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Presentation Outline

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Merger Remedies under Mandatory Notification

Under a mandatory notification regime remedies become an important piece of the review and enforcement process. How the remedies process works can have important implications not just for how enforcement agencies resolve concerns with proposed mergers but also for the details of the transaction that parties notice to the agency in the first place. Important issues for the process of establishing merger remedies include:

- When are remedies appropriate?
- What are the goals of merger remedies?
- What kinds of remedies will be permitted?
- When can the parties and the agency begin to discuss remedies?
- What is the allowable process for proposing and/or negotiating remedies?
- What kind of public transparency will exist in the remedial process?
- What kind of enforcement regime will exist for merger remedies?

The answers to the above questions are in some cases quite common across jurisdictions but in other cases the best answer may be determined by country-specific factors. Those factors include the size and sophistication of the economy, openness to foreign firm entry, institutional capacity and integrity, accountability of public officials, and the nature of the relationship between government and industry. Establishing a merger enforcement regime in general, and a remedies process more specifically, are exercises in organizational design, in which the existing institutional environment is important.

Some general principles for remedies might include the following: (1) no remedy is needed unless there is a sound basis for believing a violation will occur; (2) any remedy must be based on “careful application of sound legal and economic principles to the particular facts of the case at hand”; (3) restoring competition, not enhancing premerger competition, is the goal of any remedy; (4) the remedy should promote competition, not competitors; and (5) the remedy must be enforceable. (US Dept. of Justice).

Those general principles go some way to answering the questions of when merger remedies are appropriate and what their goals should be.

The other questions listed above may require more conditional answers. For example, consider the issue of which kinds of remedies a competition authority will accept. The conventional view is that structural remedies like divestiture are strongly preferred to behavioral remedies that

restrain the exercise of market power by the merged firm. But in an economy where viable buyers for divested assets are scarce or where collusion among the seller and buyer of divested assets is likely, the preference for structural remedies may be less applicable. Similarly, the preference for structural relief may be weaker in an economy with strong regulatory and compliance institutions that make behavioral remedies more effective. Indeed, in a concentrated and integrated economy, pure structural remedies may be impossible. Requiring a vertically integrated merged firm to undertake a divestiture at one level of the market (for example, a manufacturing facility) may do little to restore competition unless accompanied by the merged firm's commitment to provide the divested entity with downstream distribution for its output. The substantive guidelines for merger remedies are therefore likely to vary, and appropriately so, across jurisdictions with different economic characteristics.

The question of when the merging parties and the enforcement agency can begin to discuss remedies may also have conditional answers. An agency with significant resources to review a merger filing and with lots of experience with remedies might be able to form an early opinion of the kind of remedy that a given transaction would warrant; an agency with less experience or thinner resources to do a thorough review might want a period in which remedies cannot be proposed or discussed by either side. But beyond the question of experience or resources, timing of the remedies discussion may affect how bold a transaction the parties propose. One can conjecture that the longer the "quiet period" of review the more likely the parties are to make their transaction acceptable up front (perhaps adopting a "fix it first" approach) so as not to be caught late in the game with a disapproval from the agency. On the other hand, if parties can start proposing remedies right away they might put forward a transaction that they know will likely be unacceptable in the hopes of being able to quickly bargain to a settlement that still gives them a strong merger.

The mechanism by which remedies get proposed and reviewed—including the rules for how the agency responds to remedies—can also lead to different results depending on local and institution-specific factors. If merging parties are limited in the number or timing of proposals they may have incentive to make their "best offer" early. This is particularly true if the agency doesn't negotiate but instead is constrained to only accept or reject the parties' proposal "as is." An agency with strong authority to block the merger and weak oversight from courts or other reviewing entity might like such a regime in which bargaining is limited and merging parties have the weaker hand. On the contrary, an agency that has either weak authority to block the merger or that faces an unpredictable reviewing court will know that it holds the weaker position and is unlikely to receive strong remedy proposals from the parties. The agency in such a case might prefer to be able to negotiate with the parties or have multiple rounds of remedial proposals.

An alternative regime might be much less formal, and allow either the agency or the parties to initiate remedy discussions early on and to negotiate those remedies in an ongoing manner. This is essentially the regime in the United States, for example. The potential hazard of such a regime is that the merger review process can become more of a cooperative exercise in revising the transaction than an arms-length analysis by the agency. The potential benefit is that both the

agency and the merging parties can save time and resources, reaching a good remedial result sooner than otherwise. Whether such a process is a good idea will depend on several considerations, such as the quality of internal review in the enforcement agency, transparency and public accountability of agency officials for the remedial settlement, the extent to which the merging parties are repeat players before the agency and, therefore, the likelihood that there is collusion or agency capture by industry, as well as other factors.

Finally, the enforcement regime for merger remedies is both a factor that effects the institutional design of a merger review process but also a key feature of any remedial program. A small competition authority with little power or integration with other government institutions such as a justice ministry or the courts is unlikely to have good capacity to enforce settlements on its own. In such a case, simpler and more structural remedies might be preferred. If the jurisdiction has a strong court system or a strong public prosecutor, the ability of the agency to seek court enforcement or refer non-compliance to the prosecutor for action could be effective. On the other hand, an agency with strong powers and competence might be able to monitor and enforce very well, and therefore consider a broader array of remedies. Similarly, an agency that has many repeat players before it, perhaps because the economy is concentrated or small, might be more confident of compliance because the firms know they need to maintain credibility with the enforcement officials for the future. In such a setting, remedies may be relatively self-enforcing and the compliance regime might be less critical. There are many possibilities, and the point here is to show that there is no unconditional right answer that can be reached without understanding the institutional environment of the jurisdiction at issue.

To conclude, many important questions arise in the design and implementation of a regime for merger remedies. The answers to some of those questions may be universal, but for most the answers will depend critically on the specific goals a jurisdiction has for competition enforcement and, more importantly, on factors specific to each jurisdiction. The merger remedies process should therefore be treated as a problem of institutional design, with a candid view of relevant local factors and careful attention to the incentives and likely outcomes from alternative process choices. The resulting system may not lead to theoretically optimal remedies in each case but can lead to a satisfactory system of merger control that will in fact be better than a system that pursues theoretical optimality without regard to institutional realities.