

- **XI. Remedies**

- A. A remedy should address the identified competitive harm arising from the proposed transaction.**

*WORKING GROUP COMMENTS*  
(May 2017)

*Comment 1:* The object of a remedy should be to maintain or restore competition otherwise likely to be lost due to the proposed transaction. A remedy should be considered only if the agency has a sound basis to believe that the proposed transaction, if implemented, would contravene the applicable merger review law. The remedy should adequately address the potential competitive harm identified, but should not have the object of improving upon premerger competition. Tailoring the remedy to the competitive harm allows competition agencies to require the least intrusive remedy while permitting, if possible, the realization of the merger's efficiencies.

*Comment 2:* To address competitive concerns identified by a competition agency, merging parties should be permitted to propose alternative resolutions, modifications, conditions, and/or obligations that would permit the transaction to proceed while maintaining or restoring competition otherwise likely to be lost due to the proposed transaction, consistent with the applicable merger review law. Before pursuing or adopting an outright prohibition, agencies should consider such alternative resolutions. In addition, the agency may take the initiative to propose alternative resolutions. However, there may be instances where only an outright prohibition can adequately address the competitive concerns arising from the proposed transaction.

*Comment 3:* The proposal, discussion, and adoption of remedies should be conducted in a manner consistent with other Recommended Practices, particularly those on Conduct of Merger Investigations, Procedural Fairness, Transparency, and Interagency Coordination and be informed by the Merger Remedies Guide and the Practical Guide on International Cooperation.

- B. The merger review system should provide a transparent framework for the proposal, discussion, and adoption of remedies.**

*WORKING GROUP COMMENTS*  
(May 2017)

*Comment 1:* Information on the jurisdiction's procedures for proposing, discussing, and adopting remedies should be readily available to those involved in merger review proceedings. Such information may include, as applicable, when, how and to whom remedies should be proposed, the types of remedies that the agency generally prefers, how a remedy proposal may be evaluated, and any standard terms or implementation provisions the remedy would be expected to include.

*Comment 2:* In the event the competition agency identifies competitive concerns, the agency should provide the merging parties with timely and substantiated information on those concerns so the parties have sufficient time to consider and propose remedies to address those

concerns prior to the final enforcement decision. Merger review procedures should provide means to ensure that competition agencies have adequate time to discuss suitable remedies with the merging parties, evaluate the proposed remedies, and consult appropriate third parties on the effectiveness of the remedies.

**C. Procedures and practices should be established to ensure that remedies are effective and easily administrable.**

*WORKING GROUP COMMENTS  
(May 2017)*

*Comment 1:* Remedies should be effective in maintaining or restoring competition otherwise likely to be lost due to the proposed transaction and be easily administrable. Remedies should not require significant administrative intervention by the agency after the transaction is consummated.

*Comment 2:* Remedies can take two basic forms: (a) structural remedies, which involve a direct change to the competitive market structure (such as commitments to divest assets), and (b) non-structural remedies, which involve modifications or constraints on the future conduct of the merged entity (such as commitments with respect to certain contractual clauses). Certain remedies, such as commitments involving licensing of intellectual property rights or access to facilities, may be characterized as structural or non-structural, depending on the circumstances. An effective remedy package may consist of structural and/or non-structural components, including short-term transitional arrangements that support a structural remedy.

*Comment 3:* Structural remedies are generally preferred over non-structural remedies, particularly for horizontal mergers, because they directly maintain or restore the competitive structure of the market, have a durable impact, are easier to administer and do not require medium or long-term monitoring to ensure compliance. Structural remedies can take several forms. The preferred structural remedy is typically the divestiture of an ongoing, stand-alone business unit, including the sale of all the infrastructure and components, and the support of human resources necessary for the divested business to compete effectively after the remedy is implemented. The divestiture of less than an existing business carries more risk, and requires more agency scrutiny, but may constitute an effective remedy if, taking into account the scope of the remedy package, the nature of the business at issue, and the resources already owned and operated by a prospective purchaser, the divested assets are sufficient to allow the purchaser to compete successfully in the relevant market. While short-term assistance from the merging parties can be necessary to transition assets to an independent purchaser, remedies should avoid creating ongoing relationships between the merged entity and the purchaser of divested assets that may impede competition.

*Comment 4:* The remedy's effectiveness may depend on the identity of the prospective purchaser of the assets to be divested, particularly where less than an ongoing business unit is being divested. For a remedy to be effective, it should enable the prospective purchaser to be a viable and long-term competitor in the market in which the competitive harm was identified. Competition agencies should evaluate prospective purchasers for their financial strength,

managerial expertise and operational capabilities, as well as for their independence and intention to compete with the merged firm in the affected market after divestitures. An acquisition by the prospective purchaser should not in itself adversely affect competition. The agency should ensure that it has the authority and the appropriate procedures in place to approve a prospective purchaser.

*Comment 5:* When a competition agency has concerns about the availability of a suitable purchaser or viability of the proposed remedy, it should consider requiring approval of a pre-identified purchaser of the divested assets before the merger is consummated. Pre-identified purchasers should also be considered when there are concerns about a lengthy divestiture process resulting in deterioration of the divested assets.

*Comment 6:* Where structural remedies are either not possible or not appropriate to address the competitive harm, a non-structural remedy may be appropriate to address the competitive concerns. Non-structural remedies that facilitate or protect competition (such as reducing switching costs and opening up tender processes) are generally more effective than those that aim to control prices or output levels (such as price controls, service level agreements, and supply commitments). In crafting non-structural remedies, competition agencies should consider whether ongoing monitoring of the remedy is feasible and be wary of high implementation costs associated with monitoring, terms that restrain potentially pro-competitive conduct, and terms that are vulnerable to circumvention and manipulation. Competition agencies should consider other alternatives before imposing price controls as remedies, as price controls can most directly distort market forces and harm competition, require a great deal of market insight that is typically not readily available, and will likely require regulatory oversight and intervention to implement and maintain.

*Comment 7:* Market testing, involving either a formal or informal process by which a competition agency obtains views and comments from third-party customers, suppliers, and/or competitors, should be encouraged when it helps to determine if the proposed remedy will adequately address competitive concerns. Third-party views and comments should be evaluated by an agency, while remaining attuned to self-interest or any other motives that might attempt to influence the agency's views.

*Comment 8:* Timing is a critical factor in determining whether a merger remedy is effective. Remedies should be implemented in a prompt and timely manner. Remedies should have a specified end date or termination provision.

**D. Remedies should provide appropriate means to ensure implementation, monitoring of compliance, and enforcement of the remedy.**

*WORKING GROUP COMMENTS*  
*(May 2017)*

*Comment 1:* Competition agencies may have different terminology or mechanisms for formalizing and enforcing remedies. Regardless of the terminology used (“remedy order” or other), a formal and written form of imposing remedies should identify, provide notice, and bind the entities subject to its terms. The terms should be sufficiently clear and precise to provide the

parties adequate guidance in implementing the remedy. The remedy order should also include provisions that will enable the competition agency to monitor compliance and ensure the order is fully implemented.

*Comment 2:* As part of a structural remedy, whether through a formal provision of the remedy order or otherwise, a competition agency should require merging parties to maintain and preserve the assets pending divestiture to ensure that there is no deterioration of the assets' competitive strength. Such requirements (often called "hold separate" or "asset preservation" measures) can help to ensure the independence and viability of divested assets by maintaining their value and goodwill, protecting sensitive information, encouraging employees to remain with the entity until divestiture, and otherwise ensuring the divested assets are not allowed to deteriorate. A competition agency may wish to appoint a hold separate manager who can oversee implementation of hold separate measures.

*Comment 3:* In a remedy order, it may be appropriate to include terms permitting the competition agency to select one or more independent trustees who can oversee the divestiture process or the conduct of the merging parties over the duration of a non-structural remedy. Monitoring trustees can help to oversee implementation of remedies and provide regular reports or updates to the competition agency. A divestiture trustee may take over the divestiture process from the merging parties if they fail to sell the divested assets within the required time period.

Trustees should be independent of the merging parties, should have appropriate qualifications for the role, and should not be subject to conflicts of interest. The scope and limits of the trustee's responsibilities and authority should be clearly set out in a mandate provided or approved by the competition agency, which should also state that the trustee cannot accept instructions from or be dismissed by the merging parties. Nevertheless, the parties can be required to compensate the trustee. The competition agency should maintain oversight over trustees.

*Comment 4:* The competition agency should have the means to investigate compliance with the remedy order, including the ability to inspect and copy records, conduct reviews, and to require periodic or one-time reporting obligations by the parties and/or the trustee(s) on the implementation of the remedy. The ultimate decision regarding compliance with the remedy order should rest with the agency or court, and not with the trustee.

*Comment 5:* Competition agencies are unable to control or predict every factor capable of impacting the implementation of remedies. Significant and permanent changes in market conditions may impact the effectiveness of a remedy, especially in cases where a non-structural remedy continues over a long duration. Revision clauses or other procedures, which would permit remedies to be removed or modified upon demonstration of specified objectives or criteria, may provide flexibility to address unanticipated factors. Modifications can range from extensions of implementation deadlines to remedy substitutions or waivers to implement certain commitments.

*Comment 6:* When a party fails to comply with the terms of a remedy order, the competition agency should seek to enforce the order directly or through the courts. In some jurisdictions, the merger clearance may automatically lapse. Depending on the circumstances, violations of

remedy orders that are deliberate or intentional may be treated more severely than inadvertent violations. If non-compliance results from the remedy order being impossible to implement, competition authorities can consider whether modifications or alternative remedies may be effective to address the relevant competitive concerns.