The End of Remedies?

Joshua Shapiro

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THE END OF REMEDIES?

Joshua Shapiro *

TABLE OF CONTENTS

I. A BRIEF PRIMER ON REMEDIES ................................................................. 164
II. GROWING CONCERN OVER MERGER REMEDIES .............................. 165
III. FROM AGENCY SKEPTICISM TO OUTRIGHT HOSTILITY ..................... 168
IV. AGENCIES GLOBALLY RE-THINKING THEIR APPROACH TO REMEDIES .................................................................................................................................................. 171
V. WHAT DOES THIS MEAN FOR M&A? .................................................... 172

For nearly a generation, the expectation was that when a proposed merger draws scrutiny from the Antitrust Division of the U.S. Department of Justice (“DOJ”) or the Federal Trade Commission (“FTC”), a negotiated settlement would likely be the panacea for any competition concerns.1 While merging parties factored in the possibility that the antitrust agencies would refuse to accept remedy proposals as insufficient and instead seek to litigate, a remedy generally appeared to be a possible outcome.2 Indeed, it became common practice for sellers to insist on the inclusion of provisions in purchase agreements that committed the buyer to do whatever it took to get the deal done, including making divestments.3

But what happens when remedies are no longer available? While most observers are keenly aware that the U.S. antitrust agencies have launched a number of high-profile merger challenges and completely revamped their

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1 See Douglas H. Ginsburg & Joshua D. Wright, Antitrust Settlements: The Culture of Consent, in WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE – LIBER AMICORUM (Nicholas Charbit et al. eds, 2013), 1, at Section III, ¶¶ 9-12 (“[B]oth the FTC and the Antitrust Division have settled more than 90 percent of the civil cases they have brought in the last twenty years, following a steady increase in the settlement rate over the decade prior.”); OECD, SUBMISSION NO. DAF/COMP/WD(2016)23, NOTE BY THE UNITED STATES: COMMITMENT DECISIONS IN ANTITRUST CASES 2 (2016) (“The United States antitrust agencies . . . resolve most of their civil non-merger antitrust cases with negotiated settlements . . . .”), https://one.oecd.org/document/DAF/COMP/WD(2016)23/en/pdf.
2 See Ginsburg & Wright, supra note 1, at Section III.
3 See AM. BAR ASS’N, THE MERGER REVIEW PROCESS: A STEP-BY-STEP GUIDE TO U.S. AND FOREIGN MERGER REVIEW 84-85 (Ilene Knable Gotts ed., 4th ed. 2012) (noting that parties often negotiate this provision “by obligating the buyer to divest only specified assets or only assets other than certain specified assets”).
merger guidelines during the Biden Administration, a less well-tracked trend has been the agencies’ open hostility towards remedies. Since 2022, both the DOJ and FTC have drastically reduced the number of divestitures to which they agreed, and the DOJ has stopped negotiating remedies with merger parties altogether. This article addresses this trend and the implications it has on dealmaking.

I. A BRIEF PRIMER ON REMEDIES

When a proposed merger substantially lessens competition, the DOJ and FTC may permit a deal to close if the merging parties agree to a settlement that resolves the competitive concerns. The specifics of the remedy will depend on the facts of the case and the theories of competitive harm asserted by the agency investigating the deal, but, at a high level, both agencies will consider a remedy to the extent it is capable of effectively preserving or restoring the levels of pre-merger competition. As elucidated by the Supreme Court in United States v. E.I. du Pont de Nemours & Co., “[t]he key to the whole question of an antitrust remedy” is identifying “measures effective to restore competition.”

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6 RICHARD FEINSTEIN, NEGOTIATING MERGER REMEDIES: STATEMENT OF THE BUREAU OF COMPETITION OF THE FEDERAL TRADE COMMISSION 4 (2012), https://www.ftc.gov/system/files/attachments/negotiating-merger-remediesmerger-remediesstmt.pdf (“If staff determine that anticompetitive effects are likely, it will discuss with the parties what it has learned and what it believe an acceptable remedy must include to maintain or restore competition in the markets affected by the merger.”); see ANTITRUST DIV., U.S. DEP’T OF JUST., MERGER REMEDIES MANUAL 2 (2020), https://www.justice.gov/atr/page/file/1312416/dl (“Effective remedies preserve the efficiencies created by a merger, to the extent possible, while preserving competitive markets.”).

The antitrust agencies also follow a number of other principles in deciding whether to accept a remedy. First, the remedy “should not create ongoing government regulation of the [relevant] market” at issue. Second, the relief from the competitive harm must be more than temporary. Third, the parties to the merger should be the ones to bear the risk of a failed remedy (e.g., and not the consumers). Finally, the remedial provisions must be specific and clear to ensure compliance and enforceability.

While remedies can be structural (e.g., divestments of assets or entities) or involve behavioral commitments (e.g., obligations relating to research and development, information firewalls, prohibitions on contracting practices, mandatory licensing, etc.), the DOJ and FTC generally prefer structural remedies. Behavioral remedies typically are imposed only to the extent they support the effectiveness of a divestment. Although behavioral remedies can help preserve deal synergies and are flexible (e.g., they can be easily changed to the extent competition concerns change, which could happen in a dynamic industry), they are generally disfavored by the antitrust agencies as the sole remedy.

II. GROWING CONCERN OVER MERGER REMEDIES

Both agencies have shown concern about the effectiveness of remedies for some time. In January of 2017, FTC staff released a retrospective on merger

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9 See generally ANTITRUST DIV., U.S. DEP’T OF JUST., supra note 6. As discussed infra, the DOJ unilaterally withdrew the Merger Remedies Manual in 2022 in conjunction with public statements by DOJ leadership that the agency preferred litigation as a means of resolving potentially anticompetitive deals. See infra Section III.

10 ANTITRUST DIV., U.S. DEP’T OF JUST., supra note 6, at 4.

11 Id.

12 Id. at 5.

13 Id.

14 See id. at 13-15.

15 See id. at 14.

16 Id. at 13. Behavioral remedies require ongoing monitoring for compliance by the antitrust authorities and may be difficult to design with sufficient precision given the vagaries of market conditions, customer and competitor reactions to the remedies, and other factors. Martha Samuelson et al., Economic Analysis of Merger Remedies, GLOB. COMPETITION REV. (Oct. 25, 2023), https://globalcompetitionreview.com/guide/the-guide-merger-remedies/fifth-edition/article/economic-analysis-of-merger-remedies (“The Assistant Attorney General for the Antitrust Division stated in 2022 that ‘it is often impossible to craft behavioural remedies that anticipate the complex incentives that drive corporate decision-making.’”).

remedies (“2017 FTC Study”) following an extensive survey conducted on all of the Commission’s merger orders over a seven-year period (from 2006 to 2012).\footnote{See Makan Delrahim, supra note 17.} In total, the FTC staff reviewed fifty merger orders and examined each to see whether they in fact achieved the underlying remedial ends of “maintaining or restoring competition in the relevant market.”\footnote{Id. at 17.} While the FTC staff determined that eighty-three percent of the divestitures studied could be characterized as successes or qualified successes, the remaining seventeen percent failed to maintain the level of pre-merger competition.\footnote{Holly Vedova, Dir., Bureau of Competition, Fed. Trade Comm’n, Remarks at 12th Annual GCR Live: Law Leaders Global Conference (Feb. 3, 2023), https://www.ftc.gov/system/files/documents/public_statements/1318363/vedova-gcr-live_feb_2018_final.pdf.} As an FTC official recently summed up: “[the 2017 FTC Study] revealed that divestitures have not worked nearly as well as we had hoped, and definitely not as well as was necessary to prevent the illegal mergers from undermining competition.”\footnote{Id. at 17.}

In the years following, leadership at both the FTC and DOJ lodged broadsides against remedies.\footnote{See Makan Delrahim, supra note 17; D. Bruce Hoffman, Acting Director, Bureau of Competition, Fed. Trade Comm’n, Remarks at GCR Live 7th Annual Antitrust Law Leaders Forum: It Only Takes Two to Tango: Reflections on Six Months at the FTC (Feb 2, 2018), https://www.ftc.gov/system/files/documents/public_statements/1318363/hoffman_gcr_live_feb_2018_final.pdf.} In November 2017, Makan Delrahim, the then-Assistant Attorney General (“AAG”) in charge of the DOJ’s Antitrust Division, in one of his first public speeches characterized behavioral remedies as “central planning,” which put antitrust agencies in the unwanted position of being regulators when they are actually law enforcers.\footnote{Makan Delrahim, supra note 17.} Behavioral remedies, as Delrahim observed, “often require companies to make daily decisions contrary to their profit-maximizing incentives” and “demand ongoing monitoring and enforcement.”\footnote{Id.} As Delrahim opined, “[i]t is the wolf of regulation dressed in the sheep’s clothing of a behavioral decree.”\footnote{Id. The FTC expressed similar concerns at the time. In a speech in January of 2018, the then-acting Director of the Bureau of Competition, Bruce Hoffman, warned that “no one should be surprised if the FTC looks closely at a vertical merger that raises [competitive] concerns . . . and no one should be surprised if the FTC requires structural relief.” D. Bruce Hoffman, Acting Dir., Bureau of Competition, Fed. Trade Comm’n, Remarks at Credit Suisse 2018 Washington Perspectives Conference: Vertical Merger Enforcement at the FTC}
Delrahim’s remarks, the DOJ filed suit to enjoin AT&T’s acquisition of Time Warner, Inc., which was one of the first litigated challenges to a vertical merger in decades.\textsuperscript{26} The DOJ litigated the case even though AT&T proposed conduct commitments that arguably would have resolved any concerns about foreclosure of competition.\textsuperscript{27}

The FTC, for its part, made clear that merging parties should expect greater scrutiny of merger remedies from the Commission going forward.\textsuperscript{28} As D. Bruce Hoffman, the then-acting Director of the FTC’s Bureau of Competition, previewed in early 2018, “the FTC has been increasingly inquisitive and tough on remedies” and “[w]e intend to continue strictly enforcing the requirements for remedies.”\textsuperscript{29} However, unlike the DOJ, the FTC would continue to look to conduct remedies in vertical mergers when structural remedies were unworkable.\textsuperscript{30}


\textsuperscript{27} US Justice Department, AT&T Settlement Talks Failed: Court Filing, CNBC (Dec. 18, 2017, 6:26 AM), https://www.cnbc.com/2017/12/18/us-justice-department-att-settlement-talks-failed-court-filing.html (“In an effort to help reach an agreement, AT&T and Time Warner last month offered to use licensing terms that forbid Time Warner’s Turner unit from ‘going dark’ on any distributor for seven years after the deal closes if they were to reach an impasse in negotiations.”). These commitments mirrored remedies the DOJ had accepted to resolve Comcast’s acquisition of NBC Universal in 2011. See Press Release, Off. of Pub. Affs., U.S. Dep’t of Just., Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions (Jan. 18, 2011), https://www.justice.gov/opa/pr/justice-department-allows-comcast-nbcu-joint-venture-proceed-conditions (“Their joint venture [can] proceed conditioned on the parties’ agreement to license programming to online competitors to Comcast’s cable TV services, subject themselves to anti-retaliation provisions and adhere to Open Internet requirements.”).

\textsuperscript{28} See Hoffman, supra note 22.

\textsuperscript{29} Id.

III. FROM AGENCY SKEPTICISM TO OUTRIGHT HOSTILITY

For the remainder of the Trump administration and the beginning of the Biden administration, the antitrust agencies continued to reach settlements with merging parties – though with a stated preference towards structural remedies over behavioral ones.\textsuperscript{31} The statistics from the FTC and DOJ’s Hart-Scott-Rodino Annual Reports suggest a relatively consistent level of remedies agreed to year over year.\textsuperscript{32}

\textbf{Table 1}\textsuperscript{33}

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>DOJ Consent Decrees</th>
<th>FTC Consent Decrees</th>
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<tbody>
<tr>
<td>2017</td>
<td>9</td>
<td>15</td>
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<td>2018</td>
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<td>12</td>
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<tr>
<td>2020</td>
<td>7</td>
<td>10</td>
</tr>
<tr>
<td>2021</td>
<td>9</td>
<td>5</td>
</tr>
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However, this all changed shortly after the arrival of the new leadership at the DOJ and FTC in 2021. In January 2022, Jonathan Kanter, the new AAG at the DOJ Antitrust Division, announced a dramatic shift in policy:

\textsuperscript{31} See Martha Samuelson et al., supra note 16 (“Among challenged mergers in the US with publicly disclosed remedies, only 13 per cent of such mergers involved purely behavioural remedies between 1999 and 2003, and this share decreased further to 6 per cent between 2017 and 2021.”); see also Lina Khan, Chair, Fed. Trade Comm’n, Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights: Oversight of the Enforcement of the Antitrust Laws (Sept. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf (“We now strongly disfavor behavioral remedies and will not hesitate to reject proposed divestitures that cannot fully cure the underlying harm.”).


\textsuperscript{33} The fiscal year for the DOJ and FTC runs from October 1 to September 30. The statistics in Table 1 can be found in the FTC and DOJ’s Hart-Scott-Rodino Annual Reports. See sources cited supra note 32.
I am focused on how a remedy will function. After the ink has dried and the press cycle has faded, does a settlement in fact restore competition? Does it preserve the competitive process? Most importantly, does our overall approach to remedies, carried out across cases and industries, protect competition as the law demands? We are law enforcers, not regulators.

I am concerned that merger remedies short of blocking a transaction too often miss the mark. Complex settlements, whether behavioral or structural, suffer from significant deficiencies. Therefore, in my view, when the division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the merger. It is the surest way to preserve competition.

Months after this policy declaration, the DOJ officially withdrew its Merger Remedies Manual (which had just been issued in 2020) and AAG Kanter stated unequivocally that the DOJ’s “duty is to litigate, not settle, unless a remedy fully prevents or restrains the violation.” And true to his word, the DOJ has agreed only to a single divestiture in the subsequent two years, which was a settlement reached mid-merger trial. Moreover, the DOJ has been unwilling to even negotiate remedies with merging parties during the course of a merger investigation.


35 ANTITRUST DIV., U.S. DEP’T OF JUST., supra note 6.

36 Jonathan Kanter, Assistant Att’y Gen. U.S. Dep’t of Just., Keynote at the University of Chicago Stigler Center: Antitrust Enforcement: The Road to Recovery (Apr. 21, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler. Kanter also remarked, “[i]t is not our role to micromanage corporate decision making under elaborate consent decrees. It is our job to enforce the law. And when we have evidence that a defendant has violated the law, we will litigate to remedy the entire harm to competition.” Id.


38 In fact, the DOJ has only negotiated a single merger settlement under its current leadership. Satya Marar & Alden Abbott, Antitrust Enforcement in 2023: Year in Review for the Federal Trade Commission and the Department of Justice, MERCATUS CTR. (Jan. 17, 2024), https://www.mercatus.org/research/policy-briefs/antitrust-enforcement-2023-year-review-federal-trade-commission-and (“This settlement represents the first time that the Biden administration DOI, under Assistant Attorney General for the Antitrust Division Jonathan Kanter, has agreed to a settlement order to approve a merger. . .

Sicalides & Weiss, supra note 5 (“Assa Abloy is the first merger settlement under the DOJ’s current leadership.”).
Unlike the DOJ, though, the FTC has continued to negotiate and agree to structural and behavioral remedies in recent years.\textsuperscript{39} The FTC, however, also has de-prioritized remedies as a means of resolving potentially problematic mergers.\textsuperscript{40} The Director of the FTC’s Bureau of Competition recently outlined this approach:

Over time, remedies have become increasingly complex and, our studies tell us, prone to implementation failures. We can’t expect different results if we keep doing the same thing. So we are rethinking our practices and taking a different approach—one that limits the types of remedies that we will recommend the Commission accept. This means moving away from . . . remedies with “numerous, complicated and long-standing entanglements.” . . . [I]n many ways this change has been a long time coming.\textsuperscript{41}

The FTC has since imposed an increasing compliance burden on settling parties.\textsuperscript{42} Among other requirements, the FTC now is including in all consent decrees a “prior approval” provision so parties must seek approval from the agency before making future acquisitions in the market where the FTC alleges harm to competition.\textsuperscript{43}

\textsuperscript{39} The FTC continues to express a strong preference for divestitures of stand-alone businesses as a remedy, but it has even accepted behavioral-only remedies. See Feinstein, supra note 6, at 5; see, e.g., Press Release, Fed. Trade Comm’n, Biopharmaceutical Giant Amgen to Settle FTC And State Challenges to its Horizon Therapeutics Acquisition (Sept. 1, 2023), https://www.ftc.gov/news-events/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition (prohibiting Amgen from bundling its products with certain Horizon products, conditioning product rebate and contract terms to an Amgen product on the sale of certain Horizon medications, and “using any product rebate or contract terms to exclude or disadvantage” products competing with certain of Horizon’s products).

\textsuperscript{40} Daniel P. Ducore, Negotiating Remedies: A Perspective from Various Agencies, GLOB. COMPETITION REV. (Oct. 25, 2023), https://globalcompetitionreview.com/guide/the-guide-merger-remedies/fifth-edition/article/negotiating-remedies-perspective-various-agencies (“There is increasing reluctance in the US to settle merger violations and a preference to challenge them instead.”).

\textsuperscript{41} Vedova, supra note 21 (internal citation omitted).


IV. AGENCIES GLOBALLY RE-THINKING THEIR APPROACH TO REMEDIES

The perspective outside of the U.S. on merger remedies has evolved as antitrust agencies globally have also re-evaluated their approach to and acceptance of remedies. The European Commission and the UK’s Competition and Markets Authority (“CMA”), for example, have each made clear their stricter approach to remedies.44

Agencies in other jurisdictions, however, still accept the premise that a properly constructed remedy can resolve antitrust concerns and, consequently, regularly accept remedies.45 In contrast to the DOJ, for example, the question in these foreign jurisdictions is not whether a remedy is an acceptable way of resolving competitive concerns, but rather what form the remedy should take and how it should be constructed.46 Different agencies in different jurisdictions take varying approaches. For example, the European Commission, while preferring structural remedies,47 has accepted behavioral remedies in a number of cases, and China’s State Administration for Market Regulation has

44 Christopher Cook et al., Recent Developments in EU Merger Remedies, 11 J. EUR. COMPETITION L. & PRAC. 309, 309 (2020) (“The Commission continued its recent history of strict, careful merger remedy enforcement despite political calls from some Member States for a loosening of the EU merger control system . . .”); Javier Espinoza & Kate Beioley, UK Competition Watchdog Is Most Active Antitrust Enforcer, FIN. TIMES (Mar. 1, 2020), https://www.ft.com/content/ac2951a0-5185-11ea-b0ab-339c2307b4d4 (“The UK has emerged as the most aggressive antitrust enforcer worldwide after it frustrated the highest proportion of deals in the past five years and ramped up the fines it imposed, new figures reveal.”); Press Release, Competition & Mkts. Auth., CMA Sets Out Changes to Phase 2 Merger Processes (Nov. 20, 2023), https://www.gov.uk/government/news/cma-sets-out-changes-to-phase-2-merger-processes.


46 See Rachel Brandenburger et al., Spotlight on the UK’s Competition & Markets Authority, APCO (Dec. 18, 2023), https://apcoworldwide.com/blog/spotlight-on-the-uk-s-competition-markets-authority/ (describing how the CMA has changed its antitrust policies “to help ‘incentivize’ merging parties to ‘bring forward credible remedies to address concerns at the earliest possible stage’”).

47 Margrethe Vestager, Exec. Vice President, Eur. Comm’n for Competition, Keynote Speech at the Global Competition Law Centre Annual Conference: Competition Policy: Where We Stand and Where We’re Going (Mar. 25, 2022), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_2079 (“[P]arties are well aware of our preference for ‘clean slate’ remedies, by which I mean stand-alone divestitures. Clean slate remedies address competition concerns, and there is no need for long-term monitoring, which is resource intensive and increases the risk of regulatory avoidance over time. This is why divestitures are the preferred remedy in the vast majority of cases, and the standard for our remedy policy. … But in particular in some non-horizontal cases, we are open to consider other solutions.”).
demonstrated a clear preference for behavioral remedies accepting these far more regularly than structural remedies, whereas the CMA has taken a clear stance against behavioral remedies in merger cases.

Consequently, there is additional complexity for any merger which involves overlaps in both U.S. and foreign jurisdictions.

V. WHAT DOES THIS MEAN FOR M&A?

With the DOJ effectively closing the door on remedies and the FTC, though not shutting the door entirely, throwing up major hurdles, merging parties considering an acquisition that might involve product overlaps have been left in a bit of a quandary as to how to properly allocate antitrust risk and, more critically, how to close their deals. There are several ways parties can proceed in the face of this uncertainty.

One way parties can reduce risk in mergers and acquisitions is to negotiate a reverse antitrust termination fee. The fact that remedies may no longer be an option for certain deals in the U.S. (e.g., those reviewed by the DOJ) upends the antitrust risk shifting that typically takes place during negotiation over a purchase agreement. A seller, who seeks certainty of close, often will seek to have a buyer agree to take all actions necessary to get the deal closed before the deal’s outside date. This “hell or high water” obligation (“HOHW”) usually involves an explicit divestiture obligation. While the HOHW provision typically gets watered down during negotiations, perhaps to include a cap on the value of what must be divested, a HOHW provision will provide a seller with some comfort that, if left with enough time to get a remedy approved, the buyer will be able to close the deal. But if a buyer proposes remedies to the antitrust

49 Sarah Cardell, Chief Exec., UK Competition & Mkts. Auth., Keynote Speech to the CMA’s UK Merger Control Event: The Future of UK Merger Control (Nov. 20, 2023), https://www.gov.uk/government/speeches/sarah-cardell-the-future-of-uk-merger-control (“As our guidance makes clear, the CMA has a strong preference for structural remedies, given that these are more likely to address the substantial lessening of competition comprehensively at source by restoring rivalry, and do not risk distortions in market outcomes resulting from behavioural interventions which require businesses to act in a way which may be contrary to their commercial incentives,…”).
51 See id.
52 See id.
agencies and those proposals are rejected, the buyer could, in theory, have fulfilled its HOHW obligation and walk away from the deal.\(^{53}\) Essentially, if the government will not accept divestitures, a HOHW provision becomes meaningless (apart from an obligation to litigate and/or if remedies are possible outside of the U.S.) and all the risk falls on the seller.

Sellers can still manage antitrust risk, however, by negotiating a reverse antitrust termination fee instead of a HOHW provision. A reverse antitrust termination fee is a payment that the buyer must make to the seller if the deal fails to close for antitrust reasons.\(^ {54}\) For example, the reverse antitrust termination fee would be triggered if the applicable waiting periods did not expire or an antitrust authority enjoined the transaction.\(^ {55}\) This reverse termination fee—typically five to seven percent of the total deal value—compensates the seller for the loss of goodwill and possible degradation of its business during the time between the signing of the purchase agreement and the outside date, which for deals involving potential antitrust concerns, can be more than twelve months.\(^ {56}\) Equally, if remedies are possible in jurisdictions outside of the U.S. it will be important to include divestiture obligations for those jurisdictions as a means to maintain risk with the buyer.

Second, parties can reduce risk in a potential transaction by negotiating fix-it-first provisions. Unlike the reverse antitrust termination fee, which largely benefits the seller, both parties can benefit from a “fix-it-first” strategy. In a “fix-it-first” approach, parties contemplating a merger identify in advance overlapping assets or businesses that present competitive concerns and agree to divest assets to third parties before seeking regulatory approval for the main deal.\(^ {57}\) This strategy may be appealing to some merging parties because it could avoid a time-consuming and costly investigation by the FTC or DOJ and also circumvent the onerous restrictions that would normally accompany a divestiture order issued by the agencies.\(^ {58}\)

\(^{53}\) See id.


\(^{55}\) Id.

\(^{56}\) Id.

\(^{57}\) Bryan Koenig, *Does DOJ’s Assa Abloy Deal Encourage More Fix-It First?*, LAw 360 (May 9, 2023, 4:29 PM), https://www.law360.com/articles/1605432/does-doj-s-assa-abloy-deal-encourage-more-fix-it-first-.

But a “fix-it-first” approach carries with it some peril. By implementing a remedy outside of the formal consent decree process, the parties risk finding out after months of negotiating with a third-party divestiture buyer that the antitrust agencies deem the “fix” insufficient (e.g., not enough divested) or consider the divestiture buyer (heretofore un-vetted by the government) to be unqualified and unable to replicate the competitive status quo.59

Finally, parties should be prepared to litigate. Both antitrust agencies have made it clear that litigation should be the expected endgame for parties proposing an anticompetitive merger. As the DOJ and FTC recently boasted, the agencies have overseen “the highest level of enforcement activity in over 20 years.”60 For example, in a single twelve-month period, from October 1, 2021, to September 30, 2022, the agencies launched twelve merger litigations and forced seventeen merging parties to abandon their proposed transactions (presumably after the DOJ or FTC threatened litigation).61

This regulatory environment may be daunting for parties contemplating a deal that involves overlapping assets or businesses, but a threat of litigation from the DOJ or FTC does not mean defeat is inevitable. Both agencies have suffered stinging losses, and, in many cases, have pushed novel theories of harm that the federal courts have rejected.62 Moreover, presenting credible remedy proposals during the merger review process—even if the agencies reject those proposals or never entertain them to begin with—may serve as useful and persuasive evidence in a merger trial down the road.63

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62 Marar & Abbott, supra note 38 (discussing the FTC and DOJ’s significant antitrust losses in 2023).

63 In the DOJ’s unsuccessful challenge of UnitedHealth’s acquisition of Change Healthcare, the court found that the scope of UnitedHealth’s proposed divestiture, which was announced before the DOJ (and several states) sued to enjoin the transaction, “will match, and perhaps even exceed,” the “competitive intensity lost because of the merger.” United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 140 (D.D.C. 2022).