# Dynamic Industries and Merger Remedies

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## Introduction

In the United States, the Antitrust Division of the Department of Justice (DOJ or the Division) and the Federal Trade Commission (FTC) (together, the antitrust authorities) are responsible for reviewing mergers and acquisitions and imposing appropriate remedies. In rapidly evolving sectors, such as technology, consumer services, online retail and pharmaceuticals, these responsibilities can be particularly challenging.

Unlike traditional industries that change very little over time, dynamic industries are characterised by 'higher entry and exit rates, as well as continuous processes of innovation that systematically disrupt existing business models and create entirely new markets'.[2] In these markets, it can be very difficult to predict the competitive effects of a transaction or to craft an appropriate remedy to maintain competition.

This chapter contains four sections, which, in turn, briefly identify common types of merger remedies, discuss the characteristics of dynamic industries and the challenges posed for traditional merger remedies, and cover the different approaches adopted by the antitrust authorities in fashioning remedies in two dynamic industries.

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## Overview of merger remedies

As described by the antitrust authorities, the goal of a merger remedy is to effectively preserve efficiencies while maintaining competition in the relevant market.[3] The FTC and DOJ have long recognised that determining an appropriate remedy – perhaps particularly when the transaction involves a dynamic industry – requires a careful analysis of the facts of each individual transaction and implicated market.[4]

Nevertheless, the antitrust authorities adhere to several key principles and preferences regarding merger remedies: they require that merger remedies (1) must preserve competition, (2) should not create ongoing government regulation, (3) should preserve competition, not protect competitors, and (4) must be enforceable.[5] Merger remedies typically fall within one of two categories: structural remedies that required divestitures of assets or business divisions; or behavioural remedies that impose conduct restrictions or requirements on the merging parties.[6]

Structural remedies are generally required to remedy competitive concerns in horizontal mergers, or in vertical mergers where behavioural remedies are deemed inadequate, and are much more common than behavioural remedies.[7] When imposing structural remedies, the FTC and DOJ (1) prefer divestitures of an existing business,[8] (2) typically require an 'upfront' as opposed to post-close buyer,[9] and (3) allow for divestiture of discrete assets, despite their stated preference for ongoing business divestitures.[10]

When vertical mergers have raised competitive concerns, the FTC and DOJ historically often relied on behavioural remedies. The antitrust authorities have a range of remedies at their disposal, including firewalls, temporary supply agreements and temporary limits on the combined entity's ability to rehire divested employees.[11] The agencies have also combined structural and behavioural remedies,[12] particularly under the Obama administration.[13] However, in recent years, the agencies have

indicated that they will be less willing to entertain behavioural remedies to resolve vertical concerns than they have been in the past, and it remains to be seen whether the Biden administration will include a greater willingness to seek behavioural remedies.

## Overview of dynamic industries

Dynamic industries (those characterised by rapid change, innovation and disruption) are becoming more prevalent in today's technology-driven world. This has led to increased challenges for merger control because it is not always clear how a transaction might affect competition in markets that are subject to constant innovation and change. And traditional merger assessment tools may overly 'focus on the current structure of markets, instead of forwardly looking at how markets might evolve post-merger'.[14]

Section 7 of the Clayton Act prohibits transactions whose effect 'may be substantially to lessen competition, or to tend to create a monopoly'.[15] The antitrust authorities have stated that, under this standard, they seek 'not only to stop imminent anticompetitive effects, but to be forward-looking and stop potential restraints on competition "in their incipiency"'.[16]

Dynamic industries raise several unique issues with respect to merger analysis. First, innovation and new product development are often key elements of competition. The 2010 Horizontal Merger Guidelines indicate that the antitrust authorities 'may consider whether a merger is likely to decrease innovation competition' as well as 'whether [a] merger is likely to enable innovation that would not otherwise take place'.[17] The 2020 Vertical Merger Guidelines similarly identify 'deterr[ence] from innovation' as a consideration in identifying whether a vertical merger may diminish competition.[18] Second, 'potential competition' analyses take on heightened importance. Mergers in dynamic industries can raise concerns when the merging parties, absent the transaction, were planning to, or would have had the ability or incentive to, enter the other's market and compete directly.[19]

Third, the authorities recognise that elimination of competition from new, disruptive 'maverick' firms – including those with new, unusual business models – may cause significant harm, even when the maverick player is a new entrant or has only a modest market share.[20]

Where appropriate, mergers in dynamic industries can be cleared subject to remedies tailored to address the harm to competition, including harm to innovation. But one of the challenges of merger enforcement in dynamic industries is to craft adequate remedies when it is uncertain how the market will evolve in the future. The antitrust authorities regularly analyse mergers in dynamic industries, such as pharmaceuticals and high-technology goods and services. This chapter discusses how the antitrust authorities have addressed each in turn.

## Remedies in the pharmaceutical sector

There has been a consistently high volume of mergers and acquisitions within the pharmaceutical industry. Between 2016 and 2020, there were more than 900 deals in this industry representing more than US$800 billion.[21] The goal of merger enforcement in the pharmaceutical space is to protect and promote competition and innovation across product lines. Under its traditional approach, the FTC will engage in an analysis, product by product, to assess where overlap or potential future competition can be found. If the FTC believes that the effect of the transaction 'may be substantially to lessen competition'[22] in a particular market (or markets), the FTC may seek remedial action, such as pursuing a settlement or attempting to block the merger in court or through the agency's administrative process. FTC enforcement actions in the pharmaceutical sector historically have resulted in settlement between the parties and the government, rather than litigation. Although the FTC has discretion in pursuing settlements in merger cases, the most common remedy in a pharmaceutical consent decree is a structural remedy, which typically involves divesting one of the parties' overlapping pharmaceutical products and its related

assets. As part of its traditional pharmaceutical remedies, the FTC typically requires (1) ongoing business divestitures that allow for the buyer to become fully operational quickly,[23] (2) an upfront buyer that is familiar with and committed to the relevant market, including current involvement in the same or adjacent markets and prior dealings with the same customers and suppliers, and that has the financial ability to acquire and maintain the divested assets,[24] and (3) an interim monitor to oversee the transfer of the divestiture assets and the buyer's actions in connection with the new business.[25] Many consent decrees will also require that the merged firm supply buyers with inputs or products for a specified period post-divestiture to support the buyer's ability to immediately compete successfully in the market. Similarly, consent decrees may include transition services agreements, which require the merged firm to provide the buyer with back-office and other functions for a limited period until the buyer can perform the services on its own. To further mitigate any risk associated with divesture, the FTC will require the parties to present an upfront buyer, which it will then analyse to determine whether the buyer is capable of competing with the newly acquired product.

In addition to these general principles concerning divestiture remedies, the FTC's experience with settlements in the pharmaceutical industry has led to certain expected practices for divestitures in this area. For example, the FTC has stated that the merging parties should expect to divest the 'easier to divest' product when possible, including products made at third-party manufacturing sites.[26] Where the merging parties have an overlap between a branded and pipeline product, the FTC's position is that the currently marketed product must be divested.[27] This approach reflects the FTC's view that divesting a pipeline product, where the divestiture buyer must navigate the final development and approval of the to-be marketed drug, places the risk of failure onto consumers. This is also in keeping with the FTC's stated mission of encouraging innovation, as it incentivises the merged firm to continue channelling resources towards new pipeline products.

Recently, the FTC's traditional approach to pharmaceutical transactions, including the use of product divestitures, has faced increased scrutiny about whether it fully and appropriately captures all potential anticompetitive effects from a proposed transaction, as described in more detail below in the dissenting statements by Democratic Commissioners to consent decrees during the Trump administration. This scrutiny is only expected to increase under the Biden administration now that the Democratic Commissioners are in the majority at the FTC.

On 15 November 2019, Bristol-Myers Squibb Company (BMS) and Celgene Corporation agreed to divest Celgene's Otezla psoriasis treatment as proposed by the FTC in a consent decree in order for Bristol-Meyer-Squibb to consummate its US$74 billion acquisition of Celgene.[28] At the time, this was the largest proposed divestiture that either antitrust authority had ever required.[29] The FTC was concerned that the merger as proposed would not incentivise BMS to continue developing its own pipeline product, which was supposed to treat moderate-to-severe psoriasis, and, in fact, would lead to a monopoly. The parties accepted the proposal to divest the relevant products to Amgen, another pharmaceutical and biologic company. Dissenting statements to the proposed settlement were issued by Democratic Commissioners Rohit Chopra and Rebecca Kelly Slaughter, who stated that the settlement, which follows the FTC's standard approach, did not fully capture all competitive consequences of the transaction, such as possible effects on drug prices, innovation competition and incentives to engage in other anticompetitive conduct.[30] On 12 January 2020, the FTC approved the final consent order requiring divestiture to Amgen.[31]
On 5 May 2020, AbbVie Inc and Allergan plc agreed to divest assets to Nestlé, SA to remedy the FTC's allegation that the US$63 billion acquisition would impose significant competitive harm on consumers, specifically those who were being treated for exocrine pancreatic insufficiency (EPI).[32] The FTC alleged that of the four companies that sell products that treat EPI, AbbVie and Allergan controlled 95 percent of the market combined.[33] The FTC also required that Allergan return its rights and assets relating to IL-23

inhibitor brazikumab to AstraZeneca plc, as it found that AbbVie and Allergan were two of only a limited number of companies in late-stage development with IL-23 inhibitors to treat moderate-to-severe ulcerative colitis and Crohn's disease. Commissioners Chopra and Slaughter again issued dissenting statements, raising several concerns about the proposed settlement agreement and the FTC's approach in pharmaceutical mergers generally.[34] Commissioner Chopra challenged the FTC's approach of focusing on discrete product overlaps in pharmaceutical mergers and raised a number of general concerns about the divestiture process, including merging companies' desire to sell assets to weak buyers, buyers lacking incentives and ability to restore competition, and the increased likelihood that divestitures fail if the FTC relies on speculation rather than real-world data and robust due diligence.[35] Commissioner Chopra also criticised the majority for approving a divestiture buyer with minimal prior experience in the pharmaceutical sector.[36] Commissioner Slaughter generally agreed with Commissioner Chopra's statements and also raised concerns with respect to harm to innovation.[37] Specifically, she noted that major pharmaceutical companies often justify the cost of their products as necessary to fund investment in research and development, but in this case AbbVie publicly stated its plans to end Allergan's research programmes.[38] The final order was approved on 4 September 2020.[39] On 30 October 2020, Pfizer Inc and Mylan NV agreed to a divestiture remedy in a proposed consent decree. The proposed decree specifically required the spin-off of Pfizer's Upjohn division to be combined with Mylan, to form a new company called Viatris. The order required the divestiture of products in 10 generic markets to Pracso, LLC. The FTC's press release regarding the settlement stated that the proposed combination would harm current US competition by reducing the number of existing suppliers of seven products and would delay or eliminate a likely entrant for three products.[40] To ensure that Prasco would be able to maintain competition, the products that were divested continued to be manufactured by Mylan and Upjohn's suppliers and Pfizer would be Prasco's contract manufacturer. This remedy construction is fairly common and in line with the FTC's historical approach to pharmaceutical

mergers.[41] Despite that, Commissioners Chopra and Rebecca Slaughter opposed this proposed consent decree. In Commissioner Chopra's dissent, which Commissioner Slaughter joined, he stated that the FTC's record of not pursuing litigation to block mergers of this calibre 'encourages market actors to propose even more unlawful mergers', given that they believe 'that there is simply no risk of the FTC blocking an unlawful pharmaceutical merger outright'.[42] This dissent further signalled dissatisfaction with the current remedy framework in this industry.[43] The final order was approved on 28 January 2021.[44]

These cases illustrate a growing tension within the FTC about whether structural divestitures of overlapping products are the best way to prevent anticompetitive behaviours and encourage innovation in pharmaceutical transactions. On 16 March 2021, the FTC announced the creation of a working group to evaluate the impact of mergers in the pharmaceutical industry.[45] This group is comprised of various antitrust enforcement agencies, including the Canadian Competition Bureau, European Commission Directorate General for Competition and the United Kingdom's Competition and Markets Authority. This working group is tasked with identifying 'concrete and actionable steps to review and update the analysis of pharmaceutical mergers'.[46] Following the announcement of this working group, then Acting Chairwoman Slaughter addressed the Subcommittee on Antitrust, Commercial and Administrative Law of the Judiciary Committee.[47] In her address, she asserted that in the current regulatory landscape, the FTC has an issue with deterring problematic transactions evidenced by the fact that many of the cases that the FTC challenged as anticompetitive represent 'transactions or conduct that never should have left the boardroom'.[48] Acting Chairwoman Slaughter was explicit in stating that the FTC will be taking a more aggressive approach to addressing pharmaceutical mergers, especially given the number of mergers, the increasing cost of drugs, and continuous concerns surrounding anticompetitive conduct by pharmaceutical companies. In May 2021, the Multilateral Pharmaceutical Merger Task Force sought public comment regarding the future direction of

enforcement and policy-making.[49] The questions the group proposed included the following:

- What theories of harm should enforcement agencies consider when evaluating pharmaceutical mergers, including theories of harm beyond those currently considered?

- What is the full range of a pharmaceutical merger's effects on innovation? What challenges arise when mergers involve proprietary drug discovery and manufacturing platforms?

- In pharmaceutical merger review, how should we consider the risks or effects of conduct such as price-setting practices, reverse payments, and other ways in which pharmaceutical companies respond to or rely on regulatory processes?

- How should we approach market definition in pharmaceutical mergers, and how is that implicated by new or evolving theories of harm?

- What evidence may be relevant or necessary to assess and, if applicable, challenge a pharmaceutical merger based on any new or expanded theories of harm?

- What types of remedies would work in the cases to which those theories are applied?

- What factors, such as the scope of assets and characteristics of divestiture buyers, influence the likelihood and success of pharmaceutical divestitures to resolve competitive concerns?[50]

## Remedies in the technology sector

Merger remedy considerations in high-technology markets implicate a host of complex legal, economic and technical issues. These considerations must also be examined against the backdrop of increased antitrust scrutiny of high-tech markets.[51]
For much of its history, antitrust policy has focused on the likely consequences of mergers for competition in existing product markets. However, in recent years, antitrust enforcement agencies have paid much attention to potential harms from mergers affecting competition for new products and incentives to innovate. Antitrust regulators have also recognised that many high-tech markets have characteristics such as economies of scale and network effects that erect barriers to new competition and can enhance the persistence of market power.[52]

In several recent cases, the antitrust authorities have imposed merger remedies to maintain innovation competition. For example, in May 2018, the Division took action to preserve innovation competition in agricultural product markets as a resolution in the *Bayer AG/Monsanto Co* transaction.[53] According to the Division, the originally proposed transaction would have 'threatened to stifle the innovation in agricultural technologies that has delivered significant benefits to American farmers and consumers'.[54] Absent the merger, Bayer and Monsanto competed in offering 'integrated solutions' that combined innovations in various parts of the agricultural sector. The remedy was valued at US$9 billion, the DOJ's largest-ever negotiated merger divestiture at the time. The divestiture package included certain intellectual property rights and research capabilities, including research and development projects, to support innovation competition.[55] The proposed merger between Thales SA and Gemalto NV raised similar issues. Thales and Gemalto were the world's leading providers of general purpose hardware security modules (GP HSMs), which are frequently included as components of complex encryption solutions to safeguard sensitive data. The Division's remedy required a divestiture of Thales's GP HSM business, which was designed to preserve the incentive and ability to

innovate by requiring the divestiture of certain intellectual property and research capabilities for products still under development.[56] But the design and implementation of remedies to solve competition concerns in dynamic industries can be challenging and is sometimes not successful. The proposed merger of Applied Materials and Tokyo Electron in 2015 is an example of a transaction for which the Division concluded that there were no acceptable remedies for the predicted harms to innovation.[57] The firms eventually abandoned their proposed merger after the Division informed them of its competition concerns.[58] Applied Materials and Tokyo Electron were two of the world's largest providers of the tools used to manufacture semiconductor chips. In its investigation of the proposed merger, the Division identified a variety of specific overlaps where the merging firms sold existing deposition or etch manufacturing tools in competition with each other.[59] Although the overlapping tools represented a very small amount of the merging parties' revenues, the Division nonetheless concluded that the dynamics of future tool competition indicated that:

> [b]ecause [Applied Materials] and [Tokyo Electron] are so capable, they are often the two best (or among the three best) development partners to solve a leading-edge semiconductor manufacturer's high-value deposition and etch problems. The merger would have eliminated the competition between [Applied Materials] and [Tokyo Electron] to be selected as a future development partner, as well as any eventual competition between their competing products.[60]

Moreover, 'replicating the competitive of one of the most innovative companies in a sector that is virtually synonymous with innovation would be exceptionally challenging'.[61] Accordingly, 'a satisfactory structural remedy would have been difficult to construct'; the Division ultimately rejected the proposed remedies because the necessary assets to address future innovation concerns could not be isolated from the companies' broader capabilities and experiences in the relevant industry.[62]

The antitrust authorities also closely analyse mergers that eliminate a nascent or disruptive competitor, especially in dynamic high-technology markets. In many instances, this had led the authorities to seek to enjoin transactions.[63] In some cases, market dynamics have supported decisions not to intervene in mergers in high-tech markets. For example, the DOJ did not challenge the merger of the satellite radio companies XM and Sirius, in part because the Antitrust Division anticipated competition from new audio-streaming services.[64]

In certain merger enforcement actions, the antitrust authorities have accepted behavioural or structural commitments for merging parties in technology industries. For example, after Ticketmaster and Live Nation – the dominant firm in ticket sales and servicing, and the largest concert promoter in the United States, respectively – announced their intent to merge in February 2009, the DOJ investigated the transaction and eventually entered a consent decree with the merging parties that consisted of three main parts.[65] First, recognising that the merger would result in the loss of Live Nation as a competitor in ticket servicing, the consent decree sought to create a new competitor of comparable significance by requiring Ticketmaster to license its Host ticketing platform to AEG, which was a substantial company that was already integrated into several stages of the rock concert business.[66] Second, the consent decree sought to strengthen another independent competitor in ticketing services by requiring Ticketmaster to divest its specialist software and technical support business to Comcast-Spectacor.[67] Third, the consent decree prohibited certain specific practices that the DOJ viewed as anticompetitive, such as retaliation against a venue owner that might opt for ticketing services from a rival of Ticketmaster.[68] This package of remedies was designed to 'mitigate[] consumer harm while still allowing the parties to prove that together they could discount, innovate, or otherwise benefit the live music industry and its fans'.[69]

To take another example, the FTC approved semiconductor manufacturer Broadcom's 2017 acquisition of Brocade Systems

subject to a requirement that Broadcom implement firewalls to protect confidential information.[70] The FTC's concerns arose because of Broadcom's access to the confidential business information of Brocade's major competitor, Cisco Systems, Inc, that 'could be used to restrain competition or slow innovation in the worldwide market for fibre channel switches'.[71] The parties accepted a consent decree that required Broadcom to implement firewalls preventing the flow of Cisco's confidential business information outside an identified group of relevant Broadcom employees.[72] In connection with its review of Google's acquisition of ITA Software Inc, the Division required Google to develop and license travel software, to establish internal firewall procedures and to continue software research and development.[73] The Division stated that these measures were designed to avoid the 'less innovation for consumers' that would have resulted from the acquisition as originally proposed.[74] In the case of the proposed merger between T-Mobile and Sprint, the DOJ reached a settlement with the merging parties designed to promote the new entry of a competitor to the market. The settlement required the divestiture of Sprint's prepaid business to Dish Network Corp and also provided for the divestiture of certain spectrum assets to Dish. T-Mobile and Sprint were also required to make available to Dish at least 20,000 cell sites and hundreds of retail locations, and T-Mobile was required to provide Dish with access to the T-Mobile network for seven years while Dish builds out its own 5G network.[75] According to the DOJ, the goal of the remedy provided by the settlement was to 'enable a viable facilities-based competitor to enter the market'.[76]

## Conclusion

One of the challenges of merger enforcement in dynamic industries is to craft adequate remedies when it is uncertain how competitive dynamics will play out in the future. There is no one solution for how to approach merger review and remedies in dynamic industries; instead, there are many examples of the different approaches taken by the antitrust authorities in the United States depending on the specific industry and facts at issue.

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As seen in the above examples, structural remedies can be an effective solution to address competition concerns, including those such as loss of innovation competition, loss of potential competition or loss of a maverick competitor. But designing an effective remedy can be hindered when it is difficult to predict the exact assets that should be divested to promote innovation in the future and to maintain the innovation that would have happened absent the transaction. Moreover, structural remedies are often irreversible and, as a result, do not adapt to changing market circumstances. Although there are some proposals to make structural remedies more flexible, including the divestiture measures that are conditional on future events (e.g., lack of new entry in a given time frame), these proposals also have limitations, including increased legal uncertainty for merging parties and increased costs.[77]

Similarly, although behavioural remedies have more flexibility than structural remedies, they also have limitations, particularly in the context of dynamic industries. It is challenging to design behavioural remedies that anticipate future competitive dynamics, especially in rapidly changing industries where remedies can become redundant or counterproductive. Although there are some proposals in the literature to consider introducing review clauses that allow the remedy to adapt to changing market conditions, these would require even more ongoing monitoring by the authorities.[78]

## Notes

[1] Margaret T Segall is a partner and Nicole M Peles is a practice area attorney at Cravath, Swaine & Moore LLP.
[2] Organisation for Economic Co-operation and Development [OECD], Merger Control in Dynamic Markets (2020) [Merger Control in Dynamic Markets], at 7, available at **https://www.oecd.org/daf/competition/merger-control-in-dynamic-markets-2020.pdf**.
[3] US Department of Justice [DOJ], Merger Remedies Manual (September 2020) [Merger Remedies Manual], at 2 (describing the goal of preserving the efficiencies created by the merger 'while

preserving competitive markets'), available at **http://www.justice.gov/atr/page/file/1312416/download**. See also Richard Feinstein, US Federal Trade Commission [FTC] Bureau of Competition, 'Negotiating Merger Remedies' (January 2012), at 4 (acceptable remedies 'maintain or restore competition in the markets affected by the merger'), available at **ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf**.

[4] Merger Remedies Manual (see footnote 2, above), at 2 ('Tailoring the remedy to address the violation is the best way to ensure that the relief obtained cures the competitive harm.').

[5] id. at 3–6.

[6] id. at 4.

[7] See FTC, 'The FTC's Merger Remedies 2006–2012' (January 2017) [FTC Remedy Review], at 13, available at **http://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf** (80 per cent of challenged mergers resulted in structural remedies, with 87 per cent of challenged horizontal mergers resulting in a structural remedy).

[8] Merger Remedies Manual (see footnote 3, above), at 8.

[9] The FTC's remedy study found that 69 per cent of the transactions included in the study required an upfront buyer, compared with 33 per cent for which a post-close remedy was allowed. FTC Remedy Review, table 2, at 14. The DOJ's Merger Remedies Manual states that the DOJ will require an acceptable upfront buyer '[i]n most merger cases'. Merger Remedies Manual (see footnote 3, above), at 22.

[10] FTC Remedy Review (see footnote 7, above), table 2, at 14 (finding that historically only 40 per cent of structural remedies included in the study involved ongoing business divestitures, compared with 67 per cent involving discrete assets).

[11] Merger Remedies Manual (see footnote 3, above), at 14–15.

[12] id.

[13] See DOJ, Press Release No. 11-788, 'Antitrust Division Issues Updated Merger Remedies Guide' (17 June 2011), available

at **http://www.justice.gov/opa/pr/antitrust-division-issues-updated-merger-remedies-guide**.

[14] Merger Control in Dynamic Markets (see footnote 2, above), at 7.

[15] 15. U.S.C. § 18.

[16] Hearing Before the U.S. Senate Subcommittee On Antitrust, Competition Policy and Consumer Rights (statement by Bill Baer, Assistant Attorney General, Antitrust Division) (9 March 2016), available at **https://www.justice.gov/opa/file/831686/download**.

[17] Horizontal Merger Guidelines, § 6.4, 'Innovation and Product Variety' (19 August 2010) [HMG], available at **https://www.justice.gov/atr/horizontal-merger-guidelines-08192010**.

[18] Vertical Merger Guidelines, § 4(a)(1), 'Unilateral Effects' (30 June 2020), available at **https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf**.

[19] HMG (footnote 17, above), § 5.3.

[20] HMG (footnote 17, above), § 2.1.5.

[21] Brent Kendall and Jared Hopkins, 'FTC Prepares to Take Tougher Stance on Pharmaceutical Mergers', *The Wall Street Journal* (16 March 2021), available at **https://www.wsj.com/articles/federal-trade-commission-to-consider-tougher-line-on-pharmaceutical-mergers-11615905000**.

[22] 15 U.S.C. § 18.

[23] See FTC, 'The FTC's Merger Remedies 2006–2012', at 12, 21–22 (January 2017), available at **http://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competitioneconomics/p143100_ftc_merger_remedies_2006-2012.pdf**.

[24] id. at 24.

[25] id. at 10.

[26] id. at 36.

[27] D Bruce Hoffman, 'It Only Takes Two to Tango: Reflections on Six Months at the FTC', Remarks at GCR Live 7th Annual Antitrust Law Leaders Forum (2 February 2018), at 6, available

at **http://www.ftc.gov/system/files/documents/public_statements/1318363/hoffman_gcr_live_feb_2018_final.pdf**.

[28] Press Release, FTC, 'FTC Requires Bristol-Myers Squibb Company and Celgene Corporation to Divest Psoriasis Drug Otezla as a Condition of Acquisition' (15 November 2019), available at **http://www.ftc.gov/news-events/press-releases/2019/11/ftc-requires-bristol-myers-squibb-company-celgene-corporation**.

[29] id.

[30] See FTC, Dissenting Statement of Commissioner Rohit Chopra In the Matter of Bristol-Myers Squibb Company and Celgene Corporation (15 November 2019), available at **http://www.ftc.gov/publicstatements/** 2019/11/dissenting-statement-commissioner-rohit-chopra-matter-bristol-myers-squibb; FTC, Dissenting Statement of Commissioner Rebecca Kelly Slaughter In the Matter of Bristol-Myers Squibb Company and Celgene Corporation (15 November 2019), available at **http://www.ftc.gov/publicstatements/2019/11/statement-commissioner-rebecca-kelly-slaughter-matter-bristol-myers-squibb**.

[31] See FTC, 'FTC Approves Final Order Requiring Bristol-Myers Squibb Company and Celgene Corporation to Divest Psoriasis Drug Otezla as a Condition of Acquisition' (13 January 2020), available at **http://www.ftc.gov/news-events/press-releases/2020/01/ftc-approves-final-order-requiring-bristol-myers-squibb-company**.

[32] See Press Release, FTC, 'FTC Imposes Conditions on AbbVie Inc.'s Acquisition of Allergan plc' (5 May 2020), available at **https://www.ftc.gov/news-events/press-releases/2020/05/ftc-imposes-conditions-abbvie-incs-acquisition-allergan-plc**.

[33] id.

[34] See FTC, Dissenting Statement of Commissioner Rohit Chopra In the Matter of AbbVie Inc. and Allergan plc (5 May 2020), available at **http://www.ftc.gov/public-statements/2020/05/dissenting-statementcommissioner-rohit-chopra-matter-abbvie-inc-allergan**; FTC, Dissenting Statement of Commissioner Rebecca Kelly Slaughter Regarding the Proposed Acquisition of Allergan plc by AbbVie Inc. (5 May 2020), available at **http://www.ftc.gov/public-**

**statements/2020/05/dissenting-statement-commissioner-rebecca-kellyslaughter-regarding**.

[35] See FTC, Dissenting Statement of Commissioner Rohit Chopra In the Matter of AbbVie Inc. and Allergan plc (5 May 2020), available at **http://www.ftc.gov/public-statements/2020/05/dissenting-statementcommissioner-rohit-chopra-matter-abbvie-inc-allergan**.

[36] id.

[37] See FTC, Dissenting Statement of Commissioner Rebecca Kelly Slaughter Regarding the Proposed Acquisition of Allergan plc by AbbVie Inc. (5 May 2020), available at **https://www.ftc.gov/system/files/documents/public_statements/1574577/191_0169_dissenting_statement_of_commissioner_rebecca_kelly_slaughter_in_the_matter_of_abbvie_and_0.pdf**.

[38] id.

[39] See Press Release, FTC, 'FTC Approves Final Order Imposing Conditions on AbbVie Inc.'s Acquisition of Allergen plc' (4 September 2020), available at **https://www.ftc.gov/news-events/press-releases/2020/09/ftc-approves-final-order-imposing-conditions-abbvie-incs**.

[40] See FTC, 'FTC Imposes Conditions on Combination of Pfizer Inc.'s Upjohn and Mylan N.V.' (30 October 2020), available at **http://www.ftc.gov/news-events/press-releases/2020/10/ftc-imposes-conditionscombination-pfizer-incs-upjohn-mylan-nv**.

[41] See, e.g., Press Release, FTC, 'FTC Approves Final Order Imposing Conditions on Merger of Generic Drug Marketers Amneal Pharmaceuticals LLC and Impax Laboratories Inc.' (10 July 2018), available at **https://www.ftc.gov/news-events/press-releases/2018/07/ftc-approves-final-order-imposing-conditions-merger-generic-drug**; Press Release, FTC, 'FTC Approves Final Order Preserving Competition in Markets for 79 Pharmaceutical Products' (15 September 2016), available at **https://www.ftc.gov/news-events/press-releases/2016/09/ftc-approves-final-order-preserving-competition-markets-79**; Press Release, FTC, 'FTC Approves Final Order Preserving Competition for Generic Drugs that Treat Bacterial Infections and Ulcerative Colitis' (26 April 2016), available at **https://www.ftc.gov/news-events/press-**

releases/2016/04/ftc-approves-final-order-preserving-competition-generic-drugs.

[42] FTC, Dissenting Statement of Commissioner Rohit Chopra In the Matter of Pfizer Inc. and Mylan N.V (30 October 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1582382/191_0182_pfizer-mylan_-_dissenting_statement_of_commrs_chopra_and_slaughter_1.pdf.

[43] id.

[44] See Press Release, FTC, 'FTC Approves Final Order Imposing Conditions on Combination of Pfizer Inc.'s Upjohn and Mylan N.V.' (28 January 2021), https://www.ftc.gov/news-events/press-releases/2021/01/ftc-approves-final-order-imposing-conditions-combination-pfizer.

[45] Press Release, FTC, 'FTC Announces Multilateral Working Group to Build a New Approach to Pharmaceutical Mergers' (16 March 2021), available at http://www.ftc.gov/news-events/press-releases/2021/03/ftc-announces-multilateral-working-group-build-new-approach.https://www.ftc.gov/news-events/press-releases/2021/03/ftc-announces-multilateral-working-group-build-new-approach.

[46] id.

[47] See Press Release, FTC, 'FTC Acting Chairwoman, Rebecca Kelly Slaughter Testifies before House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law' (18 March 2021), available at https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-rebecca-kelly-slaughter-testifies-house.

[48] 'Reviving Competition Part 3: Strengthening the Laws to Address Monopoly Power: Hearing Before the S. Comm. on Antitrust, Commercial and Administrative Law' (statement by Rebecca Slaughter, Acting Chairwoman, FTC), available at https://docs.house.gov/meetings/JU/JU05/20210318/111350/HHRG-117-JU05-Wstate-SlaughterR-20210318.pdf.

[49] FTC, 'Multilateral Pharmaceutical Merger Task Force Seeks Public Input' (11 May 2021), available at http://www.ftc.gov/news-events/press-releases/2021/05/multilateral-pharmaceutical-merger-task-force-seeks-public-input.

[50] id.
[51] See, e.g., Exec. Order 14,036, 'Promoting Competition in the American Economy', 86 Fed. Reg. 36,987 at 36,988 (14 July 2021) ('It is also the policy of [the Biden] Administration to enforce the antitrust laws to meet the challenges posed by new industries and technologies, including the rise of dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects.').
[52] See Acting Deputy Assistant Attorney General Jeffrey M Wilder, Remarks at the Hal White Antitrust Conference, 'Potential Competition in Platform Markets' (10 June 2019), available at **https://www.justice.gov/opa/speech/file/1176236/download** ('m any of these platforms are subject to pronounced network effects and scale and scope economies that may make them more to tipping. In such environments, platforms can quickly gain market share and may enjoy market power, depending on the strength of network effects and scale and scope economies, switching costs, whether agents multi-home, and other barriers to entry').
[53] Press Release, DOJ, 'Justice Department Secures Largest Negotiated Merger Divestiture Ever To Preserve Competition Threatened by Bayer's Acquisition of Monsanto' (29 May 2018), available at **https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened**.
[54] id.
[55] id.
[56] Press Release, DOJ, 'Justice Department Requires Divestiture of Thales' General Purpose Hardware Security Module Business in Connection with its Acquisition of Gemalto' (28 February 2019), available at **https://www.justice.gov/opa/pr/justice-department-requires-divestiture-thales-general-purpose-hardware-security-module**.
[57] Press Release, DOJ, 'Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy' (27 April 2015) (statement by Acting Assistant

Attorney General Renata Hesse: 'The semiconductor industry is critically important to the American economy, and the proposed remedy would not have replaced the competition eliminated by the merger, particularly with respect to the development of equipment for next-generation semiconductors.'), available at **https://www.justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department**.

[58] Press Release, Applied Materials, 'Applied Materials, Inc. and Tokyo Electron Limited Agree To Terminate Business Combination Agreement' (26 April 2015), available at **https://www.appliedmaterials.com/company/news/press-releases/2015/04/applied-materials-inc-and-tokyo-electron-limited-agree-to-terminate-business-combination-agreement**.

[59] Nancy Hill, Nancy L Rose and Tor Winston, 'Economics at the Antitrust Division 2014–2015: Comcast/Time Warner Cable and Applied Materials/Tokyo Electron', 47 *Rev. Ind. Org*. 425, 433 (2015), available at **https://economics.mit.edu/files/12988**.

[60] id. at 434.

[61] id. at 426.

[62] id. at 434.

[63] See, e.g., Complaint ¶ 66, *United States v. Visa Inc*., No. 3:20-cv-07810 (N.D. Cal. 2020) (filed 5 November 2020) ('If the acquisition were enjoined, Plaid – on its own or in combination with a company other than Visa – would continue to act as a disruptive competitor, developing and launching new, innovative solutions in competition with Visa.'), available at **https://www.justice.gov/atr/case-document/file/1334736/download**; Complaint ¶ 10, *United States v. Sabre Corp*., No. 1:19-cv-01548 (D. Del. 2019) (filed 20 August 2019) ('Sabre now seeks to eliminate its disruptive competitor once and for all. Sabre executives have acknowledged that acquiring Farelogix would eliminate a competitive threat and allow Sabre to charge higher prices.'), available at **https://www.justice.gov/atr/case-document/file/1196836/download**; Administrative Complaint ¶¶ 3–4, *In the Matter of CDK Global, Inc*. No. 9382 (19 March 2018) ('Auto/Mate is an innovative, disruptive challenger to the two market leaders. . . . In the fall of 2016 when Auto/Mate placed itself up for sale,

CDK concluded that it could eliminate a strong current competitor, which was threatening to become an even more disruptive rival, by simply purchasing the company.'), available at **https://www.ftc.gov/system/files/documents/cases/docket_no_9382_cdk_automate_part_3_complaint_redacted_public_version_0.pdf**.

[64] DOJ, Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holding Inc.'s Merger with Sirius Satellite Radio Inc. (24 March 2008) ('Any inference of a competitive concern was further limited by the fact that a number of technology platforms are under development that are likely to offer new or improved alternatives to satellite radio.'), available at **https://www.justice.gov/archive/opa/pr/2008/March/08_at_226.html**.

[65] Final Judgment, *United States v. Tickemaster Ent. Inc*., No. 1:10-cv-00139 (D.D.C. 2010) (filed 30 July 2010), available at **https://www.justice.gov/atr/case-document/file/513321/download**.

[66] id. § IV(A)-(D).

[67] id. § IV(E)-(I).

[68] id. § IX.

[69] See Assistant Attorney General Christine A Varney, Remarks as Prepared for South by Southwest, 'The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective' (18 March 2010), available at **https://www.justice.gov/atr/file/518221/download**. Note, however, that the only consent agreement entered into by DOJ in recent years that included behavioral relief was related to the extension and modification of the Ticketmaster/Live Nation final judgment, which the DOJ sought in response to alleged repeated violations of the decree by the merged entity since it was entered. See Motion to Modify Final Judgment and Enter Amended Final Judgment, *United States v. Ticketmaster Entertainment, Inc*., No. 10-cv-00139 (D.D.C. Jan. 25, 2010), available at **https://www.justice.gov/atr/case-document/file/1233396/download**.

[70] Press Release, FTC, 'FTC Accepts Proposed Consent Order in Broadcom Limited's $5.9 Billion Acquisition of Brocade Communications Systems, Inc.' (3 July 2017), available at **https://www.ftc.gov/news-events/press-releases/2017/07/ftc-accepts-proposed-consent-order-broadcom-limiteds-59-billion**.
[71] id.
[72] id.
[73] Press Release, DOJ, 'Justice Department Requires Google Inc. To Develop and License Travel Software in Order To Proceed with Its Acquisition of ITA Software Inc.' (8 April 2011), available at **https://www.justice.gov/opa/pr/justice-department-requires-google-inc-develop-and-license-travel-software-order-proceed-its**.
[74] id.
[75] Press Release, DOJ, 'Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish' (26 July 2019), available at **https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package**.
[76] id.
[77] See Merger Control in Dynamic Markets (see footnote 2, above), at 31–32.
[78] See id., at 33.



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