FEDERAL TRADE COMMISSION
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Looking back (again) at FTC merger remedies

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The newly released Remedy Study is the culmination of nearly two years of effort by FTC staff to look back at Commission merger orders from 2006 through 2012. We looked at 89 merger orders affecting 400 markets, with 79 divestitures to 121 buyers. We evaluated 50 of those orders using a case study method, interviewing nearly 200 businesses in a wide range of industries and collecting sales data from almost that many. The report synthesizes that information and more, which we hope will be useful for businesses and provide insight for other competition enforcement agencies.

This is not the Commission's first effort to study its merger remedies. In the late 1990's, FTC staff evaluated 35 Commission orders from 1990 through 1994 requiring divestitures in horizontal mergers. Released in 1999, the Divestiture Study led to a number of significant reforms to the FTC's remedy approach: requiring upfront buyers more often; shortening the time for post-order divestiture to 6 months; appointing an independent monitor more often; and instituting a program to follow up with buyers about their progress.

There are lessons from the new study as well. The study confirmed that the Commission's practices related to designing, drafting and implementing its merger remedies are generally effective. But it also identified certain areas in which improvements can be made—so we have made them. The report includes a list of Best Practices that convey how we are already using the learning from the study to continue to improve our remedies. The Bureau is also preparing to update its Statement for Negotiating Merger Remedies to reflect these changes.

Here is an overview of key findings along with some of the adjustments you can expect.

- **All buyers of an ongoing business succeeded in restoring or preserving competition, but buyers of a more limited package of assets sometimes did not succeed even when the buyer was identified upfront.**

The Commission prefers structural remedies such as divestitures to prevent competitive harm resulting from a merger, whether the merger is consummated or has not yet been completed. The Commission has long known that divestiture of an ongoing business poses fewer risks that the buyer will not succeed in maintaining or restoring the competition eliminated by the merger. The new study affirmed this approach: all buyers that acquired an ongoing business were successful.

After the 1999 Divestiture Study, the Commission required upfront buyers more often, both to minimize any interim lessening of competition, and to ensure that there would be a buyer for the proposed package of assets, especially those packages that did not constitute ongoing businesses. The current study found that most, but not all, buyers of selected assets succeeded in maintaining or restoring competition. These overall results reveal that risks remain, even when the Commission approves the divestiture to an upfront buyer.

Going forward, respondents and buyers can expect that proposals to divest selected assets, even when the proposal includes an upfront buyer, will undergo more detailed scrutiny to reduce further the risk that the buyer won't get what it needs to be an effective competitor. As explained in our Best Practices, the Commission will accept a proposal to divest selected assets rather than require divestiture of an ongoing business only if the respondent and the buyer demonstrate that divesting the more limited asset package is likely to maintain or restore competition. For instance, the respondent must explain why an alternative ongoing business divestiture is inappropriate or infeasible, how the selected assets can operate as a viable and competitive business, and how the buyer will be able to fill any gaps for aspects of an ongoing business that are excluded from the package. For its part, the buyer must be prepared to assess what other assets and services it will need to operate the selected assets as a viable and competitive business, show how it will obtain those assets and services, and provide estimates for how long it will take, and at what cost. As in the past, the Commission may require divestiture of assets (including manufacturing facilities) related to additional complementary products, the use of brand or trade names, or other affirmative conduct obligations, such as those that facilitate the transfer of customers, to ensure the buyer's viability. Here, the choice of buyer may be critical: we found that divestitures of selected assets tended to succeed when buyers had similar existing operations, were knowledgeable about the relevant markets, and were familiar with the relevant customers.

- **Some buyers experienced unforeseen complexities in transferring critical back-office functions related to the divested assets, and sometimes needed more time than expected to transition these services.**

Running a business requires a whole range of back-office services to support manufacturing and sales efforts such as legal, finance, accounting and tax, risk, insurance, environmental evaluation, or human resources. Increasingly, back-office functions include complex information technology systems that rely on hardware, software and people to perform or monitor a variety of critical tasks. We found that regardless of whether the divested assets included these functions or the buyers independently obtained them (possibly from their own operations), buyers sometimes encountered problems or delays. Where the respondents were providing these services on a transitional basis, buyers sometimes found that they needed more time to integrate these functions.

Determining the scope of back-office functions that relate to the product market and to the assets being divested requires additional scrutiny because these functions have proven to be more important and more complicated than we (and either the buyers or the respondents) expected. Respondents, who are knowledgeable about these systems, should be prepared to explain the software, databases and other information technology that support the divested assets, and to identify any personnel or documentation that would help in the transition. Respondents should also ensure that the proposed buyer can conduct due diligence to understand what it will need in the way of back-office support services. If the buyer does not have and cannot acquire these services because they are specialized, the divestiture package will need to include these services; if it does not, the respondent must provide critical back-office functions on a transitional basis to the buyer at no more than its cost.

- **The FTC has a well-established procedure for reviewing and scrutinizing proposed buyers, but will look more closely at the source of funds, and any funding limitations that could hamper the buyer.**

The study found that, although respondents generally propose buyers that meet the Commission's criteria for a strong, viable competitor, the success of a divestiture over time depends, in part, on whether the buyer has adequate funding commitments to ensure success. As a result, this area, too, is receiving additional scrutiny. Staff is now paying closer attention to the source of and limitations on funds available to a proposed buyer and how these factors may affect the buyer's competitive and financial viability. In particular, the buyer should expect to provide detailed financial documentation and explain all sources of funding of the divestiture, including contingency plans if sales and other financials do not meet projections.

- **Buyers expressed concern about the time available for due diligence and access to facilities and employees related to the divestiture.**

With the benefit of hindsight, several buyers, especially upfront buyers operating under time constraints, raised concerns about their ability to conduct sufficient due diligence. In particular, in some cases, the lack of access to facilities and employees during due diligence may have delayed the buyer's ability to compete or increased its costs.

Here, too, additional attention is warranted, so that the due diligence process more closely follows that of a more typical arm's length asset purchase. For instance, buyers should have direct access to any key employees identified in the orders. And for divestitures from the acquired firm's (B-side) assets, upfront buyers should have direct access to information, facilities and employees without going through the acquiring firm's (A-side) representatives. Similarly, if hold-separate assets are being divested post-order, staff may need to ensure that the proposed buyer gets direct access to the assets and business as well as to the hold separate monitor and hold separate manager in order to conduct due diligence.

- **Buyers still seem reluctant to raise concerns with FTC staff or the monitor at the time when quick action could avoid problems down the road.**

The 1999 Divestiture Study revealed that buyers often do not raise concerns with staff or the monitor appointed to facilitate their transition when they arise. Staff routinely advises buyers to contact us if they have concerns that staff may be able to address. Unfortunately, not all buyers take that advice.

As with many things, timely communication is key to counteracting problems as they arise post-divestiture. Knowing that this remains a problem, staff has redoubled its efforts to maintain ongoing communications with buyers after the divestiture occurs.

Designing an effective merger remedy in every case is a goal we work toward every day. Our approach to designing effective remedies relies on an evolving process, one that benefits from periodic self-examination.

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