Buyer Beware: Considerations for a Divestiture Buyer in "Litigating the Fix"

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Introduction

In most cases when the Department of Justice Antitrust Division ("DOJ") or Federal Trade Commission ("FTC") conclude that a proposed transaction raises competitive concerns, the parties to the transaction address those concerns by proposing a divestiture and negotiating a consent decree with the agency. Yet the agencies will not always accept a proposed divestiture, and have increasingly sought to block transactions even though the merging parties had proposed a "fix," because the challenging agency has doubts that the proposed remedy will sufficiently resolve their concerns. "Litigating the fix" has thus become a feature of several high-profile merger challenges over the past decade, including *FTC v. Sysco*,[1] *FTC v. Staples*,[2] *U.S. v. Halliburton*,[3] *U.S. v. Aetna*,[4] and *State of New York v. Deutsche Telekom*.[5]

Parties looking to acquire a business or assets being divested in a merger under such scrutiny from the DOJ or FTC must therefore proceed carefully to avoid getting mired in expensive, distracting, and time-consuming litigation. Divestiture buyers should work closely with experienced counsel to ensure that as they negotiate to acquire the business or assets being divested, they maintain confidence that their acquisition of the to-be-divested business or assets is likely to be approved by the agency or, ultimately, a court. Buyers should be mindful that should the agency not consent to the proposed divestiture, they will be key participants in the litigation, with their executives' testimony and documents being featured prominently. This article identifies potential pitfalls or issues that a divestiture buyer may face in a "litigating the fix" scenario.

Too Much or Not Enough: Negotiating needed transition and support services could be characterized as an inappropriate ongoing entanglement, or, on the other hand, result in questions regarding the sufficiency of such transition services. A purchaser of a business or set of assets in a divestiture reasonably wants to ensure that it can satisfactorily operate the business upon the completion of the divestiture transaction. Most divestitures include some form of commitments on the part of the divesting party beyond the divestiture itself in order to facilitate the divested business's success, *e.g.*, a commitment to provide the divestiture buyer with back-office functions or assure the supply of a particular input on a transitional basis until the buyer can perform those functions on its own. The antitrust agencies recognize that transition services are often necessary to ensuring the success of a divestiture,[6] yet also try to minimize these

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[1] FTC v. Sysco Corp., 113 F. Supp. 3d 1 (D.D.C. 2015).

[2] FTC v. Staples, Inc., 190 F. Supp. 3d 100 (D.D.C. 2016).

[3] U.S. v. Halliburton Co., No. 1:16-cv-00233 (D. Del. 2016). The parties abandoned the transaction after about a month of litigation.

[4] U.S. v. Aetna, 240 F. Supp. 3d 1 (D.D.C. 2017).

[5] State of New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020).

[6] In its January 2017 report on merger remedies, the Federal Trade Commission found that several divestiture buyers reported that, after acquiring the divested assets, they discovered they needed more time than anticipated to complete

types of additional obligations, which create ongoing entanglements between the seller and the buyer, in order to preserve competitive vigor between the two firms. "Courts are skeptical of a divestiture that relies on a 'continuing relationship[] between the seller and buyer of divested assets' because that leaves the buyer susceptible to the seller's actions—which are not aligned with ensuring that the buyer is an effective competitor."[7]

Divestiture buyers can sometimes find themselves in the position of having negotiated a seemingly reasonable transition arrangement that minimizes the duration of entanglements with the seller yet nevertheless find the government contending in litigation that the buyer will not be able to compete as effectively in the marketplace with the divested assets as the divesting party soon enough. In *Aetna*, for example, the DOJ contended—and the Court agreed—that the transition support services negotiated between the buyer and the merging parties were insufficient to ensure the competitiveness of the buyer. There, Molina (the proposed divestiture buyer) negotiated an Administrative Services Agreement (ASA) in conjunction with an Asset Purchase Agreement (APA) to acquire the divested Medicare Advantage plans from Aetna and Humana. Under the ASA, Aetna and Humana would continue to operate the divested plans (including providing all administrative services, such as IT, claims processing and broker services) for the remainder of the year in which the transaction closes, with the possibility for up to two 6-month periods.[8] The scope of the divestiture, however, did not include Aetna's and Humana's provider contracts associated with the divested plans, and therefore Molina needed to build its provider network essentially from scratch.[9] Even with the ASA extended to the maximum extent, the Court concluded that Molina would not be likely to build a competitive Medicare Advantage provider network in the relevant areas within the available time frame.[10]

On the other end of the spectrum, in *Sysco*, the FTC argued and the Court agreed that the transition services agreement negotiated between the parties and the divestiture buyer was problematic because it would result in the divestiture buyer being too dependent on the merged firm. In that case, Performance Foods Group (PFG) negotiated the acquisition of 11 food distribution centers from the merging parties, along with access to US Foods' private label products for three years and the right to license a US Foods database for up to 10 years.[11] The Court concluded that one of the significant factors cutting against the proposed divestiture was that "PFG will be dependent on the merged entity for years following the transaction," and therefore "will not be a truly independent competitor."[12] A similar set of circumstances was presented in the proposed Halliburton-Baker Hughes combination. There, Halliburton had been having "lengthy discussions" with a prospective divestiture buyer, but had not entered into an asset purchase

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the transition. *See* Federal Trade Comm'n, The FTC's Merger Remedies 2006–2012: A Report of the Bureaus of Competition and Economics (Jan. 2017) at 26–27, 33, 35–36.

[7] U.S. v. Aetna, 240 F. Supp. 3d at 60 (citing *Sysco*, 113 F. Supp. 3d at 77).

[8] *Id.* at 62–63.

[9] *Id.* at 65.

[10] *Id.* at 68. As discussed *infra*, this case is a good example of a circumstance in which the prospective divestiture buyer's own internal document raised significant concerns about the efficacy of the divestiture.

[11] *Sysco*, 113 F. Supp. 3d at 77–78.

[12] *Id.* ("it can be a 'problem' to allow 'continuing relationships between the seller and buyer of divested assets after divestiture, such as a supply arrangement or technical assistance requirement, which may increase the buyer's vulnerability to the seller's behavior.' ") (*quoting* FTC v. CCC Holdings, Inc., 605 F. Supp. 2d 26, 59 (D.D.C. 2009)).

agreement by the time DOJ filed its complaint seeking to enjoin the merger.[13] The DOJ's complaint, however, stated its concerns with the potential divestiture should the merging parties present it as a defense in the litigation: "The fact that Defendants are not transferring any complete businesses to the divestiture buyer means that Halliburton and the buyer would need to enter into numerous support agreements that would leave the buyer dependent on one of its biggest competitors to operate successfully."[14] Halliburton and Baker Hughes ended up abandoning their transaction about a month after DOJ filed its complaint, and thus the sufficiency of the proposed divestiture was never fully litigated.

The case of DISH as the divestiture buyer in the T-Mobile-Sprint transaction presented an unusual and challenging scenario for the divestiture buyer. There, DISH negotiated a divestiture package from the merging parties, including the Boost Mobile prepaid wireless business from Sprint, as well as a seven-year Master Network Services Agreement in which DISH would gain low-cost, wholesale access to the New T-Mobile wireless network while it builds out its own new 5G wireless network. The divestiture package also included additional spectrum assets and cell sites from the merging parties. This divestiture package was vetted and approved by the Department of Justice,[15] yet 10 State Attorneys General (the "Plaintiff States") filed a complaint challenging the transaction, even taking into account the proposed divestiture to DISH.[16] At and after trial, the Plaintiff States contended, citing *Sysco* and *Aetna*, that the proposed divestiture was insufficient to remedy the harm to competition because it would result in DISH being an insufficiently independent competitor from the merged firm (called "New T-Mobile").[17] The Plaintiff States argued: "Even as DISH and New T-Mobile are contractually obligated to work together to provide wireless services to DISH's customers, DISH and New T-Mobile will be competing against one another for customers," which "will give rise to an inherent conflict of interest."[18] In its opinion denying the Plaintiff States' request to enjoin the transaction, the Court agreed with the Plaintiff States that "DISH's reliance on New T-Mobile's network [while it builds its own network] presents the risk that New T-Mobile may try to hinder DISH's ability to compete effectively," yet nevertheless concluded that "the DOJ has already prepared multiple means to

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[13] Complaint, *U.S. v. Halliburton Co.*, No. 1:16-cv-00233 (D. Del. Apr. 6, 2016), ECF No. 1 at ¶ 73.

[14] *Id.* at ¶ 77. The antitrust agencies are often skeptical of divestiture packages comprised of assets representing less-than-complete business units, and strongly prefer divestitures of a stand-alone business. *See, e.g.*, Barry Nigro, A Partnership to Promote and Protect Competition for the Benefit of Consumers (Feb. 2, 2018), *available at* https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-remarks-annual-antitrust-law.

[15] *See* Competitive Impact Statement, *U.S. v. Deutsche Telekom AG*, 1:19-cv-02232 (D.D.C. Jul. 30, 2019), ECF No. 20, *available at* https://www.justice.gov/opa/press-release/file/1189336/download; *see also* Stipulation and Order, *U.S. v. Deutsche Telekom AG*, No. 1:19-cv-02232 (D.D.C. Jul. 26, 2019), ECF No. 2-1, *available at* https://www.justice.gov/opa/press-release/file/1187711/download.

[16] Complaint, *State of New York v. Deutsche Telekom AG*, No. 1:19-cv-05434 (S.D.N.Y. Jun. 11, 2019), ECF No. 2. The Plaintiff States filed an Amended Complaint on June 25, 2019, adding four additional states as plaintiffs, *see id.* at ECF No. 65, a Second Amended Complaint on August 14, 2019 adding two additional states as plaintiffs, *see id.* at ECF No. 188, and a Third Amended Complaint on September 18, 2019, adding two additional states as plaintiffs, see *id.* at ECF No. 214. After the Department of Justice filed its complaint and proposed Final Judgment in *U.S. v. Deutsche Telekom AG*, 1:19-cv-02232 (D.D.C. Jul. 26, 2019) (the "DOJ Consent Decree"), the states of Mississippi, Colorado, Nevada, and Texas dropped out as plaintiffs in the SDNY litigation. 14 states remained as plaintiffs in the case through trial.

[17] *See* Plaintiff States' Proposed Findings of Fact and Conclusions of Law, *State of New York v. Deutsche Telekom AG*, No. 1:19-cv-05434 (S.D.N.Y. Jan. 8, 2020), ECF No. 358 at ¶¶ 105, 115.

[18] *Id.* at ¶ 115.

mitigate this potential conflict," such as appointing a monitor to ensure that New T-Mobile does not limit or cap DISH's ability to use the network or increase the wholesale price to DISH.[19]

In sum, a prospective divestiture buyer must walk the fine line between negotiating for sufficient assets and transition support in order to become a viable competitor in the relevant market but avoiding arrangements that result in excessive dependence on the seller post-divestiture.

Be mindful of conditions the sellers may impose in the purchase agreement and ensure that your expenses are covered. Depending on the size and nature of the divestiture transaction, the divestiture may be subject to notification requirements under the Hart-Scott-Rodino Act ("HSR Act") or other third-party or government consents, and the divestiture sellers will insist on attainment of these consents as a condition to closing the divestiture transaction. Prospective divestiture buyers should keep in mind that these conditions can impose potentially significant costs and delays in closing a divestiture transaction. If the divestiture transaction itself requires an HSR filing, the prospective buyer should be aware that it will be responsible for payment of the HSR filing fee—which could be up to $280,000, depending on the value of the divested business—unless it is able to negotiate an alternative arrangement in its purchase agreement with the divestiture sellers. The timing of an HSR filing for the divestiture, as well as the process of seeking review of the divestiture from the US agencies and any other jurisdictions with authority over the transaction (including seeking foreign-investment approvals, if applicable), should be top of mind for a prospective buyer, as this timeline can often take many months and require coordination across multiple countries.

Given the complications and potential extended timeline involved in being the divestiture buyer in a transaction under review by numerous jurisdictions around the world, it is critical that the prospective buyer negotiate its purchase agreement with acceptable efforts covenants, termination date and other termination conditions. For example, a prospective divestiture buyer should be mindful of how long it is willing to "be on the hook" to purchase the divested assets. Between the time needed to engage with the relevant antitrust agencies to "vet" both the purchaser as well as the package of divested assets, as well as time spent in litigation, a prospective divestiture buyer may spend up to nine months or more before actually closing the divestiture (assuming the litigation is resolved with a decision approving the main transaction, subject to the proposed divestiture). This time period is also accompanied by considerable legal fees incurred by the prospective divestiture buyer in connection with its engagement with the reviewing authorities, responding to Civil Investigative Demands ("CIDs") and litigation discovery requests, and preparing for and defending the depositions of executives during both the agency review process as well as in litigation. In addition to negotiating an agreeable termination date, the prospective divestiture buyer should also consider seeking a termination fee or other compensation for its legal fees and/or other expenses payable in the event that the divestiture seller terminates the divestiture transaction under certain circumstances (*e.g.*, because a court enjoined the main transaction notwithstanding the proposed divestiture, or because the merging parties terminated their transaction). Relatedly, a prospective divestiture buyer should be aware that the divestiture seller may also seek to negotiate a termination provision ending the agreement in the event that one (or more) of the reviewing antitrust authorities finds the divestiture buyer to be unacceptable, or if the divestiture buyer fails to achieve other necessary consents.

In *Aetna*, for example, the Asset Purchase Agreement negotiated between Humana and Molina conditioned closing upon the receipt of CMS's approval of the Medicare Advantage contract

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[19] State of New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 228 (S.D.N.Y. 2020).

novations, as well as the expiration of any waiting periods (*e.g.*, under the HSR Act) and receipt of any other consents from governmental authorities.[20] In that case, Humana and Molina agreed to typical "reasonable best efforts" covenants to achieve closing; however, that covenant was subject to a caveat: except as otherwise agreed by the parties, Humana would be entitled to control and direct the defense of the divestiture transaction before DOJ and in the litigation, and to take the lead in the strategic planning for any meetings with and negotiations with DOJ or the Court.[21] Further, Molina agreed that it would not enter into any transaction with any other party, or enter into any new line of business, if doing so would reasonably be expected to materially delay consummation of the divestiture transaction.[22] As consideration for these covenants, Humana would cover Molina's reasonable out-of-pocket costs and expenses in connection with its cooperation in the merger litigation.[23] Similar provisions were also included in the Sysco-Performance Foods divestiture agreement; however, in that case, Sysco only agreed to reimburse Performance Foods fifty percent of its expenses in cooperating with the merging parties in litigation against the FTC and to complete the divestiture (although this did include an agreement to reimburse Performance Foods one-half of the HSR filing fee).[24] In cases in which the divestiture buyer and the merging parties agree to cooperate in the defense of the transaction (including the divestiture) in agency advocacy and litigation, they will often agree to enter into a joint defense agreement to preserve privilege, as was the case in the *Aetna* divestiture agreement.[25] These examples remind potential divestiture buyers to ensure that they get covenants from the divestiture sellers that they will be kept informed of the status of the merger review before the agency, as well as to be informed about and involved with the litigation when it goes to court.

During the period when the agency is reviewing a potential divestiture, including assessing the acceptability of the proposed divestiture buyer, the prospective buyer may meet with the reviewing agency staff to discuss issues relating to the prospective buyer's suitability as well as issues relating to the sufficiency of the package of assets included in the divestiture. In this period, there may be a conflict of interest between the prospective divestiture buyer and the merging parties (divestiture seller), as the prospective buyer may make statements to the agency in meetings in which the divestiture seller and its counsel are not present about the sufficiency of the divestiture package in an effort to have additional assets added to the package, even after the proposed divestiture buyer has signed a term sheet or purchase agreement. In cases like these, the divestiture buyer must carefully navigate the terms of the cooperation and efforts covenants set forth in the purchase agreement—or negotiate those terms carefully in advance with such potential conflict of interest in mind.

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[20] Asset Purchase Agreement Between Molina Healthcare, Inc. and Humana Inc. (Aug. 2, 2016) ("Molina APA") at Section 6.01(b), *available at* https://www.sec.gov/Archives/edgar/data/1179929/000119312516673648/d234627dex22.htm.

[21] *Id.* at Section 5.03(c).

[22] *Id.* at Section 5.03(d).

[23] *Id.* at Section 5.03(e).

[24] Asset Purchase Agreement Between Performance Food Group, Inc., E&H Distributing LLC, RS Funding, Inc., USF Propco I, LLC, USF Propco II LLC, Trans-Porte, Inc., US Foods, Inc., USF Holding Corp. and Sysco Corporation (Feb. 2, 2015) at Section 5.01(b), *available at* https://www.sec.gov/Archives/edgar/data/96021/000119312515035572/d866078dex21.htm.

[25] Molina APA at Section 5.03(c).

Given the potential for conflict of interest, the divestiture sellers will often want to control the divestiture buyer's access to and engagement with the agency and the court, and as consideration for that, a divestiture buyer in a likely "litigate the fix" scenario should ensure that they have sufficient freedom to engage with the agency during the review of the proposed divestiture or otherwise get a commitment that the divestiture sellers will cover all (or most) of the buyer's out-of-pocket expenses in connection with the agency review and merger challenge litigation.

Protections you have negotiated in a purchase agreement may lead a court to question whether the divestiture is sufficiently likely to happen. A divestiture buyer sensibly wants to ensure that it will be able to take possession of and operate the business or assets that it has agreed to buy and ensure that it gets the value that it has negotiated for. To do that, the buyer may add certain conditions into the purchase agreement such that if they are not met, the buyer may withdraw from or terminate the agreement. These kinds of conditions, however, can lead a court to wonder if the divestiture is sufficiently likely to happen (and thus be sufficiently likely to counteract the anticompetitive effects of the merger).

In *Aetna*, for example, the DOJ pointed to the fact that "the divestiture is contingent on federal and state regulatory action and thus may not happen."[26] The divestiture was conditioned on, among other things, CMS approving the novation of certain contracts, Molina's receipt of "reasonably adequate assurances from CMS" that Aetna and Humana's "star ratings" from CMS would transfer to Molina in the divestiture, and the approval of the transaction and divestiture by state regulators in the states where the divested assets were located.[27] The Court examined the evidence and testimony at trial, but concluded that it did not need to reach a conclusion on whether the divestiture would occur if the Court approved the merger subject to the divestiture because the Court ultimately concluded that the proposed divestiture would not sufficiently counteract the loss of competition resulting from the merger, even if the divestiture were to occur as planned.[28]

The value of your experience in a related business may be questioned, and your past attempts to enter the market may be held against you. In many divestitures resulting in consent decrees, the divestiture buyer is often a party that operates in a related business. Indeed, the FTC's guidelines for Negotiating Merger Remedies states that a divestiture buyer must have the "experience, commitment, and incentives necessary to achieve the order's remedial objective," which can be demonstrated by its "participation in related product markets or adjacent geographic markets, involvement in up-stream or down-stream markets, past attempts to enter the market (depending on why those attempts were not successful), or previous expressions of interest in the market."[29] Rather than demonstrating your desire to enter the relevant market and compete

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[26] Plaintiffs Proposed Findings of Fact and Conclusions of Law, *U.S. v. Aetna*, No. 1:16-cv-01494 (Jan. 5, 2017), ECF No. 277 at ¶¶ 255, 279–285.

[27] *Id.*

[28] *Aetna*, 240 F. Supp. 3d at 63–64.

[29] Federal Trade Commission, Bureau of Competition, Negotiating Merger Remedies (Jan. 2012) (hereinafter "Negotiating Merger Remedies") at 11, *available at* https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf. *See also* Federal Trade Commission, Frequently Asked Questions About Merger Consent Order Provisions ("FTC FAQ"), at Q.5, *available at* https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq ("parties who do not operate in the market but who have a track record of operating similar assets successfully have been found to be acceptable purchaser. . . Firms who operate in related product markets . . . have been found to be acceptable buyers."); U.S. Department of Justice, Antitrust Division Policy Guide to Merger Remedies ("DOJ 2004 Policy Guide") (Oct. 2004) at 31 ("there should be evidence of the purchaser's

aggressively, a divestiture buyer's prior attempts at entry may, in a "litigate the fix" scenario, be characterized as evidence that the company is not likely to be successful at operating the divested business in a way that restores competition.

For example, the DOJ in Aetna pointed to several previous attempts by Molina to compete in Medicare Advantage in support of its argument that Molina's acquisition of the divested Medicare Advantage plans from Aetna and Humana would not restore the competition lost between the merging parties.[30] There, the Court agreed with the DOJ, concluding that "while past performance is not perfectly predictive of the future, the Court gives some weight to Molina's consistently unsuccessful attempts to enter Medicare Advantage particularly since Molina's theories for why this attempt would be different have not been borne out elsewhere."[31] The DOJ likewise questioned whether Molina's experience in a related market (Medicaid and "dual-eligible" plans) would transfer over and make it likely that it could successfully operate the divested Medicare Advantage business,[32] and the Court agreed.[33]

Similarly, in the T-Mobile/Sprint case, the Plaintiff States pointed to DISH's previous statements to the FCC that it would be entering the retail wireless market but the failure of its entry to date.[34] After hearing the evidence presented at trial, however, the Court was not persuaded by the Plaintiff States' evidence of DISH's historic failure to enter the retail mobile wireless market, finding instead that "[o]n the contrary, the DOJ and FCC have strongly supported DISH's entry into the market despite being fully aware of these concerns."[35]

Your executives' and board members' contemporaneous emails about the divestiture will be under considerable scrutiny. Any expressions of concern about the potential lack of success with the divested business will be held against you.[36] In *Aetna*, the government at trial introduced several emails between Molina board members and executives considering acquiring the divested business which called into question Molina's capabilities as a buyer and its future intent to compete aggressively with the divested assets. For example, board members questioned whether the company had appropriate talent and resources to take on the divestiture, and Molina executives therefore had to explain and try to walk back those statements on the witness stand at trial.[37] The

intention to compete in the relevant market. Such evidence might include business plans, prior efforts to enter the market, or status as a significant producer of a complementary product."), *available at* https://www.justice.gov/atr/page/file/1175136/download.

[30] *Aetna*, 240 F. Supp. 3d at 72–73; Plaintiffs Proposed Findings of Fact and Conclusions of Law, *U.S. v. Aetna*, at ¶¶ 286–290.

[31] *Id*. at 73.

[32] Plaintiffs Proposed Findings of Fact and Conclusions of Law, *U.S. v. Aetna*, at ¶¶ 269–274.

[33] *Aetna*, 240 F. Supp. 3d at 64–72.

[34] Plaintiff States' Proposed Findings of Fact and Conclusions of Law, *State of New York v. Deutsche Telekom AG*, at ¶¶ 111–112.

[35] State of New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 230 (S.D.N.Y. 2020).

[36] *See Aetna*, 240 F. Supp. 3d at 69–71.

[37] *See, e.g.*, *id*. at 68 (citing email from Molina executive characterizing the divestiture as a "big fricken lift"), 69 (citing email from Molina board member stating that he thought "we are woefully under-resourced to be able to take this on"), 70 (citing another email from Molina board member describing the divestiture: "The image that comes to my mind here is the dog chasing the car and we are the dog. What happens if we catch it?").

Court was not persuaded by the Monina executives' post-hac attempts to explain or disavow the contents of the contemporaneous emails.[38]

Similarly, in *Sysco*, the divestiture buyer PFG's earlier internal emails and communications with the FTC were brought forth as evidence that the divestiture deal they later struck with the merging parties was inadequate to restore competition. In that case, PFG's pre-divestiture documents indicated that it believed it needed to acquire 13 distribution centers to compete effectively in the market and advocated for as much before the FTC during its pre-complaint investigation.[39] Yet ultimately, PFG was unable to negotiate a purchase of more than 11 distribution centers from Sysco, and therefore changed its position during the litigation, later claiming that 11 distribution centers would be enough for it to sufficiently compete.[40] The Court did not accept PFG's testimony at trial, and instead credited the projections made in internal PFG documents created months before it began negotiating the divestiture with Sysco.[41]

Your business plan must show you believe that the divested business will be as competitive in the future as it is today (if not more so). The failure of Performance Food Group's business plan to do just this effectively doomed its bid to acquire the divested assets in the Sysco-US Foods transaction.[42] In that case, the FTC pointed to PFG's five-year plan for the post-divestiture business and highlighted that it projected that PFG would have roughly 20% share of the relevant market for national broadline food distribution in five years—a share considerably smaller than the divested business (US Foods) had at the time.[43]

The purchase price you negotiate may be characterized as inadequate to give you the incentive to compete aggressively with the divested business. Divestitures incident to an antitrust enforcement action are, unsurprisingly, often done at a discount, but in the case where the merging parties decide to "litigate the fix," the government may argue that if the divestiture buyer got too low of a price, then the buyer may be more likely to abandon or limit the operation of the divested business.[44] As Judge Bates explained in *Aetna*: "The government counters that the [low purchase price] reflects the riskiness of the transaction, and makes Molina more able to abandon many plans, counties and members (*i.e.*, not adequately replacing lost competition) while still making a profit given the modest outlay."[45] This concern is precisely what is articulated in the DOJ's remedies guide, which explains that an extremely low purchase price can reveal a divergent interest between the divestiture buyer and the consumer, as a low-priced acquisition could still produce something of value to the purchaser even if it does not become a significant competitor and would not cure the agency's competitive concerns.[46] As Judge Bates assessed contempora-

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[38] *Id*. at 70–71.

[39] *Sysco*, 113 F. Supp. 3d at 75–76.

[40] *Id*.

[41] *Id*.

[42] *Id.* at 74.

[43] *Id*.

[44] *See, e.g.*, U.S. v. Franklin Elec. Co., Inc., 130 F. Supp. 2d 1025, 1033 (W.D. Wisc. 2000) (low purchase price provides "minimal incentive" to make divestiture work effectively).

[45] *Aetna*, 240 F. Supp. 3d at 72.

[46] *See* DOJ 2004 Policy Guide at 33 ("A purchase price that is "too low" may suggest that the purchaser does not intend to keep the assets in the market."). *See also* Negotiating Merger Remedies at 11 ("The Commission does not typically evaluate the proposed purchase price, but an offer to pay a price that is less than the break-up value of the assets

neous e-mails among Molina's executives and board members indicating concerns with the viability of the divestiture, he concluded that they supported the inference that the "screaming good price" reflected the buyer's "serious doubts" about its ability to manage the divested business but was willing to take a gamble "given the low risk to the company reflected in the bargain price."[47]

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The possibility of acquiring a business or package of assets in a divestiture can present a company with an opportunity to expand its business or grow into a new area, likely at a discount to the price those assets could fetch on the open market. Potential buyers need to be aware of and be prepared to address potential challenges that they may face in convincing the FTC or DOJ, or ultimately, a court, that their acquisition of the divested assets is likely to remedy the competitive harm of the proposed merger.

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may raise concerns about the buyer's incentives to compete and its commitment to the market."). It should be noted that as of September 25, 2018, the DOJ's 2004 Policy Guide is the currently-effective statement of the DOJ's practices on merger remedies, as the 2011 Policy Guide to Merger Remedies was withdrawn. *See* Makan Delrahim, It Takes Two: Modernizing the Merger Review Process (Sept. 25, 2018), *available at* https://www.justice.gov/opa/speech/file/1096326/download. The DOJ's 2004 and 2011 Policy Guides, however, are consistent on the point that the DOJ's practice is not to approve a proposed divestiture buyer if the purchase price clearly indicates that the purchaser is unable or unwilling to compete in the relevant market.

[47] *Aetna*, 240 F. Supp. 3d at 72.