BEHAVIORAL REMEDIES IN U.S. MERGER SETTLEMENTS: PAST, PRESENT, AND FUTURE

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I. INTRODUCTION

Although structural remedies have long been the U.S. antitrust agencies' preferred means of resolving competitive concerns raised by mergers, behavioral remedies, such as information firewalls and non-discrimination requirements, historically have been used to address competitive concerns arising from vertical mergers (i.e. mergers of businesses operating at different levels of the supply chain) while preserving the efficiency and consumer welfare benefits of vertical integration.

In recent years, however, representatives from both the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") have called into question the appropriateness of behavioral remedies and the agencies' willingness to consider them in settlements of merger enforcement actions. The Assistant Attorney General of the Antitrust Division, Makan Delrahim criticized behavioral remedies as a form of "central planning," expressing the view that they "often require companies to make daily decisions contrary to their profit-maximizing incentives," and "demand ongoing monitoring and enforcement" that the agencies are not well equipped to police effectively.[2] Three days later, the DOJ filed suit to block AT&T's acquisition of Time Warner Inc. — the first litigated challenge to a vertical merger in decades.[3]

Leadership at the FTC has likewise expressed skepticism in recent years about the effectiveness of behavioral remedies. In a 2018 speech, the then-Acting Director of the Bureau of Competition cautioned 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."[4] However, in conjunction with such pronouncements, and in contrast to the DOJ, FTC representatives have indicated more willingness to consider behavioral remedies to resolve vertical concerns, and have affirmed that "limited, tried-and-true behavioral remedies . . . can be appropriate under the right circumstances."[5]

2 Dep't of Justice, Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum, November 16, 2017. Delrahim went on to warn that while DOJ remained open to considering behavioral remedies, they will be limited to situations where a transaction "generates significant efficiencies that cannot be achieved without the merger or through a structural remedy"—"a high standard to meet." *Id.*

3 Julie North was a member of the litigation team representing Time Warner in the *United States v. AT&T* trial.

4 Remarks of D. Bruce Hoffman, Acting Director, Bureau of Competition, Fed. Trade Comm'n, Vertical Merger Enforcement at the FTC, January 18, 2018. Similarly, the now current (and at the time Deputy) Director of the Bureau of Competition noted in an official statement that the FTC "typically disfavors behavioral remedies and will accept them only in rare cases based on special characteristics of an industry or particular transaction." Statement of Bureau of Competition Deputy Director Ian Conner on the Commission's Consent Order in the Acquisition of Orbital ATK Inc. by Northrop Grumman Corp., File No. 181-0005, June 5, 2018.

5 Keynote Address of Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Vertical Merger Policy: What Do We Know and Where Do We Go?, February 1, 2019.

From these developments, many have concluded that, except where used as a limited-in-scope adjunct to a divestiture remedy,[6] behavioral remedies are off the table when it comes to negotiating merger remedies with the DOJ — even where the competitive issues to be resolved arise from the vertical components of the merger. It appears that the FTC may be more receptive to behavioral relief in vertical mergers than the DOJ would be in analogous contexts. This article examines these assumptions, looking at the remedies used by each agency in recent years to resolve alleged vertical issues in merger enforcement actions, in order to inform what the future may hold for remedies in vertical merger settlements. It concludes that (i) the DOJ's track record over the last three years indicates that it has, in fact, substantially limited the use of the behavioral remedies; and (ii) the FTC's actions over the same time period suggests that the FTC, by contrast, remains receptive to considering behavioral relief to resolve discrete vertical competition concerns. It is unclear if the agencies' divergent track records indicate an actual conflict in their approaches to vertical remedies. Currently, the fate of a vertical merger that presents discrete competitive issues may depend on which agency reviews it.

II. SETTLEMENTS BY THE DEPARTMENT OF JUSTICE

A. Prior Merger Settlements (2010 – 2016)

Under the prior administration, the DOJ entered a number of consent decrees that included a range of behavioral remedies designed to prevent the merging parties from acting on alleged post-merger incentives to engage in conduct that could harm competition:

- In 2010, the DOJ approved Ticketmaster's $2.5 billion acquisition of Live Nation subject to a consent decree that included both structural relief, to address concerns relating to horizontal overlap in primary ticketing, and behavioral relief, to address concerns relating to the vertical integration of Ticketmaster's primary ticketing service and Live Nation's concert promotion business.[7] The behavioral remedies included a prohibition on retaliating against venue owners who want to use rival primary ticketing services, a prohibition on mandatory bundling of promotion and primary ticketing services, and a requirement that Ticketmaster either not use its ticketing data in its promoting and management businesses, or makes the data available rival promoters and managers.[8]

- In 2011, DOJ approved Comcast's $30 billion joint venture with NBCU Universal subject to a consent decree requiring, among other behavioral relief, that the joint venture provide programming content to online video distributors ("OVDs") on non-discriminatory terms and, in conjunction with a related FCC order, giving distributors the option to submit any content licensing disputes to baseball style arbitration.[9]

- That same year, the DOJ approved Google's $700 million acquisition of ITA Software Inc., a developer of software enabling flight search functionality for travel websites, subject to a consent decree requiring Google to honor existing licensing contracts for ITA's software, to negotiate new licensing agreements on fair and non-discriminatory terms and to continue development of software for and offer upgrades to ITA's licensees.[10]

- In 2016, the DOJ approved the combination of three cable companies, forming "New Charter," subject to a consent decree that prohibits New Charter from entering into or enforcing agreements that could make it more difficult for OVDs to obtain content from video programmers.[11] The competitive harm alleged by DOJ did not relate to vertical integration but neither was it horizontal

6 For example, a requirement that the merging parties provide transition services to a divestiture buyer on a short-term basis or not solicit key employees of the divestiture business to support its viability.

7 Press Release, Dep't of Justice, Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger with Live Nation Inc., January 25, 2010.

8 *Id.*

9 Press Release, Dep't of Justice, Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions, January 18, 2011.

10 Press Release, Dep't of Justice, Justice Department Requires Google Inc. to Develop and License Travel Software in Order to Proceed with Its Acquisition of ITA Software Inc., April 8, 2011.

11 Press Release, Dep't of Justice, Justice Department Allows Charter's Acquisition of Time Warner Cable and Bright House Networks to Proceed with Conditions, April 25, 2016. Notably, that same year, the parties to a proposed vertical merger in the semiconductor industry abandoned their transaction in the face of DOJ opposition, and reportedly after remedy talks fell apart. See Press Release, Dep't of Justice, Lam Research Corp. and KLA-Tencor Corp. Abandon Merger Plans, October 5, 2016.

in nature—as the DOJ explained, the parties did "not compete to provide video distribution services to consumers in the same local geographic markets."[12] Rather, according to the DOJ, the increased user base that New Charter would acquire through the combination gave it an increased incentive to frustrate OVD competition using contractual provisions that had been employed with frequency by one of the merging parties. [13] The behavioral remedies were designed to prevent New Charter from acting on these post-merger incentives.[14]

B. Recent Merger Settlements (2017 –YTD 2020)

The DOJ has not entered into any new merger settlements featuring stand-alone behavioral relief since the change in DOJ leadership in 2017. With one exception discussed below, every merger settlement entered into by DOJ since 2017 that involved allegations of vertical competitive harm has required a divestiture to remedy the alleged harm:

- In 2018, the DOJ secured one of the largest ever negotiated divestiture packages in connection with Bayer AG's acquisition of Monsanto Company.[15] The divestitures were designed to address both horizontal and vertical concerns. As to the vertical concerns, the DOJ alleged that the combination of Bayer's seed treatment business with Monsanto's leading seed business would have given the merged entity the incentive and ability to raise the costs of Bayer's rival seed treatment suppliers.[16] To remedy this alleged harm, DOJ required Bayer to divest its seed treatment business.[17]

- That same year, the DOJ required a divestiture to resolve concerns relating to vertical and horizontal overlaps in connection with the acquisition of Pounding Mill Quarry Corporation, a producer of aggregate, by CRH, a producer of asphalt concrete and aggregate.[18] According to the DOJ, CRH's only rival in the supply of asphalt concrete in Southern West Virginia sourced aggregate, an essential input in asphalt concrete, from Pounding Mill, raising concerns that the transaction would give CRH an incentive and ability to disadvantage its only rival by withholding or raising the price of Pounding Mill aggregate. To remedy this vertical concern, as well as a horizontal concern created by the parties' overlap in aggregate, the DOJ required that CRH divest Pounding Mill's aggregate quarry as a condition to approving the transaction.

- Last month, the DOJ entered a consent decree conditioning the merger of United Technologies Corporation ("UTC") and Raytheon on structural relief designed to address alleged vertical issues.[19] At the time of the merger, both parties supplied critical inputs for use in EO/IR reconnaissance satellite payloads, which enable reconnaissance satellites to perform reconnaissance missions, while Raytheon also competed in the downstream payload market.[20] In the upstream markets, Raytheon is a leading supplier of focal plane arrays used by payloads, while UTC was one of only two companies able to build space-based optical systems, another critical payload input.[21] The DOJ alleged that the combination of these capabilities would have given the merged company the incentive and ability to foreclose competition both in the downstream market for EO/IR payloads — by denying Raytheon's payload rivals access to UTC's space-based optical systems — and in the upstream market for space-based optical systems—by requiring EO/IR payload builders seeking to purchase Raytheon's industry-leading focal plane arrays to also purchase space-based optical

12 Competitive Impact Statement, *United States v. Charter Communications, Inc.*, 16-cv-00759 (D.D.C. May 10, 2016).

13 *Id.*

14 *Id.*

15 Press Release, U.S. Dep't of Justice, Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto, May 29, 2018.

16 *Id.*

17 *Id.*

18 Press Release, U.S. Dep't of Justice, Justice Department Requires CRH to Divest Rocky Gap Quarry in Order to Proceed with Pounding Mill Acquisition, June 22, 2018.

19 Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures in Merger Between UTC and Raytheon to Address Vertical and Horizontal Antitrust Concerns, March 26, 2020.

20 *Id.*

21 *Id.*

systems from UTC rather than its lone competitor in that market.[22] Working closely with the Department of Defense ("DoD"), the primary user of reconnaissance satellites, the DOJ required that UTC divest its spaced-based optical systems business to ensure that the merged entity would be unable to employ such foreclosure tactics.[23]

The only settlement entered into by DOJ during this time frame that included behavioral relief was in connection with the extension and modification of the 2010 *Ticketmaster/Live Nation* final judgment. According to the allegations in the motion to modify the original final judgment, since the entry of that judgment, and in contravention of its requirements, Live Nation and Ticketmaster have "repeatedly conditioned and threatened to condition Live Nation's provision of live concerts on a venue's purchase of Ticketmaster ticketing services" and "retaliated against venues that opted to use competing ticketing services," thereby foreclosing competition in the primary ticketing market.[24] To address these alleged violations, and prevent future competitive harm, the DOJ and the parties stipulated to an amended order that clarifies the parties' obligations under the consent decree, extends the duration of the decree and adds additional compliance and enforcement provisions.[25]

III. SETTLEMENTS BY THE FEDERAL TRADE COMMISSION

Between 2017 and year-to-date 2020, the FTC has entered four merger settlements that featured stand-alone behavioral relief:

- In 2017, the FTC approved Broadcom Limited's acquisition of Brocade Communications Systems, Inc., subject only to behavioral conditions.[26] At the time, Brocade and Cisco Systems, Inc. were the only two suppliers of fibre channel switches, and Broadcom supplied custom-tailored application specific integrated circuits ("ASICs") to both for use in their respective switch fibre channel products.[27] As Cisco's ASIC supplier, Broadcom had extensive access to competitively sensitive information relating to Cisco's fibre channel switch business.[28] The FTC alleged that, without a remedy, Broadcom post-merger could use Cisco's competitively sensitive confidential information to unilaterally, or in coordination with Cisco, raise prices or slow innovation in the fibre channel switch market.[29] Rather than require a divestiture, however, the FTC agreed to a consent that required Broadcom to establish a firewall between its business team responsible for developing Cisco's customized ASICS and the rest of the company, subject to the oversight of a monitor.[30]

- That same year, the FTC agreed to settle charges that the proposed merger of Enbridge Inc. and Spectra Energy Corp., two natural gas pipeline operators, would, absent relief, reduce competition in local markets for pipeline transportation of natural gas by giving Enbridge an ownership interest in the two closest and likely lowest cost natural gas pipelines in the area.[31] The settlement required the establishment of firewalls to limit Enbridge's access to non-public information about one of the competing pipelines in the market and recusal of certain board members from votes involving that pipeline.[32]

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22 *Id.*

23 *Id.*

24 Motion to Modify Final Judgment and Enter Amended Final Judgment, *United States v. Ticketmaster Entertainment, Inc.*, No. 10-cv-00139 (D.D.C. January 25, 2010) ("Ticketmaster Motion to Modify").

25 *Id.*

26 Press Release, Fed. Trade Comm'n, FTC Accepts Proposed Consent Order in Broadcom Limited's $5.9 Billion Acquisition of Brocade Communications Systems, Inc., July 3, 2017.

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 Press Release, Fed. Trade Comm'n, FTC Preserves Competition in Merger of Enbridge Inc. and Spectra Energy Corp., February 16, 2017.

32 *Id.*

- In 2018, the FTC accepted a consent agreement with only behavioral conditions in connection with its approval of Northrop Grumman Corporation's acquisition of Orbital ATK, Inc.[33] According to the FTC, Northrop is one of four companies capable of supplying the DoD with missile systems, while Orbital ATK is the leading supplier of solid rocket motors ("SRMs"), an essential input for missile systems.[34] The FTC alleged that, absent relief, Northrop's ownership of Orbital's SRM business would give Northrop an incentive and ability to withhold access to or increase the prices of Orbital SRMs to rival missile system suppliers, leading to higher prices or reduced output.[35] To prevent Northrop from acting on these alleged incentives, the FTC required Northrop to agree to supply its SRMs and related services on non-discriminatory pricing, scheduling, quality, data, design, risk and other terms to any competitor seeking SRMs for a missile contract with DoD.[36] The consent also requires Northrop to establish safeguards preventing the misuse of any proprietary information it receives from competing missile system contractors or SRM suppliers.[37] The settlement also provides that the appointment by the DoD's procurement unit of a compliance officer with broad authority to oversee Northrop's compliance with the consent.[38]

- In 2019, the FTC approved Staples, Inc.'s acquisition of Essendant Inc. subject only to behavioral conditions. According to the FTC, Staples is one of the largest vertically integrated resellers of office products in the U.S., while Essendant operates the largest office product wholesale distribution business in the U.S. The FTC alleged that, absent relief, the combination of these vertically-related businesses would lead to competitive harm in the downstream market for reselling office supply products to mid-market end-customers.[39] According to the FTC's allegations, Staple's competitors in that market need to supply Essendant with competitively sensitive information in order to use Essendant's prepackaged product delivery services.[40] The FTC alleged that, with access to this information, as well as information relating to the cost of goods of Essendant's resellers, Staples would be able to increase prices on end-customers in the market for business-to-business office supplies.[41] The settlement addresses this vertical concern by requiring Staples to implement a firewall between its business-to-business operations and Essendant's wholesale business.[42]

IV. TAKEAWAYS FROM THE AGENCIES' MERGER SETTLEMENTS

First, although the sample size of DOJ vertical merger enforcement actions is limited—as is widely acknowledged, vertical integration is often "procompetitive or competitively neutral,"[43] and, presumably, most vertical mergers subject to DOJ review have been, and will continue to be, cleared without conditions—the DOJ's recent track record appears consistent with the view that the DOJ has closed the door to behavioral relief, even for the limited cases that, in the DOJ's view, present vertical competition concerns. Although the DOJ agreed to modify and extend the duration of the behavioral remedies of the *Ticketmaster/Live Nation* final judgment[44] — rather than, as was advocated by at least one interest

33 Press Release, Fed. Trade Comm'n, FTC Imposes Conditions on Northrop Grumman's Acquisition of Solid Rocket Motor Supplier Orbital ATK, Inc., June 5, 2018.

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 Sycamore Partners II, L.P., FTC File No. 181-0180 (January 28, 2019).

40 *Id.*

41 *Id.*

42 *Id.*

43 Dep't of Justice, Assistant Attorney General Makan Delrahim Delivers Opening Remarks for the Workshop on the Proposed Vertical Merger Guidelines, March 11, 2020.

44 It is also worth noting that the modified final judgment includes a range of monitoring and compliance provisions — including the appointment of an independent monitor with broad investigatory powers, reporting obligations, appointment of an antitrust compliance officer, mandatory employee compliance training, whistleblower protections, and a penalty of one million dollars for each future violation — that appear designed to address the DOJ's concern that behavioral remedies require aggressive and proactive monitoring by DOJ and waste agency resources, and could provide a roadmap for ensuring the effectiveness of future behavioral settlements. See Ticketmaster Motion to Modify at 12-15. The DOJ added similar provisions to the modified final judgment entered in 2018 in connection with Anheuser Busch InBev SA/NV's acquisition of SABMiller, which includes behavioral remedies as part of the original settlement entered into in 2016. Modified Final Judgment, *United States v. Anheuser Busch InBev SA/NV*, No. 16-cv-1483 (D.D.C. October 22, 2018).

group,[45] seek to unwind the transaction — it has since signaled that its willingness to agree to behavioral relief in that case should be viewed as a one-time exception.[46] Indeed, the DOJ has indicated that its experience investigating and enforcing the original *Ticketmaster/Live Nation* final judgment has only reinforced its position that behavioral remedies are problematic and disfavored.[47]

Second, it appears that the FTC has been more open to considering behavioral relief in merger settlements than the DOJ, but it is not clear if there is an actual conflict, or only a perceived one.[48] Although the FTC has agreed to behavioral remedies in a handful of merger settlements over the last few years, in all but one case, the remedy was limited to internal firewalls, which are generally seen as less "regulatory" in nature than externally-facing behavioral requirements such as non-discrimination and non-retaliation conditions.[49] Moreover, in conjunction with the settlement of its challenge to the *Northrop/Orbital ATK* merger — in which the FTC accepted a non-discrimination requirement to resolve vertical concerns — the FTC Bureau of Competition took the unusual step of issuing an official statement from its then-Deputy Director stressing that it "typically disfavors behavioral remedies and will accept them only in rare cases based on special characteristics of an industry or particular transaction."[50] The statement goes on to describe the special characteristics of the defense industry that made vertical relief appropriate for that transaction, including the FTC's close coordination with the DoD, the only buyer in the industry, the DoD's need for sophisticated products and the success of prior merger consents that relied on behavioral remedies to prevent vertical harms in the defense industry.[51]

V. CONCLUSION

The DOJ under the current administration has been unreservedly critical of the use of behavioral remedies in vertical merger settlements. Its approach to behavioral remedies in practice appears consistent with these policy views. By contrast, the FTC, while likewise disfavoring their use, appears willing to consider behavioral remedies to address discrete competition issues arising from vertical mergers while preserving the benefits of vertical integration. Whether there is an actual conflict between the agencies' respective approaches to vertical merger remedies, or only an apparent one, is unclear. Although the agencies' draft Vertical Merger Guidelines, which addresses the agencies' analytical approach for assessing the competitive effects of vertical mergers, aim to provide "[g]reater transparency about the complex issues surrounding vertical mergers, [which] will benefit the business community, practitioners, and the courts," practitioners should be aware of the difference in application when it comes to remedying vertical competitive concerns.[52]

45 See Letter from Diane L. Moss, President, American Antitrust Institute, Re: Amended Final Judgment: U.S. v. Tickemaster Entertainment, Inc., and Live Nation Entertainment, Inc., February 4, 2020, available at https://www.antitrustinstitute.org/wp-content/uploads/2020/02/AAI_Ltr-to-DOJ_LN-TM_F.pdf.

46 Joshua Sisco, *Live Nation Consent Decree Shows Problems with Behavioral Remedies, DOJ Official Says*, mLex, January 23, 2020.

47 *Id.*

48 In one merger settlement entered into by the FTC during this time frame, the FTC did require a divestiture to address vertical concerns, but the divestiture also resolved a problematic horizontal overlap in the relevant market, and it is impossible to know whether the FTC would have required the divestiture if the transaction raised only the vertical competition issues alleged by the FTC. See Analysis of Agreement Containing Consent Orders to Aid Public Comment, UnitedHealth Group Incorporated, FTC File No. 181-0057, June 19, 2019.

49 It is worth noting, however, that the FTC's settlement in *Staples/Essendant* drew dissenting opinions from the two Democratic Commissioners, asserting that the alleged vertical harms were not sufficiently addressed by the firewall remedy, including because, "[g]iven the hundreds of customers and resellers of Essendant, it may be difficult to police the firewall, especially with oral communications." Statement of Commissioner Rohit Chopra, Sycamore Partners II, L.P., FTC File No. 181-0180, January 28, 2019.

50 Fed. Trade Comm'n, Statement of Bureau of Competition Deputy Director Ian Conner on the Commission's Consent Order in the Acquisition of Orbital ATK, Inc. by Northrop Grumman Corp., File No. 181-0005, June 5, 2018.

51 *Id.* One can only speculate as to whether the DOJ would have agreed to the behavioral remedies accepted by the FTC in these cases if the same vertical factors had been present in transactions subject to the DOJ's review. It is perhaps notable, however, that the one defense industry merger reviewed by the DOJ that raised vertical concerns in this time frame was resolved with a divestiture.

52 Press Release, Fed. Trade Comm'n & Dep't of Justice, DOJ and FTC Announce Draft Vertical Merger Guidelines for Public Comment, January 10, 2020.

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