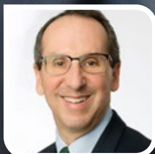
FIX IT OR FORGET IT: A "NO-REMEDIES" POLICY FOR MERGER ENFORCEMENT

BY JOHN KWOKA & SPENCER WEBER WALLER[1]



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Fix It or Forget It: A "No-Remedies" Policy for Merger Enforcement

By John Kwoka & Spencer Weber Waller

The inherent limitations of remedies as a method of resolving competitive concerns with mergers have become more evident. The expansive use of remedies in actual practice has likely exceeded the capabilities of agencies and courts; and empirical evidence has increasingly cast doubt on their effectiveness. Accordingly, we propose a "no-remedies" policy under which the antitrust agency would not accept any conduct remedies and only limited divestitures. The agencies would only consider those structural changes that have been undertaken (or at least committed to) prior to the parties' filing their merger proposal and would not enter into negotiation with the parties during the review period. This "Fix It or Forget It" ("FIFI") policy would encourage merging parties to initiate the necessary competitive fixes and permit the agency to evaluate precisely what the parties file in their proposal. We believe this policy would strengthen merger enforcement by restoring the traditional roles of the agencies and the courts.

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I. INTRODUCTION

Over the past several years, merger remedies have come under ever closer scrutiny. Adverse experiences have exposed the difficulties of fashioning effective remedies while academic studies have documented the frequency with which remedies have failed. This is particularly true for conduct or behavioral remedies, which proscribe specified actions on the part of the merged firm, but it is also true that divestitures have failed with considerable frequency. In light of this mounting evidence, the U.S. antitrust agencies, the Antitrust Division of the Justice Department ("DOJ") and the Federal Trade Commission ("FTC"), have undertaken a number of actions. Starting in 2004, the DOJ has issued no fewer than three successive and somewhat different – guides or manuals setting out its policies, while the FTC has conducted two major studies of its own past remedies and used those as the basis for numerous recommendations.

This churn in policy reflects dissatisfaction with each iteration of policy, as well as persistent uncertainty about the best direction of reform. Moreover, agency practices have often deviated – and continue to deviate – from their own stated policies, approving mergers subject to remedies that are ill-conceived, too easy to evade, and ultimately unenforceable. As a result, many anticompetitive mergers continue to avoid the challenges that should be brought against them. Current remedies policy does not generally preserve or restore competition in affected markets.

We conclude that, despite the promise of merger remedies as a third way between outright rejection and unconditional approval of a merger, in practice there appears to be no viable and sustainable third way. The defects of remedies policies in principle, compounded by the misuse of remedies in practice, suggest that their problems are inherent and unfixable. Accordingly, the time has come for a radical rethinking of the current approach. We propose moving to a "no remedies" policy towards competitively problematic mergers.

Under our no-remedies policy, the competition agency's role would return to its statutory origin, namely, to simply decide "yea" or "nay" to each merger as it is filed under HSR and then evaluated for its competitive effects. The agency would make its determination based on the filed proposal. The parties could make no further changes and the agency would not negotiate, propose, or in any other way be drawn into a discussion with the prospective merging parties on what would or might be a satisfactory remedy. Nothing, of course, would or should prevent the merging parties from undertaking changes prior to their filing that would, in their estimation, resolve the competitive problems posed by their prospective merger. Any such changes would simply be a factual part of their HSR filing, not a proffer or trial balloon or agenda item for negotiation. Even here, however, there would be limitations. As will be discussed further below, no conduct remedies whatsoever would be allowed, and any divestitures must be targeted and represent a truly miniscule portion of the operation of the companies.

Our "no-remedies" policy might therefore more accurately be labeled a "no-negotiated-remedies" policy, or perhaps better yet as "Fix It or Forget It" — FIFI for short. It would provide merging parties with every incentive to undertaking their own fixes prior to making their HSR filing. If the agencies conclude that the divestitures — whether consummated or subject to binding commitment – are viable, fully cure competitive concerns, and involve a fully suitable buyer, such commitments would be embodied in a consent decree approving the merger. If not, the agency would proceed to challenge the proposed transaction in its entirety.

Under this plan, the parties would face the full burden of establishing that the proposed relief would fully preserve or restore competition in the relevant markets as well as the current public interest standard in the Tunney Act. Otherwise, the competitive impact of the transaction as a whole would be challenged for an up or down decision by the district court or administrative law judge. Once litigation commenced, remedies would be off the table, both substantively and as an evidentiary matter, and the court would be limited to a consideration of whether the transaction as a whole violated the provisions of the Clayton Act, FTC Act, or state law equivalent.

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II. THE INHERENT DEFECTS OF REMEDIES... AND OF REMEDIES POLICY

In its 1961 decision affirming rejection of Dupont's attempted equity stake in General Motors, the Supreme Court made clear its preference for a divestiture remedy, rather than the conduct remedy proposed by the parties. The court said, "Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure." By contrast, in the view of the court, a conduct approach "would probably involve the courts and the Government in regulation of private business affairs more deeply than administration of a simple order of divestiture."[2]

Nothing in the intervening sixty years has challenged this wisdom: conduct remedies do indeed have fundamental, generally fatal, weaknesses. But in practice it is clear that the court did not go far enough since experience and evidence have now shown that divestiture remedies routinely fail to preserve or restore competition in affected markets as well. The problems with each type of remedy are different, and each deserves comment.

The defects of conduct remedies are by now reasonably well known. A conduct remedy is essentially an order by the competition agency that the merged firm not engage in certain anticompetitive actions as a condition for allowing the merger to proceed. The problem is that those prohibited acts are in the interest of the firm, which therefore can be predicted to seek workarounds and other methods to avoid or evade the intent of the remedy. The agency in turn labors under an informational disadvantage with respect to the firm's decisions and the intent of any action. This results in the likelihood that the firm will identify ways of minimizing the effect of the remedy, despite an agency's efforts at monitoring and overseeing the constraints it has imposed on the firm's behavior

For these reasons, most – but not quite all – of the remedies guides and manuals issued by the U.S agencies have stated their strong preference for divestitures instead of conduct remedies. The first of these – the 2004 Policy Guide to Merger Remedies issued by the Department of Justice Antitrust Division – echoed the Supreme Court. That guide described structural remedies as "clean and certain, and generally avoid costly government entanglement in the market," whereas conduct remedies were "more difficult to craft, more cumbersome and costly to administer, and easier...to circumvent."[3]

Despite this language, the DOJ employed conduct remedies in a number of major merger cases, and in 2011 issued a revised policy guide reflecting this policy shift endorsing some conduct remedies. Several years and many criticisms later, DOJ withdrew the revision and in 2020 issued a new Merger Remedies Manual restating its strong preference for structural rather than conduct remedies.[4]

The Federal Trade Commission has concurred in this stated preference for structural remedies. It also has conducted two studies of the effects of divestitures in actual merger cases. The first study, in 1999, assessed divestitures as successful if the divested assets remained in the market and were financially viable. Even by that weak standard, a sizeable fraction were failures.[5] A second FTC study, in 2017, suffered from a number of methodological flaws,[6] but nonetheless again found a similarly substantial fraction of studied divestitures to be failures.

These studies identified a number of defects and limitations of divestitures. Primary among them are the failure to divest an entire business operation rather than selected assets and the failure to ensure that the buyer has adequate financial and operational capabilities. Other divestitures have failed to recognize business issues affecting competition beyond the easily identified overlaps in operations, including so-called "portfolio effects." It was apparent that many failures simply resulted from the competition agency's informational disadvantage with respect to the technology, operations, marketing, and financial aspects of the businesses.

2 *U.S. v. E.I. Dupont de Nemours & Co.*, 366 U.S. 316, 330-31 (1961).

3 Antitrust Division, U.S. Department of Justice, Antitrust Division Policy Guide to Merger Remedies (2004), https://www.justice.gov/atr/page/file/1175136/download.

4 Antitrust Division, U.S. Department of Justice, Merger Remedies Manual (Sept. 2020), https://www.justice.gov/atr/page/file/1312416/download. This Manual was issued shortly after approval of the *Sprint/T-Mobile* merger subject to only to a deeply flawed remedy (discussed below), illustrating the dichotomy between stated policy and actual practice.

5 A Study of the Commission's Divestiture Process, Prepared by the Staff of the Bureau of Competition of the Federal Trade Commission, William J. Baer, Director (August 1999), https://www.ftc.gov/reports/study-commissions-divestiture-process.

6 John Kwoka, *Controlling Mergers and Market Power* (CPI, 2020), Appendix, https://www.competitionpolicyinternational.com/controlling-mergers-and-market-power-a-program-for-reviving-antitrust-in-america/.

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Divestitures have increasingly been used in novel ways that do not plausibly result in the preservation of competition. In a number of cases where it is apparent that the operations to be divested do not by themselves represent a fully capable business, the agencies have now sought to identify and assemble a package of assets from disparate sources in order to create the necessary replacement competitor. In this role the agencies have gone well beyond their law enforcement mission. Rather, they have entered into a three- or four-way bargaining process for which they are ill-suited,[7] acting more like a Wall Street investment bank determined to make a merger happen — a role altogether outside their writ.

Examples of the ineffective conduct and structural remedies and of overly expansive agency remedy practices abound. The difficulties of crafting a remedy and of fixing any possible loophole are illustrated by the resolution of the *Ticketmaster/Live Nation* merger in 2010. DOJ approved the merger subject to a conduct remedy that prohibited the company from several anticompetitive acts made possible by the merger. One key provision of the order stated that the merged firm must not condition or threaten to condition the provision of Live Nation Entertainment Events to a venue owner on whether the venue had contracted with another company for ticketing services. The merged company immediately did precisely that, arguing that the language only prohibited it from withholding *all* Live Nation events, not just one or a few events.

DOJ became aware of Live Nation's use of the prohibited conditioning almost immediately after the order went into effect, but it did not take action until 2020. At that time, it simply went to court to "clarify" the original language so as to prevent conditioning on one or more events, as opposed to all of them, but it did not charge Ticketmaster with contempt of court or even violating the order, nor did it seek rescission of the merger or any restitution or penalty from the company. As a result, customers were harmed for nearly a decade after the merger, in very much the same manner if the transaction had been approved unconditionally.

More recently, the DOJ approved the merger of Sprint and T-Mobile, two of the four national wireless carriers, subject to a remedy that illustrated many other problems with such orders. The agency acknowledged the need for four carriers in this industry, so that approval required constructing a fourth carrier to replace the one being extinguished. That fourth carrier is supposed to be Dish, a satellite TV operator with no relevant operations, infrastructure, or expertise in wireless telephony.[8] Dish is nonetheless supposed to become the necessary fourth carrier by 2026 by cobbling together Sprint's prepaid business; rights to acquire spectrum from Sprint; a phased 5-year divestiture plan for Sprint's retail locations, personnel, and licenses; all supported by interim use of T-Mobile's infrastructure and transitions services for a period of three years, while the new company builds out a national wireless infrastructure.

Many doubt the prospects of success for this remedy.[9] After all, success would require (1) the competition agency correctly identifying the necessary components of a new viable competitor, (2) a newcomer firm's ability to integrate those components into a new national network, (3) T-Mobile's willingness to divest suitable locations and infrastructure, and (4) providing crucial services to that newcomer to help it become a potent rival to itself. The entire deal was held together only as a result of the extraordinary — and likely inappropriate — intervention of the then-Assistant Attorney General for Antitrust who helped smooth tensions between Sprint and T-Mobile and coached them on their lobbying strategies with other regulators and with Congress.[10] Not surprisingly, it has quickly become clear that this remedy is already failing.

In the software sector, these limitations and problems are exacerbated by the fact that key assets are often software and other intellectual property, that the technology defies easy definition and is readily manipulated, and that the process confers enormous discretion on the parties, rendering oversight largely impossible. One of the most complicated examples came in the *Google/ITA* merger.[11] In July 2010, Google entered into a merger agreement to acquire ITA, the provider of the QPX software, which was the leading independent airfare pricing and shopping system. These systems provide pricing, schedule, and seat availability information to Internet travel sites such as Expedia and Travelocity, where consumers make on-line travel reservations, as well as so-called meta-search sites such as Kayak and TripAdvisor, which allow customers to view results from multiple travel sites. While Google was not then in the on-line travel space, it was the leading general use Internet search engine in the U.S., the leading seller of Internet advertising, and planned to launch an Internet travel aggregator site using the technology it would acquire from ITA.

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7 For an analysis of the hazards of agency negotiation over remedies, see Joseph Farrell, "Negotiation and Merger Remedies: Some Problems," *in Merger Remedies in American and European Union Competition Law*, (Francois Leveque & Howard Shelanski, eds., Edward Elgar, 2003).

8 The criterion that a buyer be suitable or even plausible has weakened to the point where it is unrecognizable. In addition to the *Sprint/T-Mobile* matter, see the FTC's resolution of the proposed merger of AbbVie and Allergan by drug divestitures to Nestle, a food and beverage company. Dissenting Statement of Commissioner Rohit Chopra In re *AbbVe, Inc./Allergan plc*, May 5, 2020, https://www.ftc.gov/public-statements/2020/05/dissenting-statement-commissioner-rohit-chopra-matter-abbvie-inc-allergan.

9 https://www.wired.com/story/opinion-the-terrible-t-mobilesprint-merger-must-be-undone/.

10 Katie Benner and Cecilia Kang. *How a Top Antitrust Official Helped T-Mobile and Sprint Merge,* N.Y. Times, (Dec. 19, 2019), https://www.nytimes.com/2019/12/19/technology/sprint-t-mobile-merger-antitrust-official.html.

11 For other examples see Spencer Weber Waller, *Access and Information Remedies in High Tech Antitrust*, 8 J. Comp. L. & Econ. 573 (2012).

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The Justice Department's complaint focused on access as the likely harm resulting from the transaction. The complaint argued that the proposed merger would give Google the means and incentive to use its ownership of QPX to foreclose or disadvantage its prospective flight search rivals by degrading their access to QPX, or denying them access to QPX altogether. As a result, the proposed merger was likely to result in reduced quality, variety, and innovation for consumers of comparative flight search service.

The eventual consent decree imposed one of the most complicated access regimes of any merger case. The defendants were required to honor all existing QPX licensing agreements, negotiate extensions of such licenses with commercial terms "substantially similar" to the existing terms at the time of the consent decree, and negotiate other terms of the extension that are "fair, reasonable and non-discriminatory." New licenses must contain commercial terms that are "fair, reasonable and nondiscriminatory" as measured by both the specific terms under negotiation and the terms in effect between the defendants and similarly situated competitors. Defendants must provide upgrades at no more than fair, reasonable, and non-discriminatory prices. Furthermore, defendants must license a new software product called InstaSearch that was in development by ITA at the time of the merger on fair, reasonable, and non-discriminatory terms to all interested parties. Finally, the defendants agreed to devote at least as much annual resources as the average of the past two years for the continued research development and maintenance of both QPX and InstaSearch.

These cases are not isolated examples, but rather illustrations of the extraordinary efforts by the antitrust agencies to devise increasingly complex, but ultimately unenforceable, remedies as pretexts for merger approval. Not surprisingly, broader evidence confirms that they are not effective. One of us has conducted a meta-analysis (a structured summary of studies) of the effects of remedies in actual mergers and found that on average divestitures result in price increases of the same magnitude as cases not subject to remedies at all, while conduct remedies (many fewer in number) lead to more substantial price increases.[12]

Despite repeated efforts at reform, our merger remedies policy is broken. Even where policy guides set out sensible principles, the competition agencies have consistently misused their discretion, resulting in remedies too easily evaded and mergers too often anticompetitive. The time has come to confront the implications of these facts and act to prevent the agencies, and to a lesser extent, the courts from abusing their discretion over merger remedies.

III. FIX IT OR FORGET IT

We propose a Fix It or Forget It ("FIFI") system to replace our broken remedies system. Under FIFI, the agencies would challenge any transaction that may substantially harm competition in its entirety, unless — and only unless — the parties propose and implement before consummation to the satisfaction of the agencies a viable divestiture to a suitable buyer. The parties would be required to submit their commitments in their original HSR filing itself or in response to a second request from the Agencies, and these would become an integral part of their merger proposal.[13]

Conduct remedies would not be considered under any circumstances. Any merger seemingly "fixable" only with a conduct remedy would be treated as anticompetitive and challenged as such. Divestitures proposed by the parties would be considered under two circumstances. First, they must be *de minimis*. Divestitures involving more than a small fraction of a company — perhaps 5 to 10 percent of revenues, or $1 billion — would be judged as inherently unlikely to yield a satisfactory outcome, since they would constitute a change more akin to a restructuring of the company rather than a merger-related fix. Second, any divestiture would have to be proposed by the merging parties as an integral part of their merger filing. Ideally, the parties would complete the divestiture prior to consummation. In the event this is not possible, they would have to enter into a binding commitment to divest assuming agency approval of the merger-plus-divestiture that the parties file under HSR. In any event, the agency would have before it the full package for evaluation.

In response, the Agencies would evaluate the proposed merger-plus-divestiture plan and market test it as needed through the familiar process of seeking information and testimony from customers, suppliers, and competitors. In addition, the Agencies could seek more general feedback from the public through publication in the Federal Register and a notice and comment period. If the proposal is acceptable to the Agency, then the parties and the Agency would embody the agreement in a consent decree and share with the court both why and how the remedy fully cures all substantial potential competitive harms to the transaction as a whole.

12 Kwoka, *supra* note 6.

13 Our FIFI proposal focuses on horizontal mergers. We do not here address vertical or other mergers, nor dual agency review.

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What would *not* happen is an endless round of negotiations, modifications, brokering, and back and forth between the Agency and the parties over divestiture, access, and behavioral remedies. If the proposed remedy package truly cures the problem, the Agencies would accept it after appropriate review. If not, the proposal would be rejected, and the Agency would seek to prohibit the proposed transaction in its entirety under the Clayton or FTC Act. The court would then judge the legality of the proposed transaction in its entirety under the applicable law and not litigate the fix.

Under FIFI, parties could not continually introduce new proposed remedies, or strategically introduce revisions late in the investigative process, as has sometimes been done. This limitation would create strong incentives for the parties to propose their best offers, sooner rather than later, to avoid a challenge on the merits to the transaction as a whole. It also creates incentives for the Agency to focus their resources on litigation, and not the evaluation of complex and often-changing offers that continue into the litigation phase of any merger challenge.

Parties could of course always withdraw a filing (as they can under the present system) for the purpose of refiling with an enhanced remedy package. While in principle they could do this repeatedly until the agency responded favorably, merging parties would face disincentives to that strategy. Each refiling would restart the HSR time clock and impose new filing fees. Given market realities and current legislative proposals for greater filing fees and longer time periods for investigation, merging parties would almost certainly wish to avoid such repetitions.

Under FIFI the parties propose, and the agency disposes, rather than initiating a bargaining process. FIFI would constrain the discretion of the courts as well as the agencies. All acceptable *de minimis* settlements with party commitments would go through enhanced Tunney Act review to satisfy the court and public that the proposed remedies are truly effective to eliminate the competitive problems with the transaction as a whole. The problems with the current limited Tunney Act review[14] would be addressed with greater standing and appeal rights for all affected parties and a higher burden on the merging parties and the agencies to demonstrate that the transaction as a whole poses no danger to competition.

The proposed divestiture remedy proposals normally should be completed on, or before, the approval of the consent decree by the court. If there were truly exceptional circumstances making that infeasible, the consent decree or closing statement would have to include monitoring and trustee provisions (with crown jewel provisions if necessary) on a tight time frame plus reporting obligations to provide the agency with the information if any further action – including undoing the merger agreement – is necessary. In all cases, the remedy would include the requirement that the parties report, on a regular basis, key performance data to the agency sufficient to permit assessment of the effectiveness of the remedy over a suitable period of time.

FIFI would also have the salutary effect of making merger law look more like the rest of antitrust law. In Section 1 and Section 2 cases, settlement is possible if the parties and the agencies reach agreement that cures the competitive harm at issue. But otherwise, the Agencies challenge the agreement or the unilateral conduct, rather than seeking to broker structural and behavioral remedies that are hard or impossible to monitor or evaluate.

Some version of a different, but similarly titled, policy of "fix it first" has been around since the 1980s.[15] But that policy was designed to enhance agency discretion to decline to challenge mergers, rather than eliminate flawed remedies and unchallenged mergers. The current version of the DOJ Merger Remedies Manual describes the general outlines of the government's fix it first policy over the past forty years as:

A fix-it-first remedy is a structural solution implemented by the parties that the Division accepts before a merger is consummated. An acceptable fix-it-first remedy eliminates the Division's anticipated (and yet to be determined) competitive concerns and therefore the need to file a case.[16]

This occasional practice is not embodied in statute or regulation but agency practice. It is not limited by size. It is an alternative to even filing a case or having to embody the parties' divestiture in a consent decree or seek judicial approval for that agreement. As currently constituted, fix it first is a tool that enhances, rather than limits, agency discretion over merger remedies.

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14 John J. Flynn & Darren Bush, *The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the "Microsoft Fallacies,"* 34 Loy. U. Chi. L.J. 749 (2003).

15 Nathaniel C. Nash, *Business and the Law; U.S.'S 'Fix-it' Antitrust Policy*, N.Y. Times, Sept. 16, 1986, https://www.nytimes.com/1986/09/16/business/business-and-the-law-us-s-fix-it-antitrust-policy.html.

16 2020 Merger Remedies Manual, *supra* note 4, at 17.

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Our FIFI proposal is not fix it first, but rather fix it or forget it (unless the parties convince the judge that no competitive harm is likely). The fix is further limited to *de minimis* divestitures that render the entire transaction competitively benign. If the defendants do not propose any commitments or do not propose commitments satisfactory to the Agencies, then the transaction in its entirety would be challenged in district court or before an administrative law judge. If the litigation is successful, the transaction is blocked. If not, it proceeds free from conditions, but remains subject to further challenge if actual (rather than predicted) harm ensues.

IV. CONCLUDING OBSERVATIONS

Although this proposal might be viewed by some as radical, others may see it as quite modest. In some cases, sophisticated merging parties already do thing along these lines: they determine the likely antitrust issues with their merger and proceed to make a fix before initiating their HSR filing. The agencies then have a complete proposal from the parties and can evaluate it as such. To the extent the parties have indeed made the necessary fix — say, a minor divestiture or two — the prospects for a straightforward investigation, consent decree, and clearance are correspondingly enhanced.

That said, this proposal is fundamentally different from existing policy and practice in the U.S. It shifts the full responsibility for identifying an appropriate remedy to the parties. It creates an incentive for the parties to come forward with a sound remedy from the outset, rather than attempting to determine what they can get away with or introducing a new remedy well into the process. It relieves the agency of the burden of engaging in protracted negotiations with the parties as the latter seek the least constraining remedy. It also eliminates the risk of the agencies stepping outside their lane and acting as de facto business brokers or investment bankers in matching buyers and sellers. Finally, it brings more rigor to Tunney Act review of proposed *de minimis* divestitures and requires litigation of more troubling transactions. By focusing on the necessary remedy, the process would likely require less post-merger monitoring. And if no remedy is found acceptable, it will likely streamline the litigation that would follow a challenge.

This proposal, in short, "gets the incentives right," and thereby promises a more efficient and effective remedy policy: Simply put, the parties (and not the agencies) must fix it or forget it.

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