DOJ Announces Largest-Ever U.S. Antitrust Divestiture in the Bayer/Monsanto Transaction

June 4, 2018

On May 29, 2018, the DOJ announced the largest-ever antitrust divestiture in the U.S. in connection with Bayer's takeover of Monsanto. In addition to being newsworthy in light of its sheer size (at approximately $9 billion), the remedy reflects a number of principles that have been emphasized publicly by key U.S. antitrust agency officials in recent months and provides insight into how the U.S. antitrust agencies might approach remedy negotiations in future transactions. Among the key takeaways are that the agencies may require divestitures that extend beyond overlapping product areas and, building on an emerging U.S. enforcement trend, are more likely to seek structural remedies to address innovation and vertical concerns. The Bayer/Monsanto decree also suggests that the U.S. antitrust agencies may require additional provisions to improve effectiveness of the remedy and ease of enforcement. And finally, the consent decree underscores how the Antitrust Division under Assistant Attorney General Makan Delrahim continues to demonstrate an aggressive approach to merger enforcement.

In September 2016, Bayer agreed to acquire Monsanto. Bayer's Crop Science division is active in the research, development, and marketing of seeds, crop protection chemicals, and related agricultural products. Monsanto is active in these same lines of business. The principal areas of competitive concern relate to the seeds business. To remedy horizontal, vertical, and innovation concerns stemming from the merger, the U.S. Department of Justice ("DOJ") required the divestiture of select assets to BASF, along with supporting transition services and supply arrangements. BASF is also active in the agribusiness sector but until now only in the market for crop protection chemicals; through this divestiture it will enter into the seeds business in competition with the merged Bayer/Monsanto.

Largest-Ever U.S. Antitrust Divestiture

As a condition for approving the combination of Bayer and Monsanto, the DOJ required divestitures valued at approximately $9 billion, almost 14% of the total value of the merger. This sum is close to $2 billion more than the value of divestitures required by the European Commission ("EC") to approve the merger.[1]

Requiring Divestiture in Non-Overlap Areas to Ensure a Complete Business Is Transferred

The DOJ was very deliberate in ensuring that the divestiture comprised a complete business. This approach reflects concerns that agency officials have recently expressed regarding the adequacy of asset carveouts, which officials have described as "inherently suspect."[2] In the Bayer/Monsanto transaction, there was not a single business unit that could be cleanly separated; rather, the assets comprising the

[1] *See* Press Release, European Comm'n, **Commission clears acquisition of parts of Bayer's Crop Science business by BASF, subject to conditions** (Apr. 30, 2018).

[2] Barry Nigro, Deputy Ass't Attn'y Gen., Antitrust Div., Dep't of Justice, **A Partnership to Promote and Protect Competition for the Benefit of Consumers** (Feb. 2, 2018).

areas of concern were spread across several businesses. Thus, to ensure the transfer of a complete and viable business, the DOJ required the merging parties to divest two types of assets: first, assets that are part of overlapping businesses; and second, assets that do not overlap but that are essential complements or joint resources for the divested, overlapping businesses. In developing the divestitures, the DOJ was also guided by the current business profile of the divestiture buyer, BASF, and required assets to be included in the divestiture that BASF might not have needed if it had an existing seeds business.

This case signals the importance of understanding the business position of a proposed divestiture buyer, the relationship between separate operating areas of the merging parties, and how these factors can affect the scope of remedies that the U.S. antitrust authorities might require.

Emphasis on Broad Structural Remedies That Encompass Vertical and Innovation Concerns

The Bayer/Monsanto remedy is a strong signal that the DOJ is serious in its preference for structural remedies over behavioral fixes.[3] Earlier this year, Assistant Attorney General Makan Delrahim stated that the use of consent decrees should be "consistent with a view of the Antitrust Division as a law enforcement agency, not a regulatory one," and that "behavioral conditions are fundamentally regulatory, imposing government supervision on what should be free markets."[4] While the agencies have long preferred divestitures over conduct remedies in horizontal mergers with existing overlaps, the agencies have often accepted conduct remedies such as mandatory access or licensing provisions. This has especially been the case in vertical mergers or transactions involving more dynamic concerns relating to innovation and future competition. Bayer/Monsanto, as with some other recent transactions like the AT&T/Time Warner merger, indicates a firmer and more expansive insistence by the DOJ on structural remedies.

In particular, the DOJ's consent decree with Bayer/Monsanto alleged several harms to innovation and raised key vertical concerns. To address those concerns, the DOJ here required divestitures that went beyond horizontal overlaps to include R&D assets and pipeline projects. A good example of this is found in the divestiture of Bayer's wheat-related R&D. While there is no U.S. overlap between Bayer and Monsanto in wheat, Bayer had been pursuing significant wheat-related research for the purpose of expanding its overall seeds and traits portfolio. The potentially resulting innovations could be applied across a number of crops, including those being divested. As such, the DOJ found this divestiture necessary to "increase the incentive [of BASF] to innovate" by giving BASF all of the tools that Bayer has in running its business.[5]

In sum, merging parties should be mindful that antitrust agencies are increasingly likely to require structural remedies rather than behavioral ones, including to address innovation and vertical concerns. Furthermore, the agencies may require divestitures of R&D, even where the primary focus of such research may not directly concern an overlapping product area.

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[3] *See* Makan Delrahim, Ass't Attn'y Gen., Antitrust Div., Dep't of Justice, **Keynote Address at American Bar Association's Antitrust Fall Forum** (Nov. 16, 2017) ("I expect to cut back on the number of long-term consent decrees we have in place and to return to the preferred focus on structural relief."); *see also* Bruce Hoffman, Acting Dir., Bureau of Competition, Fed. Trade Comm'n, **Vertical Merger Enforcement at the FTC** (Jan. 10, 2018) ("[W]e prefer structural remedies—they eliminate both the incentive and the ability to engage in harmful conduct, which eliminates the need for ongoing intervention.").

[4] Makan Delrahim, Ass't Attn'y Gen., Antitrust Div. Dep't of Justice, **Improving the Antitrust Consensus** (Jan. 25, 2018).

[5] Competitive Impact Statement, at 20.

Importance of Preserving Innovation Competition

As indicated above, the Bayer/Monsanto divestiture illustrates the DOJ's growing focus on preserving and promoting innovation.[6] Evidence for that sharpened focus can be seen by comparing the approaches of the DOJ and EC in this case with their respective approaches to remedies in last year's Dow/DuPont merger in the same industry. In Dow/DuPont, the DOJ's consent decree contained numerous references to the importance of R&D but did not contain any related remedies. In contrast, the EC required the divestiture of DuPont's global crop protection R&D arm. In the Bayer/Monsanto transaction, the EC again took steps to address R&D harms but the DOJ went notably further and required a broader array of R&D divestitures. The DOJ's analysis of the transaction focused on ensuring future competition beyond the expiration of the consent decree, which the settlement suggests can only be accomplished with a structural remedy and through preservation of incentives to innovate going forward.[7]

Provisions to Improve the Effectiveness and Enforcement of Consent Decrees

In its continued efforts to improve the effectiveness and enforceability of consent decrees, the DOJ included a few provisions that increase the burden on the merging parties, as well as on the divestiture buyer. First, the consent decree gives BASF the ability, within one year after closing, to identify additional assets it deems reasonably necessary to continue to operate the divested business in a competitive manner, and the DOJ can require Bayer to sell those assets to BASF.[8] By allowing a divestiture buyer to request additional assets after having some experience operating in the relevant business, this apparently novel provision seems to align with the DOJ's focus, discussed above, of ensuring the transfer of a whole business to protect long-term competition.

Second, BASF has been made a party to the consent decree for purposes of the divestiture. Given that the DOJ specifically crafted the divestitures with BASF's existing business in mind, the DOJ found that BASF's participation in the consent decree was necessary in order to ensure that competition is sufficiently preserved.[9] This stands in contrast to the vast majority of merger settlements, which usually make only the merging companies party to the settlement, including prior cases where the DOJ expressed concern with a divestiture's effectiveness. Third, and relatedly, the DOJ is continuing here its trend of reducing its own burdens of showing consent decree violations by including a "preponderance of the evidence" standard in the decree itself. This is a lower standard than the "clear and convincing evidence" standard the U.S. antitrust agencies have used in the past. These provisions place the burden on the merging parties and the divestiture buyer to ensure that the remedies they are proposing are complete and successful.[10]

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[6] *See e.g.*, Makan Delrahim, Ass't Att'y Gen., Antitrust Div., Dep't of Justice, **The Long Run: Maximizing Innovation Incentives Through Advocacy and Enforcement** (Apr. 10, 2018); *see also* Press Release, Dep't of Justice, **Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy** (Apr. 27, 2015) (finding particular concern to the development of next-generation semiconductors).

[7] *See* Competitive Impact Statement, at 17.

[8] Proposed Final Judgment, Section IV(F)(2). Under this provision, the DOJ will have "sole discretion, taking into account BASF's assets and business" to determine whether any additional assets should be divested. If the DOJ determines additional divestiture is needed, the parties will have 30 days to negotiate the divestiture. "The terms of any such divestiture agreement shall be commercially reasonable and must be acceptable to the United States, in its sole discretion." One further insight from this provision is that it appears to contradict the stated DOJ preference for remedies that do not require continuing DOJ oversight; though such oversight would be short-term.

[9] *See* Competitive Impact Statement, at 30.

[10] *See* Andrew C. Finch, Principal Deputy Ass't Att'y Gen., Antitrust Div., Dep't of Justice, **Trump Antitrust Policy After One Year** (Jan. 23, 2018) ("Overall, the goal of these new provisions is to improve consent decree enforcement and shift the risk of failure to the parties and away from the taxpayer and American consumer."); *see also* Bruce Hoffman, Acting Dir., Bureau of Competition, (*cont.*)

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Conclusion

The DOJ's remedy in the Bayer/Monsanto transaction contains several key points that companies and counsel should keep in mind when assessing the regulatory risks of a transaction or in negotiating merger remedies. In particular, merging parties should expect that antitrust agencies will continue to carefully consider whether the divestiture of non-overlapping products is required to ensure redress of competitive harms. Further, this remedy is an example of the increasing focus on structural fixes, including for vertical and innovation concerns that parties have historically been able to resolve with behavioral fixes. Finally, the remedy contains a number of provisions that demonstrate the agencies' focus on ensuring the effectiveness and enforceability of consent decrees, which looks to be a strengthening trend in U.S. merger enforcement.

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Fed. Trade Comm'n, **It Only Takes Two to Tango: Reflections on Six Months at the FTC** (Feb. 2, 2018) ("[I]t is entirely proper that the risk of failure [in a merger remedy] be placed on the parties to the merger.").