MERGER ANTITRUST LAW

LAW 1469 | Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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Class 2 (August 27): TransDigm/Takata (Unit 1)

After finishing anything left over from Tuesday's class, we will turn to the remedy in *TransDigm/Takata*. In its complaint, the DOJ alleged that TransDigm's acquisition of SCHROTH from Takata violated Section 7 of the Clayton Act by posing a reasonable probability of substantially lessening competition in four worldwide markets. The government's request for relief appears in paragraph 43 of the complaint (p. 21):

IX. REQUEST FOR RELIEF

43. The United States requests that this Court:

   a. adjudge and decree TransDigm's acquisition of SCHROTH to be unlawful and in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18;
   b. order TransDigm to divest all assets acquired from Takata Corporation on February 22, 2017 relating to SCHROTH Safety Products GmbH and Takata Protection Systems and to take any further actions necessary to restore the market to the competitive position that existed prior to the acquisition;
   c. award the United States its costs of this action; and
   d. grant the United States such other relief as the Court deems just and proper.

TransDigm faced a strategic choice: litigate the DOJ's claims or try to negotiate a settlement. The core divestiture demand was clear from paragraph 43(b): sell the SCHROTH business. But the DOJ's additional requests for relief created settlement complexity. The language requiring TransDigm to "take any further actions necessary to restore the market to the competitive position that existed prior to the acquisition" left undefined what those additional actions might entail. Similarly, the request for "such other relief as the Court deems just and proper" gave the government broad discretion to seek remedies beyond simple divestiture. To settle the case, TransDigm would need to negotiate not only the divestiture terms but also the full scope of what the DOJ might require to restore premerger competition.

TransDigm's settlement illustrates a broader strategic question that arises whether or not the deal has closed. In each case, the merging parties facing likely enforcement action confront the same basic choice: fight the government in court or negotiate a settlement that restructures the deal to address competitive concerns. When litigation prospects appear poor, can the parties craft a settlement that satisfies the agency's competitive concerns while still allowing some version of the transaction to proceed?

As you work through the TransDigm documents and remedies materials, focus on two key analytical questions: First, what drives agency settlement demands—why does the DOJ seek broad ‘further relief’ language beyond simple divestiture, and how do the remedies principles and divestiture paradigms explain those demands? Second, analyze the strategic calculus facing merging parties—what factors should influence whether to accept agency settlement terms or litigate on the merits? Pay particular attention to how the bargaining dynamics and legal technicalities in the class notes inform both the government’s negotiating position and the company’s response options.

TransDigm settlement materials. Begin by reading the TransDigm and DOJ settlement announcements and the two TransDigm Form 8-Ks (pp. 22-32).[1] Focus on the scope of the business TransDigm agreed to divest, the identity and characteristics of the divestiture buyer, the timing of the divestiture, and the difference between the $90 million acquisition price and the $61.4 million divestiture price.

Investigation outcomes and current settlement policy. Briefly review the note on investigation outcomes (pp. 106-110) and the opening section of the Unit 1B class notes (slides 2-8). The important point is that, when an agency identifies a competitive problem, the parties ordinarily must choose among restructuring the transaction, settling through an enforceable consent order, litigating, or abandoning the transaction. Historically, consent settlements resolved the great majority of problematic mergers. The Biden agencies sharply reduced their willingness to accept negotiated remedies, but the Trump 2.0 agencies have returned to the more traditional practice of accepting properly designed structural settlements.

Read the Ferguson statement and Commissioner Holyoak’s speech (pp. 112-128) with this policy shift in mind. Both emphasize that structural relief remains the preferred response to horizontal overlaps, but that acceptance of a divestiture depends on the scope of the assets, the suitability of the buyer, the independence of the divested business, and the likelihood that the remedy will preserve premerger competition. Then read the Weiner and Jiang article (pp. 129-34). It gives a useful practitioner-oriented account of what the return of consent settlements means for parties planning transactions and presenting remedies to the agencies.

The theory of horizontal divestiture remedies. Next, work through the class notes explaining the basic theory of divestiture relief (slides 9-12). A horizontal merger creates a Section 7 problem because the parties would combine competing businesses in a relevant market. A divestiture can eliminate that problem if one overlapping business is transferred to a third party that will compete with the same force as the divestiture seller did before the merger. The identity of the owner changes, but the competitive structure of the market does not. This is what it means for the divestiture buyer to “step into the shoes” of the divestiture seller.

Designing an effective divestiture. The next section of the class notes (slides 13-18) identifies the practical conditions that make that theory work. There must be economically meaningful parts of the transaction that do not present antitrust problems; the problematic business must be separable from the remainder of the buyer’s or seller’s operations; and a qualified buyer must have the incentive and ability to operate the divested business with the same competitive force as the divestiture seller. The DaVita/University of Utah example shows how a remedy may be confined

[1] I did not include the substantive documents comprising the TransDigm settlement because they are both technically detailed and do not contain much of the boilerplate in modern DOJ consent decrees. This reading guidance and the class notes will give you all of the information you need. However, the court filings are included here in the supplemental readings.

to the particular local operations that create the competitive problem while leaving the remainder of the transaction intact.

Pay particular attention to continuity and independence. The divested business must include the assets, personnel, intellectual property, contracts, customer relationships, permits, know-how, and other capabilities necessary to compete immediately. The business must be preserved pending divestiture, and transition services must be limited so that the divestiture buyer does not remain dependent on the merged firm for competitively significant capabilities. The divestiture itself also must not create a new competitive problem.

The three divestiture paradigms. The class notes distinguish three recurring remedy structures: (1) divestiture of a complete standalone business; (2) divestiture of an operating business whose buyer supplies management, back-office support, and strategic direction; and (3) divestiture of an asset or product package that an established buyer integrates into its own operations. The examples—Ardagh/Saint-Gobain, Ahold/Delhaize, and Danaher/GE Biopharma—show why the appropriate structure depends on the degree to which the divested operations can stand alone and the capabilities the proposed buyer already possesses (slides 19-22).

Empirical experience with divestiture remedies. Read the assigned excerpts from the FTC's 2017 Merger Remedies Report (pp. 135-48).[2] The study examined the operation of FTC merger orders entered from 2006 through 2012. The Commission concluded that the great majority of the remedies it studied preserved or restored competition. Divestitures of ongoing businesses performed especially well; limited asset packages were more vulnerable to problems involving incomplete scope, missing personnel or know-how, customer loss during transition, weak buyers, and continuing dependence on the merged firm. The report supplies empirical support for the agencies' preference for complete operating businesses and careful buyer review.[3]

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[2] Bureau of Competition, Fed. Trade Comm'n, The FTC's Merger Remedies 2006–2012: A Report of the FTC's Bureau of Competition and Bureau of Economics (Jan. 2017).

[3] Other empirical work, which heavily influenced antitrust enforcement officials in the Biden administration, is considerably more skeptical of merger remedies. The most prominent is the work of John Kwoka. *See* JOHN E. KWOKA JR., MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015) (finding that mergers subject to divestiture remedies experienced postmerger price increases comparable to mergers cleared without remedies and concluding that the remedies often failed to preserve competition); John Kwoka, *Revisiting Structural Remedies*, 39 Antitrust 38, 40-43 (Fall 2024) (criticizing the FTC studies' methodologies and definitions of "success" and reviewing evidence of substantial divestiture failure rates). Kwoka's 2015 methodology and conclusions have themselves been contested. *See* Michael G. Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L.J. 361 (2018); John E. Kwoka, *A Response to the Vita–Osinski Critique*, 82 ANTITRUST L.J. 983 (2019) (defending the selection of studies and econometric methods used in his retrospective merger analysis and disputing claims that his database is biased toward finding anticompetitive effects); Michael G. Vita, *Kwoka's Mergers, Merger Control, and Remedies: Rejoinder to Kwoka*, 28 RESEARCH IN L. & ECON. 433 (2018) (restating concerns that Kwoka's sample, coding, and interpretation overstate the frequency and magnitude of anticompetitive merger effects and remedy failures). For other articles critical of merger remedies, see, for example, Xiao Dong, Paul Koh, Devesh Raval, Dominic Smith & Brett Wendling, *Antitrust on Aisle Five: How Well Do Divestiture Remedies Work?* (Apr. 8, 2026) (working paper) (finding that divested grocery stores experienced substantially elevated exit rates and persistent declines in employment and sales and that divested assets were systematically weaker and often transferred to lower-capability buyers); Tomaso Duso, Klaus Gugler & Burçin B. Yurtoglu, *How Effective Is European Merger Control?*, 55 EUR. ECON. REV. 980, 999-1002 (2011) (using stock market event studies of 151 mergers reviewed by the European Commission and finding that outright prohibitions generally reversed the anticompetitive rents associated with merger announcements, while remedies on average reversed those rents only partially).

Four ways to implement a divestiture solution. The class notes next distinguish four implementation routes:

1. A consent decree settling an investigation
2. A consent decree settling litigation
3. "Litigating the fix," in which the parties ask the court to evaluate a restructured transaction the agency has rejected
4. A negotiated "fix it first," in which the parties eliminate the overlap before closing and ordinarily avoid an enforcement order.

(slides 23-27). Keep the terminology straight. A consent settlement creates an enforceable government order; a fix-it-first restructuring ordinarily does not. Litigating the fix is not a settlement unless the parties later resolve the case through a consent decree.

The settlement bargaining game. The class notes provide the framework for understanding whether a settlement is possible and where its terms will fall (slides 28-33). In practice, the merging parties ordinarily make the proposals, and the agency responds. If the agency rejects a proposal, it often explains what it regards as inadequate, thereby giving the parties information about the relief the agency would require. The parties may then revise the proposal and continue the process. A settlement becomes possible only if the parties are willing to offer relief the agency will accept and both sides prefer that resolution to the expected consequences of continued litigation. Within that range of potentially acceptable outcomes, the agency's demands and the parties' willingness to meet them reflect their relative leverage.

The parties' assessments of liability, likely judicial relief, litigation expense, delay, and business disruption shape their reservation payoffs. Before closing, delay may require the buyer to preserve acquisition financing, pay ticking consideration, and bear the risk that market conditions or the merger agreement will cease to be viable. Before or after closing, uncertainty and restrictions on integration may cause the target or acquired business to lose strategic direction, customers, key employees, or anticipated efficiencies. After closing, hold-separate and asset-preservation orders can freeze integration and increase the risk that a court will impose relief broader than the settlement the agency is offering.

In a settlement reached during litigation, the merging parties ordinarily are the moving force. They reopen negotiations and typically are prepared to offer additional relief to provide the agency some "win" and eliminate the remaining risk of losing in court. The agency's receptivity—and the amount of additional relief it demands—depends on how discovery and other litigation developments have affected its view of liability and remedy. Even when the agency perceives its litigation position to be weak, it ordinarily will require at least some additional relief that permits it to explain why the litigation produced a better outcome than the proposal it rejected during the investigation.

Postclosing divestiture examples. Work through the four examples in the class notes (slides 34-44). Each illustrates a different consequence of attempting to restore competition after the buyer has closed and, in some instances, integrated the acquired business. TransDigm/Takata required divestiture of the entire acquired business. D&B/QED required reconstruction and augmentation

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of a database after integration. Parker-Hannifin/CLARCOR required assets outside the alleged relevant markets to create a viable and separable business. MSC.Software/Nastran required the creation and licensing of a clone of MSC's current software after the acquired products had been discontinued. Together, these examples show why postclosing relief may be broader and more intrusive than simply returning what the buyer originally acquired.

> *In both the graded homework assignment and the final exam, you should expect to be asked whether a consent decree could resolve an antitrust problem raised by a merger and, if so, what restructuring the agency is likely to require for the consent decree to be acceptable.*

Legal nature and consequences of consent decrees. The class notes address legal rules that matter to the negotiation and enforcement of consent settlements (slides 45-55). The investigating agency decides whether to negotiate and whether to accept a proposed settlement. A consent decree ordinarily contains no adjudication, findings, or admission of liability. Its obligations derive from the parties' consent, but once entered it is also a judicial order enforceable through contempt. It ordinarily has claim preclusive effect as to the claims it resolves, although issues not actually litigated ordinarily are not issue preclusive. Courts generally construe consent decrees using contract principles, while retaining their equitable power to modify prospective relief when changed circumstances satisfy the governing standards.

Cleveland Firefighters. The Supreme Court's decision in *Cleveland Firefighters* illustrates the flexibility created by consent. A court may enter a consent decree containing relief broader than the relief it could have awarded after trial, provided that the decree resolves a dispute within the court's jurisdiction, falls within the general scope of the pleadings, furthers the objectives of the governing law, and does not itself violate the law. The point is important in merger practice: the agency may demand negotiated provisions that go beyond the remedy a court necessarily would impose after adjudicating the merits.[4]

Approval of consent settlements. The final section of the class notes provides a short overview of the approval process (slides 56-62). In a DOJ matter, the complaint, proposed final judgment, Competitive Impact Statement, and interim stipulation are filed in federal court. Once the court enters the interim stipulated order, DOJ ordinarily permits the main transaction to close without awaiting completion of the Tunney Act's 60-day comment process and final public-interest

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[4] The only merger matter of which I am aware that might have implicated *Cleveland Firefighters* involved the consent decree in The Thomson Corporation's 1997 acquisition of West Publishing Company. (I was the lead counsel for Thomson). West, Lexis-Nexis, and Thomson were the only significant legal publishers in the United States. The consent decree primarily involved the divestiture of certain legal books and treatises, but the DOJ also insisted that the merged firm license West's "star pagination"—the page numbers in the official reporters published by West in which West (backed by an Eight Circuit decision) claimed a copyright—to any interested third party. West historically refused to license its "star pagination." I thought that a mandatory star pagination license was relief unrelated to the DOJ competitive concerns and so court could not order a mandatory license as relief after fully litigating the merits. Although not an issue in court, Judge Paul L. Friedman found the mandatory license was related to the competitive concerns in the DOJ's complaint, so it is not technically an application of *Cleveland Fighters*.

The saga of the acquisition over the opposition of the DOJ, seven states, Lexis-Nexus and numerous others is fascinating. It is one of the few contested Tunney Act proceedings. For a small taste of the machinations in the deal, see United States v. Thomson Corp., 949 F. Supp. 907 (D.D.C. 1996) (denying the DOJ's motion to enter the proposed consent order as a final judgment), and Civ. A. No. 96–1415(PLF), 1997 WL 90992 (D.D.C. Feb. 27, 1997) (entering revised proposed consent decree as the final judgment). The acquisition was the subject of a major article in the American Lawyer. *See* John E. Morris, *How West Was Won*, AM. LAW., Sept. 1996, at 72.

determination. The FTC process largely parallels the DOJ process, but it occurs within the Commission, uses different documents, provides a 30-day comment period, and does not require an independent federal-court public-interest determination.

In-class counseling exercise. After completing the remedies discussion, we will use the TransDigm facts for a pre-signing counseling exercise. There is no separate reading for the exercise. Be prepared to think as counsel to the buyer: identify the most important facts you would want to learn, assess inquiry, substantive, and remedies risk, explain the analysis in terms the client can use, and recommend steps that could improve the likelihood of closing the transaction.

If you have any questions or comments, please send me an email. I look forward to seeing you in class on Thursday, August 27.

Dale Collins