaintiffs successfully challenged a great number of consummated mergers, both in federal court and in administrative proceedings. Enforcement, however, required protracted litigation.[4] As a result, Congress passed the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, Section 7A of the Clayton Act ("HSR Act"). By requiring premerger notification and imposing a mandatory waiting period for certain acquisitions, the HSR Act provided the Agencies with the opportunity to investigate the potential for harm—and, in appropriate circumstances, bring a legal action to block a merger—prior to consummation. The majority of the Agencies' merger investigations and enforcement take place under our pre-merger enforcement authority, addressing illegal mergers before physical assets, intellectual property, and human capital are combined and assets are allowed to deteriorate. However, as discussed in the prior U.S. submission on "Start-ups, Killer Acquisitions and Merger Control," the

[1] *See Fed. Trade Comm'n v. Meta Platforms, Inc.,* No. 1:20-cv-03590 (D.D.C.)

[2] *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 697–98 (1957).

[3] Challenges to unconsummated mergers were not unheard-of. *See, e.g.*, *United States v. Brown Shoe Co.*, 179 F. Supp. 721, 724 (E.D. Mo. 1959). In *Brown Shoe*, the government challenged a proposed merger on November 28, 1955. The district court ordered the businesses to be operated separately, but the defendants were allowed to merge. They did so on May 1, 1956. *Id.*

[4] A not untypical example is *United States v. El Paso Natural Gas Co*., 376 U.S. 651 (1964), which required a total of 17 years of litigation and eight trips to the Supreme Court before divestiture occurred.

ability to review and, if necessary, challenge non-notifiable transactions, which are often consummated, remains an important element of U.S. merger control.[5]

4. The HSR Act facilitated the Agencies' ability to review and challenge unconsummated mergers, but it did not impose any limits on the long-standing ability to challenge consummated mergers. Thus, the Agencies can challenge any acquisition of stock or assets, without regard to whether the acquisition requires a premerger notification under the HSR Act, before or after a transaction is consummated. The Agencies maintain full authority to investigate and challenge transactions that were not reportable under the HSR Act[6] as well as those that were previously notified under the HSR Act.[7]

5. In the U.S., the Agencies do not "clear" or "approve" mergers as part of HSR reviews. The HSR Act explicitly provides that an Agency decision not to challenge a merger immediately following an HSR review does not affect the Agencies' ability to challenge that merger in the future.[8] If the Agencies undertake an HSR review, then later conclude that a merger may have anticompetitive consequences, they can file a complaint challenging the transaction.[9] Private parties with standing can also challenge a consummated merger that the Agencies reviewed, and obtain full relief, including divestitures.[10]

6. Evidence of post-consummation harm can, of course, be relevant to determining whether a merger violates the Clayton Act or the Sherman Act. However, lack of evidence of immediate harm after consummation is not necessarily outcome-determinative, because the post-merger period may simply reflect the merged entity's awareness of a possible

[5] Note by the United States, Start-ups, Killer Acquisitions and Merger Control, DAF/COMP/WD(2020) 23, https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-killer_acquisiitions_us_submission.pdf.

[6] For example, investigations of non-reportable transactions accounted for nearly 20% of DOJ merger investigations between 2009 and 2013, and nearly one-quarter of those resulted in challenges. *See* Leslie C. Overton, Deputy Assistant Att'y Gen. for Civ. Enforcement, U.S. Dep't of Just., Non-Reportable Transactions and Antitrust Enforcement: Remarks as Prepared for the 14th Annual Loyola Antitrust Colloquium (Apr. 25, 2014), https://www.justice.gov/atr/file/517791/download.

[7] *See, e.g., Chi. Bridge & Iron v. Fed. Trade Comm'n*, 534 F.3d 410 (5th Cir. 2008); Complaint, *U.S. v. Parker Hannifin Corp*., No. 17-cv-01354 (D. Del. Sept. 26, 2017).

[8] 15 U.S.C. § 18a(i)(1).

[9] Two recent examples in 2017 of cases where the Department of Justice did not take action on a notified merger, but later opened an investigation upon receiving complaints from third parties, are Deere & Company (https://www.justice.gov/opa/pr/deere-abandons-proposed-acquisition-precision-planting-monsanto) and Parker-Hannifin (https://www.justice.gov/opa/pr/justice-department-reaches-settlement-parker-hannifin). In Deere & Company, the parties abandoned the transaction; in Parker-Hannifin, the parties settled and agreed to a divestiture to restore competition. *See also,* Menesh S. Patel, *Merger Breakups*, 2020 WISC. L. REV. 975, 990 (observing that, since 2001, the Agencies have challenged at least four mergers that previously underwent HSR review).

[10] *Steves and Sons, Inc. v. Jeld-Wen, Inc*., 988 F.3d 960 (4th Cir. 2021), discussed further below.

challenge.[11] If lack of such evidence were a defense, companies could evade liability by waiting to behave in anticompetitive ways while a lawsuit was threatened or pending.[12]

2. Remedies for consummated mergers

7. In the United States, if a consummated merger violates the antitrust laws, broad equitable remedies are available. Again, whether the merger was subject to mandatory pre-notification is irrelevant. Structural relief in the form of divestitures will almost always be necessary in order to restore competition in the affected market.[13] As the U.S. Supreme Court has explained, divestiture is the "most important of antitrust remedies," and it "should always be in the forefront of a court's mind when a violation of § 7 has been found."[14]

8. The objective of a remedy is to eliminate to the extent possible the competitive harm that has occurred or will occur as a result of the illegal merger, and to restore full, open competition to the relevant market.[15] This will typically require a complete unwinding of the merger.[16] The remedy may require the merged firm to reorganize into two separate, standalone divisions and to divest one division to a new buyer.[17] In some cases, a remedy may require divesting other assets in addition to those directly involved in the illegal transaction or include conduct remedies in addition to the divesture in order to fully restore competition.[18] "[O]nce the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." [19]

[11] *United States v. Gen. Dynamics Corp*., 415 U.S. 486, 504–05 (1974) ("The need for such a limitation is obvious. If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending.").

[12] *Id.*; *see also Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 434-35 (5th Cir. 2008); *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 79-80 (D.D.C. 2017).

[13] *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961). "Complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws." *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972).

[14] *E.I. du Pont de Nemours & Co.*, 366 U.S. at 330–31; *see also* Calif. v. Am. Stores Co., 495 U.S. 271, 280–81 (1990) ("[I]n Government actions divestiture is the preferred remedy for an illegal merger or acquisition.").

[15] U.S. Dept. of Justice, Antitrust Division, Merger Remedies Manual 19 (Sept. 2020), https://www.justice.gov/atr/page/file/1312416/download.

[16] *See, e.g., Promedica Health Sys., Inc. v. Fed. Trade Comm'n,* 749 F.3d 559, 573 (6th Cir. 2014).

[17] *See Chi. Bridge & Iron Co.*, 534 F.3d 410.

[18] *See, e.g., Polypore Internat'l, Inc. v. Fed. Trade Comm'n*, 686 F.3d 1208, 1218-19 (11th Cir. 2012) (Commission's broad discretion to fashion remedies permits inclusion of newly built plant to restore competition and provide buyer with ability to compete).

9. Fashioning an effective remedy for a consummated merger should take into account marketplace realities, including any degradation of assets, and any other relevant market conditions. Of course, a remedy seeks to protect the public interest, not the antitrust violators' private interests.[20]

10. Ordering divestitures following an illegal consummated merger is a natural remedy, given the nature of the violation.[21] Moreover, as compared to alternatives, divestitures tend to be relatively simple, administrable, and effective.[22]

11. In the Agencies' experience, when transactions have been recently consummated, seeking to prevent further integration can help protect market participants and preserve divestiture options. The Agencies have multiple mechanisms for seeking to do so. For instance, the Agencies may seek a voluntary hold separate agreement to prevent the companies' operations from integrating during the pendency of an investigation into the transaction's potential anti-competitive effects. A hold separate agreement is meant to limit the post-merger firm's ability to commingle the newly merged assets until the Agencies can determine whether to seek to unwind the acquisition.

12. The Commission's case against Ottobock[23] offers an example of an agency pursuing this option to ensure the merged firm held the acquired business separate during the pendency of the FTC's administrative trial and subsequent divestiture. In September 2017, Ottobock acquired competitor Freedom Innovations as part of a non-HSR reportable transaction. Prior to the acquisition, the companies were two of the most significant U.S. suppliers of lower-limb prosthetics, including microprocessor-equipped prosthetic knees.

13. FTC staff began investigating the acquisition almost immediately after consummation. On December 19, 2017, just prior to filing the administrative complaint, the FTC and Ottobock entered into a Hold Separate and Asset Maintenance Agreement (the "Hold Separate"). The terms of the Hold Separate were designed to limit the intermingling of assets during the pendency of the litigation, with the goal of allowing certain acquired assets, such as Freedom's microprocessor knee products and technology, to be more easily divested to an FTC-approved buyer.[24] The Hold Separate prevented Ottobock from integrating the newly acquired business and required that Ottobock maintain and operate Freedom as a separate, independent, and viable business throughout the pendency of the litigation.[25] As a part of this Hold Separate, Ottobock agreed to restore all Freedom services, locations, employees, products, and operations.[26]

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[20] *E.I. duPont de Nemours & Co.*, 366 U.S. at 326.

[21] *E.I. duPont de Nemours & Co.*, 366 U.S. at 329 ("The very words of § 7 suggest that an undoing of the acquisition is a natural remedy.").

[22] *Id.* at 330–31 ("Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure.").

[23] *In re Otto Bock HealthCare N. Am., Inc.* (Dkt. No. 9378), https://www.ftc.gov/legal-library/browse/cases-proceedings/171-0231-otto-bock-healthcare-north-america-inc-matter.

[24] FTC, News Release, FTC Approves Otto Bock HealthCare North America, Inc.'s Application to Divest Assets It Gained through Acquisition of FIH Group Holdings, LLC(Dec. 1, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-approves-otto-bock-healthcare-north-america-incs-application-divest-assets-it-gained-through.

[25]*In re Otto Bock HealthCare N. Am., Inc*. 97 (May 7, 2019) (Dkt. No. 9378)(Initial Decision), https://www.ftc.gov/system/files/documents/cases/docket_9378_initial_decision_public_5-7-19.pdf.

[26] *See id*.

14. The Hold Separate required the appointment of a Hold Separate Monitor and a Hold Separate Manager.[27] According to the Hold Separate, these individuals were engaged to ensure the independent operation and competitiveness of the Freedom business. When appointing a Hold Separate Monitor candidate, the Agencies seek an individual that is familiar with the held-separate business and the affected industry and has the experience to effectively oversee the business's operations and maintenance. The Agencies will only appoint a candidate who has no conflicts of interest or the appearance of such conflicts.

15. While the Ottobock Hold Separate was in effect, a member of the Commission's compliance unit met regularly with the Hold Separate Monitor and Manager to review how the Freedom business and products were operating, to identify any concerns that arose, and to monitor whether those concerns were addressed. Depending on the issues that arise during the course of a Hold Separate, an agency may have to expend considerably more time and resources to ensure its maintenance. Notwithstanding these expenses, the Hold Separate can be an important adjunct to the ongoing litigation to ensure an effective future remedy.

16. At trial, Ottobock argued that because it had complied with the Hold Separate, its acquisition of Freedom had not harmed competition. The Commission rejected that argument, finding that "hold separate agreements do not preclude harm to competition or counteract the changed incentives that result from unified ownership."[28] Moreover, the Commission found that during the three months after consummation but prior to executing the Hold Separate Agreement, management at the two companies had communicated to their sales teams that the companies were "aligned in our messaging, . . . with the likely stifling effect on future competition."[29] Thus, the Commission found evidence of substantial past and likely future harm to competition as a result of the consummated merger, notwithstanding that the Hold Separate temporarily interrupted integration of their operations.

17. Notably, the Commission rejected Ottobock's proposed divestiture of only some of the assets it had acquired, finding the lesser divestiture would not have replaced the competitive intensity lost as a result of the merger. As the Commission explained, the lesser divestiture would have been rejected even if it would have lowered market-concentration levels close to the premerger levels.[30] Instead, the Commission ordered the divestiture of Freedom's "entire business," including assets relating to the sale of prosthetic knees and also related foot products. This was necessary in order to offer the buyer the same competitive advantages available to Freedom before the acquisition, and to avoid placing the risk of a failed remedy on consumers.[31] The broader package of assets ensured that the divestiture buyer would have the assets needed to restore lost competition.[32]

[27] *See* Opinion of the Commission, *In re Otto Bock HealthCare N. Am., Inc.*, (Dec. 1, 2020) (Dkt. No. 9378), https://www.ftc.gov/system/files/documents/cases/d09378commissionfinalopinion.pdf ("Ottobock Commission Opinion")

[28] Ottobock Commission Opinion, *supra* note 25, at 34-35.

[29] *Id*. at 35.

[30] *Id*. at 54. Much of the Commission's decision discussing the terms of the offered divestiture is redacted from the public version of the opinion.

[31] *Id*. at 62.

[32] While ruling that divestiture of Freedom's "entire business" was "the appropriate remedy in this case," the Commission did provide "potential exceptions for certain lines of prosthetic foot products that may not be necessary for competition." *Id.* at 63. The FTC-approved buyer elected not to

18. In some instances, the merged firm will be unwilling to enter into a voluntary hold separate agreement. Additionally, the merged firm may propose an ineffective or a partial hold separate that does not facilitate the ultimate remedy. Other relevant factors may militate against devoting the Agencies' scarce resources to seeking, entering into, or enforcing such an agreement.

19. The agencies may seek preliminary injunctive (interim) relief after a merger has been consummated. For example, the Commission's case against ProMedica involved both an administrative complaint and a complaint seeking a preliminary injunction in federal court. In that case, the merging parties agreed to a Hold Separate, then consummated their merger. About five months later, the Commission filed an administrative complaint against ProMedica and joined with the state of Ohio in filing a separate complaint in federal district court seeking a preliminary injunction. The district court granted the preliminary injunction. After trial, the administrative law judge held that the merger was illegal and ordered total divestiture. The Commission affirmed that decision, as did a federal Court of Appeals.[33]

20. In ProMedica, the preliminary injunction extended the term of an existing Hold Separate until the final remedy was accomplished. However, the Agencies have also obtained divestiture and other injunctive relief in cases where there was no Hold Separate or preliminary injunction. In St. Luke's, for example, the parties consummated a merger on December 31, 2012.[34] On March 26, 2013, the Commission joined with the state of Idaho to file a complaint in federal court seeking a permanent injunction.[35] Following a trial, the district court rejected the merged firm's proposed "conduct remedy." Instead, the court ordered full divestiture. The federal Court of Appeals for the Ninth Circuit affirmed that decision.[36] As the appellate court explained, "The customary form of relief in § 7 cases is divestiture."[37]

21. In each of these cases, courts opted for divestiture. Again, divestiture is generally the "surer, cleaner" remedy available for illegal mergers, including illegal mergers that have been consummated.[38]

22. The Department of Justice recently had occasion to express its views on a proposed divestiture to remedy an unlawful consummated merger in *Steves and Sons, Inc. v. Jeld-*

purchase some of the discretionary products as unnecessary for it to effectively operate the assets it did acquire. *See* Application for Approval of Divestiture of the Freedom Assets, *In re Otto Bock HealthCare N. Am., Inc.* (Oct. 9, 2020) (Dkt. No. 9378),https://www.ftc.gov/system/files/documents/cases/project_felix_-_application_for_approval_of_divestiture_public_version_-_redacted.pdf.

[33] *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 564 (6th Cir. 2014).

[34] Complaint, *FTC v. St. Luke's Health Sys., Ltd.*, No. 13-cv-116-BLW, at *8 ¶ 18 (Mar. 26, 2013 D. Id.).

[35] *Id.* at *27.

[36] *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 792–93 (9th Cir. 2015).

[37] *Id.* at 792.

[38] *Id.*; *see also St. Alphonsus Med. Ctr.-Nampa Inc.*, 778 F.3d at 782 (calling divestiture "generally . . . the most straightforward way to restore competition"); *Am. Stores Co.*, 495 U.S. at 280–81 (calling divestiture "the preferred remedy for an illegal merger").

Wen, Inc.[39] In that private litigation, the court tasked a Special Master with supervising the divestiture process. The Special Master recommended that one potential purchaser not be considered based on concerns that the bidder's acquisition of the divested assets could itself be anticompetitive. DOJ noted that ideally a merger that violates Section 7 would be blocked outright before consummation. When this is not possible, a post-consummation remedy—including divestiture—should restore lost competition in the relevant market without creating new competition issues. In addition, DOJ recognized that a court may also need to order other measures beyond divestiture to restore lost competition, particularly where an illegal acquisition was consummated many years before, leading to a significant loss of competition in the relevant market.

23. DOJ noted that as an inherently imperfect solution, divestitures following consummation of a merger should be undertaken with high standards for completeness and efficacy. Because the purpose of the divestiture is to *restore* competition to the relevant market, the Special Master in this case was correct to consider whether the acquisition of divested assets by particular bidders could *harm* competition. Before the unlawful merger, three vertically integrated companies had competed in the market, but that status quo no longer existed when the divestitures were being considered, and the Special Master was concerned that a divestiture to a particular purchaser would lead to another vertically-integrated firm. The DOJ stated that the Special Master applied correct legal principles, including his skepticism of purported merger efficiencies and his proper focus on the *current* market conditions, including market conditions that had already deteriorated as a result of the merger. The proper remedy analysis must focus on the competitive effects of the divestiture transaction in the current market, including any additional risks of vertical foreclosure given the relevant changes since the merger.

[39] The DOJ's statement of interest is available at https://www.justice.gov/atr/case-document/file/1504651//download.