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Remedy Riddle: The Enduring and Consequential Contest over What a Merger Remedy Is

BY JEFFREY OLIVER

FOR OVER HALF A CENTURY IN THE United States, there have been two competing theories of what a merger remedy is, fundamentally. Some courts and federal antitrust agencies have viewed merger remedies as a unique form of regulated commercial behavior, categorically distinct from precipitating transactions and worthy of a remedy-specific antitrust analysis and standard (the "Enforcement Theory"[1]). Some courts and merging parties, on the other hand, have viewed proposed remedies as part and parcel to their precipitating transactions and properly subject to the same well-established inquiry into competitive effects (the "Transactional Theory"[2]).

In short, the Transactional Theory holds that a remedy is the same genus and species as its precipitating transaction while the Enforcement Theory holds that a remedy is something else entirely. The most consequential difference between the two theories is a disparity in the standards that each prescribes for a proposed remedy. The Transactional Theory holds that a proposed remedy, like a proposed transaction, must not lessen competition substantially under Section 7 of the Clayton Act. The Enforcement Theory holds that a proposed remedy must not lessen competition whatsoever.

Origins of the Enforcement and Transactional Theories

The two theories were born in varying circumstances that help explain their differences. Perhaps the earliest iteration of the Enforcement Theory can be found in *United States v. E.I. du Pont de Nemours & Company*.[3] The case began in 1949, when the Department of Justice sued du Pont, alleging that its 1917 acquisition of 23 percent of the voting common stock of General Motors violated Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. In 1961, more than 40 years after consummation of the precipitating transaction and more than a decade after the DOJ's complaint, the Court reviewed an order for relief. The district court had rejected the DOJ's request for full divestiture of the offending voting shares, instead rendering the shares passive.[4] The DOJ appealed, claiming the remedy was inadequate.

At the time, U.S. courts had very little experience reviewing proposed remedies under Section 7. While courts had significant expertise fashioning extensive remedies for Sherman Act violations (starting with *Standard Oil* in 1911[5]), Clayton Act jurisprudence, particularly involving proposed remedies, was almost nonexistent for the first half of the 20th century. The 1950 Celler-Kefauver Act[6] changed this by placing asset acquisitions squarely underneath Section 7, which previously only extended to stock acquisitions. Though *du Pont* was not an asset acquisition, it was among the first substantive federal court decisions on proposed merger remedies.

The Court in *du Pont* treated the proposed remedy as distinct from the precipitating transaction. Having already ruled in 1957 that the transaction violated Section 7, the Court in 1961 was limited to determining the remedy's effectiveness. In doing so, the Court divorced the proposed remedy analysis from Section 7, stating: "The burden is not on the Government to show de novo that a [proposed remedy] like [a precipitating transaction] would violate [Section] 7."[7] The Court also noted that "[t]he key to the . . . antitrust remedy is . . . the discovery of measures effective to restore competition."[8] This appears to be the earliest articulation of something approaching a no-lost-competition standard for proposed merger remedies, a hallmark of the Enforcement Theory.

A few years later, in 1969, economist Kenneth Elzinga provided one of the first full articulations of the Enforcement Theory in his seminal article, *The Antimerger Law: Pyrrhic Victories?*[9] The article constituted the first comprehensive analysis of the effectiveness of FTC and DOJ consent decrees. Such consent decrees had proliferated in the wake of the Celler-Kefauver Act, as the agencies began reviewing more and more asset acquisitions. Relevant remedies remained significantly distanced, timewise, from underlying transactions. Of the 39 consent orders that Elzinga studied, the divestiture followed, on average, five-and-a-half years after the acquisition.[10]

In a section titled "The Theory of Effective Relief," Elzinga provided his own definition of a successful merger remedy. In doing so, he cited no judicial authority. At the time, aside from *du Pont*, there really was nothing to cite. According to Elzinga's theory, a merger remedy should have a formal resemblance to a precipitating asset transaction—the sale of a set of assets to a business—but should face a much higher standard. As detailed in his article, the central tenets

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of this remedy theory were as follows: (1) Proposed remedies are only properly considered after a determination that the precipitating transaction is, in fact, illegal under Section 7; (2) Proposed remedies must meet a no-lost-competition standard; and (3) Only divestitures are likely to meet this standard.[11] These tenets were based on his view that "[i]f all markets prior to an anticompetitive acquisition were, by structural standards, workably competitive and subsequent to the acquisition are not, these standards require divestiture of the acquired firm so that the markets affected are returned to their premerger, workably competitive status."[12] These remain the primary tenets of the Enforcement Theory today.

Given the higher no-lost-competition standard, Elzinga's theory required a remedy-specific analysis. Eschewing any qualitative examination of market shares, Elzinga focused instead on somewhat subjective traits like "independence" and "viability," noting that "[t]he faster the independence and viability of relief criteria are met in a given anticompetitive acquisition, the more satisfactory is the relief."[13] This qualitative approach to remedies—as compared to the quantitative approach to assessing competitive harm under Section 7—also continues to be a hallmark of the Enforcement Theory.

The same year Elzinga published his study, a U.S. district court articulated the Transactional Theory of remedies in *United States v. Atlantic Richfield*.[14] In that case, the DOJ sought to permanently enjoin the proposed merger of Sinclair Oil Company and Atlantic Richfield. Atlantic Richfield sought to admit evidence of their proposal to sell Sinclair's Northeast assets to BP, but the DOJ objected, arguing that the court should ignore the proposed remedy. The court rejected this argument, stating that there is "no reason why merging companies cannot eliminate probable anti-competitive effects by such a disposition of assets as will be made here."[15] Ultimately, the court found that the record did not support a Section 7 claim in the Northeast when the remedy was taken into consideration: "For the arrangement viewed as a whole indicates that, instead of competition being eliminated, a new, vigorous and viable competitive force will be substituted for the present competitor."[16] *Atlantic Richfield* appears to mark the first instance where the transaction and remedy were taken "as a whole" and assessed concurrently under the Section 7 substantial lessening standard.

Therefore, by 1970, the Enforcement and Transactional Theories had each obtained some official sanction. The Court in *du Pont* had provided a partial, though ultimately influential, formulation of the Enforcement Theory—with its treatment of remedies as distinct in category from precipitating transactions, subject to a higher standard and a remedy-specific analysis. Elzinga followed with a fuller articulation of the theory. Meanwhile, the court in *Atlantic Richfield* provided a clear expression of the Transactional Theory—with its emphasis on treating a proposed remedy as identical in nature to its precipitating transaction and, therefore, subject to the same antitrust analysis and standard under Section 7.

Two additional early cases are worth mentioning here. In 1972, three years after Elzinga's study, the Supreme Court provided a second endorsement of the Enforcement Theory. In *Ford Motor Company v. United States*, the Court considered Ford's acquisition of spark plug manufacturer Electric Autolite Company.[17] The ruling on the remedy came 11 years after consummation of the precipitating transaction, and several years after lower courts found the transaction illegal under Section 7. In *Ford,* the Court held that the divestiture ordered by the district court was proper, being "necessary to restore the pre-acquisition market structure . . . [because] only divestiture would correct the condition caused by the unlawful acquisition."[18] Echoing *du Pont* and Elzinga, the Court in *Ford* subscribed to a no-lost-competition standard for remedies, opining that "[t]he relief ordered should 'cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.'"[19] Justice Stewart's concurring opinion noted that divestitures were the only remedy likely to be successful and cited Elzinga for support.[20]

A year later, in 1973, a district court considered *United States v. Connecticut National Bank,* where the DOJ sought to permanently enjoin a proposed merger between two of Connecticut's largest banks.[21] As with *Atlantic Richfield,* the transaction remained unconsummated at the time of trial. The banks overlapped in four towns. Parties were negotiating to divest three of the relevant branches and were actively seeking buyers for three more branches. The DOJ again argued that the court should ignore the proposed remedy until ruling on the original transaction. Similar to *Atlantic Richfield*, the court rejected that position: "[T]he divestiture is an intrinsic aspect of the merger. Therefore, the Court deems it appropriate and proper to weigh the effect of the divestiture plan as a matter of plain common sense."[22] The Court further explained that "the plaintiff has not convinced the Court by a preponderance of the evidence that the merger in question will substantially lessen competition."[23]

The *Connecticut National Bank* decision includes the same key Transactional Theory elements as *Atlantic Richfield*: the remedy is "part and parcel" and an "intrinsic aspect of the merger," subject to the same standard, and "there would be no substantial lessening of competition after divestiture."[24]

The HSR Era

One purpose of the HSR Act was to do away with the prolonged, inefficient post-merger battles and negotiations exemplified by *du Pont* and *Ford*. Under the HSR Act, merging parties must notify the agencies and observe a waiting period prior to closing. This allows the agencies to assess the competitive merits of the transaction, including potential remedies, prior to closing. This led, throughout the 1980s and '90s, to numerous agency consent decrees setting out remedies negotiated with merging parties out of court.

This changed in the mid-to late 1990s, when the FTC became concerned that the negotiated remedies were insufficient.[25] Thirty years after Elzinga's study, the FTC published its own review of more recent consent decrees. Citing Elzinga and *du Pont*, the 1999 FTC Study stated that the purpose of all remedies is to "maintain the competition that otherwise would be eliminated by the merger."[26] In its study, the FTC crafted an Enforcement Theory approach to remedies, locating a legal foundation for the no-lost-competition standard in the HSR Act. "The legislative history of the HSR Act identifies two types of problems that were addressed by the HSR Act: interim harm to competition and the inability to fully restore competition."[27] This debatable claim that the no-lost-competition standard is encoded in the HSR Act may have evidenced some awareness on the FTC's part that the no-lost-competition standard is potentially out of sync with the Clayton Act. Then FTC Chairman Robert Pitofsky cited *Ford* to explain that "[t]he law is clear that divestiture and other restructuring remedies should not be adopted unless they are likely to restore fully the competition lost as a result of the merger."[28]

Before and after the study, the FTC had begun rejecting proposed remedies with increasing frequency.[29] Defense lawyers noted that the DOJ and FTC had assumed a new posture with regard to potentially problematic mergers, "almost daring merger parties to take their cases to court."[30] It was only a matter of time before merging parties began again to ask judges to opine on proposed mergers, as in *Atlantic Richfield* and *Connecticut National Bank*.

United States v. Franklin Electric, decided in 1999, is credited as the first time merging parties introduced evidence of a proposed remedy when litigating a pending merger in the HSR era.[31] The parties were asking for a second opinion regarding a remedy the DOJ had already rejected.[32] *Franklin Electric* marks the beginning of an era in which the Enforcement and Transactional Theories have regularly competed head-to-head in federal courts. As a result of the HSR Act, those battles have more closely resembled *Atlantic Richfield* and *Connecticut National*—proposed mergers and proposed remedies considered concurrently—rather than the post-consummation context in *du Pont* and *Ford.* Perhaps for that reason, early contests favored the Transactional Theory.

For its part, the *Franklin Electric* court aligned itself with the Transactional Theory only after significant DOJ efforts on behalf of the Enforcement Theory. The DOJ's motion for injunction ignored the proposed remedy altogether. When the defendants presented evidence of the proposed remedy in their opposition, the DOJ filed a motion *in limine* to bar such evidence. The DOJ argued that consideration of the remedy in conjunction with the transaction "would create a dangerous precedent that would severely undermine the United States' ability to protect competition."[33] This emphasis on the proper sequencing of review is a primary principle of the Enforcement Theory: the violation must precede a remedy.

The merging parties' opposition to the motion *in limine* provided a detailed formulation of the Transactional Theory. Citing both *Connecticut National Bank* and *Atlantic Richfield*, the merging parties argued that the proposed licensing scheme was "part and parcel of the merger agreement between the defendants" and that it was "appropriate and proper to weigh the effect of the divestiture plan as a matter of plain common sense."[34] The court agreed, thereby putting federal courts at odds with the federal antitrust agencies as to how to treat remedies. Ultimately, the *Franklin Electric* court provided a concise echo of the Transactional Theory, stating in its rejection of the DOJ's motion *in limine* that the remedy "appears relevant to the determination whether, considered as a whole, defendants' transaction will lessen future competition substantially."[35]

Two years later, the Transactional Theory prevailed again in *FTC v. Libbey*.[36] The FTC had sued to enjoin a merger between Libbey and Anchor, two leading producers of food service glassware. One week after the FTC filed its complaint, the merging parties amended their merger agreement to exclude one of the problematic service lines. The court ultimately required the FTC to make a "*prima facie* case that the amended agreement may substantially lessen competition," thereby placing the remedy in the same category as the precipitating transaction and applying the same analysis and substantial lessening standard to both.[37]

It happened a third time, in 2004, when the FTC sued to preliminarily enjoin a merger between Arch Coal and Tritan Coal, two owners of mines in the Southern Powder River Basin in Wyoming. Some four months prior to the complaint, as an effort to avoid it, Arch Coal informed the FTC that it intended to divest one of the acquired mines to Keter Kiewit Sons, another mining company.[38] Regarding the proposed divestiture, the court concluded: "The burden is on the FTC to convince this Court that its judgment is correct that the Arch-Triton merger including the Kiewit transaction raises questions so serious, substantial, difficult and doubtful as to make the challenged transactions fair ground for permanent injunction proceedings before the Commission."[39] Quoting *Atlantic Richfield* and other precedents, the court went on to emphasize "that a proposed transaction to resolve government antitrust concerns regarding a proposed merger or acquisition should be considered by the district court as 'relevant to the determination whether, considered as a whole, defendants' transaction will lessen future competition substantially.' "[40]

Proliferating Agency Statements on Remedies

After the 1999 FTC Study, the federal agencies have continued to publish extensive official statements on remedies every few years. Despite judicial applications of the Transactional Theory in *Franklin Electric*, *Libbey*, and *Arch Coal*, each such statement has treated remedies as categorically distinct from precipitating transactions and subject to a remedy-specific analysis and standard.

As the DOJ's 2004 Policy Guide to Merger Remedies explained, the agency will not accept a remedy until "the Division is confident that the proposed fix will indeed preserve the premerger level of competition."[41] It also notes that "[r]estoring competition requires replacing the competitive intensity lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels."[42] The FTC's 2017 Remedy Study states: "Commission staff's assessment of the success or failure of the divestiture depended on whether competition in the relevant market remained at its pre-merger level or returned to that level within a short time."[43]

The DOJ's 2020 Remedies Manual is the most recent iteration. It cites *du Pont* and *Ford* multiple times, features "cure" as one of its most repeated words, and again focuses on the three tenets of the Enforcement Theory: proper sequencing of review, no lost competition, and necessity of divestitures.[44] "Before proposing a remedy to an anticompetitive merger, the Division should satisfy itself that there is a logical nexus between the remedy and the alleged violation—that the remedy both cures the competitive harm and flows from the theory of competitive harm."[45] As with Elzinga's 1969 study, these statements have consistently prescribed a more qualitative approach to remedy analysis. Similar to prior DOJ remedies guidance, the 2020 Remedies Manual focuses almost exclusively on subjective qualities of the divestiture and the divestiture buyer, emphasizing the importance of divesting a "standalone business."[46] This most recent guidance reinforces the agencies' strongly held view that the fact finder must undertake a remedy-specific analysis to determine whether proposed remedies meet the remedy-specific no-lost-competition standard.

More Recent Battles

After the 1972 *Ford* decision, no federal court appears to have applied the Enforcement Theory until five years ago, at which point courts did so three times in quick succession, in *FTC v. Sysco*,[47] *FTC v. Staples*,[48] and *United States v. Aetna.*[49] This consequential development potentially signaled a long-term, perhaps permanent, shift in merger regulation in favor of government enforcement. However, court rulings in three subsequent losses for merger enforcers—*United States v. AT&T, Inc.,*[50] *FTC v. Rag-Stiftung,*[51] and *New York v. Deutsche Telekom AG*[52]—strongly indicate that judicial analysis of merger remedies remains remarkably flexible and unsettled. In short, the contest between the two theories continues.

Sysco, Aetna, Staples. In *Sysco,* the FTC successfully sued to enjoin the proposed merger of Sysco and US Foods. The *Sysco* court spent some 50 pages painstakingly applying the well-established inquiry into the competitive effects of the precipitating transaction, concluding that it violated Section 7's substantial lessening standard. The court then turned to analyzing the proposed divestiture, treating it as a rebuttal to the FTC's successful *prima facie* case. As indicated, this sequencing—first, the analysis of the proposed transaction, then the analysis of the proposed remedy—is a central tenet of the Enforcement Theory. When analyzing the remedy, the *Sysco* court, citing DOJ statements on remedies, settled on the no-lost-competition remedy standard, stating "that a successful merger remedy must effectively preserve competition in the relevant market. . . . 'That is, the divestiture assets must be substantial enough to enable the purchaser to *maintain the premerger level of competition*. . . .' "[53] Not surprisingly, the court found that the proposed divestiture failed to meet the no-lost-competition standard, and thereby failed to rebut the FTC's *prima facie* case. The *Sysco* court granted the FTC's motion for preliminary injunction.

The Enforcement Theory garnered a second, though somewhat less definitive, victory in *Staples.* There*,* the defendants' presented no affirmative defense of their proposed merger, which allowed the court to forgo any substantive analysis of the proposed remedy. Citing *Sysco*, the Court required the "Defendants [to] bear the burden of showing that any proposed remedy would negate any anticompetitive effects of the merger."[54]

In *Aetna*, a year later, the court granted the DOJ's motion to permanently enjoin the proposed merger of health insurers Aetna and Humana.[55] The DOJ alleged that the proposed remedy to the anticompetitive merger would fail because the "only acceptable remedy for an anticompetitive merger is one that completely resolves the competitive problems created by the merger."[56] The merging parties, on the other hand, cited *Arch Coal* and *Atlantic Richfield* to argue that the "Government bears the burden of showing that the merger as a whole—including divestitures to the extent necessary—will substantially lessen competition."[57] The court sided with the DOJ, citing DOJ remedy guidance to support its view that the defendant bears the burden of producing evidence "that a proposed divestiture would 'restore [the] competition' lost by the merger."[58]

As indicated, these three successive judicial endorsements of the Enforcement Theory seemed to cement the theory firmly into guiding jurisprudence. However, more recent government losses suggest the Transactional Theory remains a strong alternative.

***AT&T*.** In 2017, the DOJ attempted to block the AT&T/Time Warner combination. AT&T announced a proposed remedy shortly after the DOJ filed its complaint, promising to provide relevant cable distributors with the option for baseball-style arbitration if they were unable to reach a satisfactory distribution agreement with the combined entity. The DOJ argued that the arbitration commitment "is no cure at all" and generally pushed the no-lost-competition standard for remedies. Citing *Staples,* the DOJ argued that "Defendants 'bear the burden of showing that any proposed remedy would negate any anticompetitive effects of the merger.'"[59] The DOJ also filed a motion *in limine* requesting the exclusion of any evidence of the arbitration offer.[60]

The court rejected the DOJ's promotion of the Enforcement Theory, and supported the arbitration remedy, which

it considered "extra icing on a cake already frosted."[61] The court made early and frequent mention of the proposed remedy, referencing it some 25 times while analyzing the government's *prima facie* case.[62] The opinion never applies the no-lost-competition standard. As the D.C. Circuit put it: "Neither [the government's expert] nor his quantitative model considered the effect of the post-litigation offer of arbitration agreements, something he acknowledged would require a new model."[63] This absence helped convince both the district and appellate courts that "the government failed to meet its burden of proof," indicating that the court considered the proposed remedy to be the proper subject matter of the DOJ's *prima facie* case. In short, the *AT&T* court ultimately treated remedies as if they occupied the same category of regulated behavior as the underlying transaction and are, therefore, subject to the same standard and analysis.

RAG-Stiftung. In late 2019, the FTC sought a preliminary injunction barring the proposed combination of two hydrogen peroxide producers, Evonik and PeroxyChem.[64] The FTC alleged that "Defendants compete vigorously for customers, especially in regional markets in the Pacific Northwest and the Southern and Central United States."[65] A few days after the FTC filed its complaint, the defendants announced a previously proposed agreement to divest a relevant plant in British Colombia to United Initiators GMBH.[66]

In its initial motion, the FTC told the court that it "should not even consider Defendants' (inadequate) proposal to divest the Prince George plant."[67] Citing *Staples, Sysco*, and *Aetna,* the agency argued that "Defendants bear the burden of showing that 'a proposed divestiture would restore the competition lost by the merger counteracting the anticompetitive effects of the merger.' "[68] For their part, the merging parties cited *Arch Coal*, arguing that the remedy is rightly subject to the same standard as the underlying transaction: "'determining the likelihood of the FTC's success in showing that the challenged transaction may substantially lessen competition . . . requires the Court to review the *entire* transaction in question,' including the divestiture."[69]

In ruling for RAG-Stiftung, the court concluded that the transaction as fixed was "not likely to 'substantially . . . lessen competition'" in the FTC's proposed Pacific Northwest market, treating the remedy as an intrinsic part of the merger.[70]

Deutsche Telekom. The DOJ passed on the Sprint/T-Mobile tie-up, after the parties agreed to a package of remedies that included the divestiture of Sprint's Boost business to DISH Network.[71] However, 12 states and the District of Columbia sued to block it. The states generally encouraged the court to ignore the proposed divestiture, arguing that the deal was a " 'four to three' merger that would dramatically increase market concentration in an already highly concentrated industry."[72] Citing *Aetna* and *Sysco*, the states pushed the no-lost-competition standard for the remedy: "Defendants must show that DISH's entry into the marketplace will 'restore [the] competition lost by the merger . . . .'"[73] The merging parties pushed back, arguing that "Plaintiffs ask the Court to ignore . . . marketplace realities," and stating that "the merger is only a '4-to-3' if one were to ignore the divestiture to DISH mandated by the FCC and DOJ."[74]

Ultimately, the court agreed with the states that merging parties bore the burden of proving the sufficiency of the remedy. This seemed to presage an application of the Enforcement Theory, with its emphasis on sequencing. However, on close review, the court clearly held the remedy to a standard far lower than the no-lost-competition standard. After analyzing the proposed remedy under the "entry" rubric of the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, the court concluded: "Looking beyond the short term, DISH's entry would likely be timely enough to replace the competitive impact of Sprint in the long term."[75] This is a standard that explicitly allows for *some* lost competition, both in the short and medium term. This places the court's treatment of the proposed remedy much closer to the Transactional Theory.

Toward a Stable Remedy Analysis

It would appear that the ongoing battle between the Enforcement and Transactional Theories has largely led to bewilderment and inconsistency among federal judges. One clear expression of this can be found in *Sysco,* where the court—after painstakingly applying the well-established inquiry into the competitive effects of the precipitating transaction (analysis of market shares and HHIs)—found itself at a loss as to how to analyze the competitive impact of the proposed divestiture.

In turning to the remedy, the court found itself frustrated by the "lack of clear precedent providing an analytical framework for addressing the effectiveness of a divestiture that has been proposed to remedy an otherwise anticompetitive merger."[76] The court, of course, was overlooking *Atlantic Richfield, Connecticut National, Franklin Electric, Libbey* and *Arch Coal,* all of which hold that the proper "analytical framework for addressing the effectiveness" of a proposed remedy is precisely the framework that the *Sysco* court had just applied to the precipitating transaction. While the judge's inability to locate and apply these precedents to the proposed remedy is somewhat confounding, one potential explanation is that the judge had simply concluded that the proposed divestiture in *Sysco* was a thing entirely distinct from the precipitating transaction, in which case *Atlantic Richfield, Connecticut National Bank, Franklin Electric, Libbey,* and *Arch Coal* are all fairly inapposite precedents, given that they all treated the proposed transactions and the proposed remedies as categorically identical. If so, a clear explanation for this rejection of otherwise relevant precedents would have been helpful. However, it seems likely that the court simply did not fully appreciate why it was ignoring the prior authority.

The *Aetna* decision is also revealing. Remarkably, the same judge decided both *Arch Coal* and *Aetna,* two opposing high-water marks for the Transactional and Enforcement Theories respectively. Having applied the Transactional Theory in *Arch Coal*, the judge then applied the Enforcement Theory in *Aetna*. The judge in *Aetna* never acknowledged his shift from *Arch Coal*, and certainly never explained the rationale for it. Indeed, the *Aetna* opinion provides no indication that the judge was even aware of the diametrically opposed nature of his two analyses.

Similarly, the three varied approaches to remedies found in *AT&T, RAG-Stiftung,* and *Deutsche Telekom*—coming so closely on the heels of the apparent consensus achieved in *Sysco, Staples,* and *Aetna*—further demonstrate the extraordinarily unsteady ground on which judicial approaches to proposed remedies currently stand.

What would be most helpful in resolving the ongoing instability surrounding remedy analysis in the United States is a frank and transparent discussion of the respective complications of the Enforcement and Transactional Theories. These are not particularly difficult to identify. For example, a primary complication of the Transactional Theory is that by treating proposed remedies as indistinguishable from precipitating transactions, the theory tends to ignore or, at least, steeply discount remedy-specific questions such as whether a proposed buyer is actually capable of competing with the divested assets. The purely quantitative analysis of market shares and HHIs cannot accommodate these nuances, much less resolve them. Some qualitative, remedy-specific analysis seems to be required.

On the other hand, a primary complication of the no-lost-competition remedy standard—a central tenet of the Enforcement Theory—is that it essentially edits "substantially*"* out of Section 7, at least for transactions that require modification to pass Clayton Act scrutiny. The 2017 FTC Remedy Study seemed to tacitly acknowledge this fact by actually editing "substantially" out of Section 7 in its opening sentence: "One of the Federal Trade Commission's primary tasks is to enforce Section 7 of the Clayton Act . . . which prohibits mergers when their effect may be to lessen competition."

Unfortunately, transparent discussion has been consistently absent from official agency statements on remedies, which only acknowledge their preferred theory. For example, the new DOJ Remedies Manual cites *Sysco* and *Aetna* some 11 times while ignoring *Connecticut National, Franklin Electric, Libbey, Arch Coal,* and *AT&T* altogether. Although the agencies are under no obligation to provide airtime to theories or rulings they disfavor, the lack of a substantive discussion regarding the dueling remedy theories is perhaps one reason why the agency statements have failed to produce the sort of predictable and stable antitrust analysis that should be the aim of any mature enforcement regime.

To that end, perhaps the next agency statement could include an answer to what is, perennially, the most interesting question raised by each iteration and by the Enforcement Theory generally: What is the substantive difference between a proposed transaction and a proposed modification to that transaction (i.e., a "remedy"), whereby the former merits the statutory standard and the latter merits something far stricter? Any such discussion would hopefully acknowledge that many courts over the years have found that there is, in fact, no substantive difference.

In the meantime, recent rulings provide some guidance to practitioners hoping to persuade courts to reject the Enforcement Theory. This is an essential outcome for any party litigating a fix, given that no party-preferred proposed remedy appears to have ever survived judicial application of the no-lost-competition standard. As *AT&T, RAG-Stiftung,* and *Deutsche Telekom* make clear, meaningful judicial resistance to such application persists.

The *Deutsche Telekom* case is particularly illustrative of a successful tactic for grounding the remedy analysis in the more forgiving substantial lessening standard under Section 7. There, the parties argued that the proper framework for analyzing the remedy was Section 9 of the 2010 Horizontal Merger Guidelines, which is the section devoted to "Entry."[77] In rejecting the no-lost-competition standard in favor of something far more lenient, the court cited Section 9 multiple times, finding that the "current iteration" of the Merger Guidelines sets no "hard limit" as to when successful entry must occur.

This centering of the remedy analysis in the Horizonal Guidelines—as opposed to precedents like *Sysco* and *Aetna* and the proliferating agency statements on remedies—is inevitably more favorable for defendants. The Horizontal Guidelines, after all, are built around Section 7's *substantial lessening* standard. As the opening sentence states, the Guidelines provide the "principal analytic techniques" used to predict whether a given transaction "may substantially lessen competition."[78] Successfully convincing a court to apply Guidelines-based analysis to a proposed remedy now appears to be one of the more promising ways to limit any potential disparity between the analysis and standard applied to the precipitating transaction and that applied to the proposed remedy. ■

[1] This article applies the term "Enforcement Theory" to the conception most favorable to antitrust enforcement and, in turn, most favored by antitrust enforcers.

[2] This article applies the term "Transactional Theory" to the theory most favorable to relevant transactions and, in turn, most favored by parties to those transactions.

[3] United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961).

[4] United States v. E.I. du Pont De Nemours & Co., 177 F. Supp. 1 (N.D. Ill. 1959), *vacated*, 366 U.S. 316 (1961).

[5] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

[6] Celler-Kefauver Act, 64 Stat. 1125 (1950).

[7] 366 U.S. at 331 (citing United States v. Aluminum Co. of Am., 91 F. Supp. 333, 346 (S.D.N.Y. 1950)).

[8] *Id.* at 326.

[9] Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories*, 12 J.L. & Econ. 43 (1969).

[10] *Id.* at 52.

[11] *See id.* at 45.

[12] *Id.*

[13] *Id.* at 45–46.

[14] United States v. Atlantic Richfield Co., 297 F. Supp. 1061 (S.D.N.Y. 1969).

[15] *Id.* at 1069.

[16] *Id*.

[17] Ford Motor Co. v. United States, 405 U.S. 562 (1972).

[18] *Id.* at 562, 575.

[19] *Id*. at 575.

[20] *Id.* at 582.

[21] United Sates v. Connecticut Nat'l Bank, 362 F. Supp. 240, 268 (D. Conn. 1973), *vacated on other grounds*, 418 U.S. 656 (1974).

[22] *Id.* at 283.

[23] *Id.* at 284.

[24] *Id.* at 283, 286; *see Atlantic Richfield*, 297 F. Supp. at 1069.

[25] William J. Baer & Ronald C. Redcay, *Solving Competition Problems in Merger Control: The Requirements for an Effective Divestiture Remedy*, 69 Geo. Wash. L. Rev. 915 (2001).

[26] Fed. Trade Comm'n, A Study of the Commission's Divestiture Process: Prepared by the Staff of the Bureau of Competition, 43 (1999), https://www.ftc.gov/sites/default/files/documents/reports/study-commissions-divestiture-process/divestiture_0.pdf.

[27] *Id.* at 1.

[28] Robert Pitofsky, Chairman, Fed. Trade Comm'n, The Nature and Limits of Restructuring in Merger Review, Remarks Before the Cutting Edge Antitrust Conference (Feb. 17, 2000), https://www.ftc.gov/es/public-statements/2000/02/nature-and-limits-restructuring-merger-review#N_14.

[29] *See* Baer & Redcay, *supra* note 25, at 55.

[30] Sean F. Boland & Virginia R. Metallo, *Hear Our Divestitures: We Must Consider Parties' Own Proposed Remedies, Says District Court*, Legal Times, Nov. 6, 2000, at 41.

[31] United States v. Franklin Elec. Co., 130 F. Supp. 2d 1025 (2000).

[32] *See* Boland & Metallo, *supra* note 30.

[33] Motion of Plaintiff in Limine at 5, United States v. Franklin Elec. Co., 130 F. Supp. 2d 1025 (2000) (No. 00C-0334-C).

[34] Opposition of Defendants to Motion of Plaintiff in Limine at 4, United States v. Franklin Elec. Co., 130 F. Supp. 2d 1025 (2000) (No. 00C-0334-C).

[35] *Id.*

[36] FTC v. Libbey Inc., 211 F. Supp. 2d 34 (D.D.C. 2002).

[37] *Id.* at 51.

[38] FTC v. Arch Coal Inc., 329 F. Supp. 2d 109, 115 (D.D.C. 2004).

[39] Mem. Op. Denying Motion in Limine at 6, FTC. v. Arch Coal Inc., 329 F. Supp. 2d 109 (D.D.C. 2004) (No. CIV.A.04–0534).

[40] *Id.*

[41] U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 27 (2004), https://www.justice.gov/atr/page/file/1175136/download.

[42] *Id.* at 5.

[43] Fed. Trade Comm'n, The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics 1 n.4 (2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

[44] U.S. Dep't of Justice, Merger Remedies Manual nn.6, 9, 19, 46 (2020), https://www.justice.gov/atr/page/file/1312416/download.

[45] *Id.* at 2.

[46] *Id.* at 8–11, 20.

[47] 113 F. Supp. 3d 1, 72 (D.D.C. 2015).

[48] 190 F. Supp. 3d 100 (D.D.C. 2016).

[49] 240 F. Supp. 3d 1, 60 (D.D.C. 2017).

[50] 310 F. Supp. 3d 161, 241 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

[51] 436 F. Supp. 3d. 278 (D.D.C. 2020).

[52] 439 F. Supp. 3d 179 (S.D.N.Y. 2020).

[53] *Id.* at 73 (emphasis added by court).

[54] *Id.* at n. 15.

[55] United States v. Aetna Inc., 240 F. Supp. 3d 1 (D.D.C. 2017).

[56] Complaint at 55, United States v. Aetna Inc., 240 F. Supp. 3d 1 (D.D.C. 2017) (No. 16–1494).

[57] Defendants' Proposed Conclusions of Law at 32, United States v. Aetna Inc., 240 F. Supp. 3d 1 (D.D.C. 2017) (No. 16–1494).

[58] *Aetna*, 240 F. Supp. 3d at 60.

[59] Trial Brief of the United States at 62, United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018) (No. 1:17-cv-02511).

[60] United States' Motion in Limine to Exclude or Limit Evidence of Defendants' Arbitration Offer, United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018) (No. 1:17-cv-02511).

[61] 310 F. Supp. 3d at n.51.

[62] *See, e.g., id.* at 184–225.

[63] *AT&T*, 916 F.3d at 1037–1040.

[64] FTC v. RAG-Stiftung, 436 F. Supp. 3d 278 (D.D.C. 2020).

[65] Complaint ¶ 2, FTC v. RAG-Stiftung, 436 F. Supp. 3d 278 (D.D.C. 2020) (No. 19-2337).

[66] *See* Answer at 1, FTC v. RAG-Stiftung, 436 F. Supp. 3d 278 (D.D.C. 2020) (No. 19-2337).

[67] Plaintiff's Mem. in Support at 37, FTC v. RAG-Stiftung, 436 F. Supp. 3d 278 (D.D.C. 2020) (No. 19-2337).

[68] Plaintiff's Proposed Findings of Fact ¶ 95 (citing *Aetna*), FTC v. RAG-Stiftung, 436 F. Supp. 3d 278 (D.D.C. 2020) (No. 19-2337).

[69] Defendants' Proposed Findings of Fact and Conclusions of Law ¶ 122 (citing *Arch Coal*), FTC v. RAG-Stiftung, 436 F. Supp. 3d 278 (D.D.C. 2020) (No. 19-2337).

[70] *RAG-Stiftung*, 436 F. Supp. at 308.

[71] *See, e.g.,* Emily Birnbaum, *DOJ, FCC Argue in Favor of T-Mobile-Sprint Merger*, The Hill (Dec. 20, 2019, https://thehill.com/policy/technology/475492-doj-fcc-argue-in-favor-of-t-mobile-sprint-merger.

[72] Plaintiff States' Pre-Trail Memorandum at 1, New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020) (19 Civ. 5434).

[73] Plaintiffs States' Pre-Trial Memorandum at 12, New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020) (19 Civ. 5434).

[74] Defendants' Pre-Trial Memorandum at 10, New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020) (19 Civ. 5434).

[75] *Deutsche Telekom*, 439 F. Supp. 3d at 233 (citing U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) [hereinafter Merger Guidelines], https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#9).

[76] *Sysco*, 113 F. Supp. 3d at 1, 72.

[77] Merger Guidelines, *supra* note 75, § 9.

[78] *Id.* § 1.