

## **XI. Remedies**

- A. A remedy should address the identified competitive harm arising from the proposed transaction.**

*WORKING GROUP COMMENTS*  
*Original Comments (June 2005)*

*Comment 1:* The object of a remedy should be to restore or maintain competition, thereby preventing competitive harm that the transaction would otherwise cause. A remedy should be considered only if the agency has a sound basis to believe that the proposed transaction, if implemented, would contravene the applicable merger review law. The remedy should adequately address the potential competitive harm identified, but should not have the objective of improving premerger competition.

*Comment 2:* There are instances in which only an outright prohibition can address the competitive concerns. The merging parties should be permitted, however, to propose alternative resolutions that permit the transaction to proceed with appropriate modifications, conditions, and/or obligations that restore or maintain competition, consistent with the applicable merger review law. Before pursuing or adopting an outright prohibition, agencies should consider such alternative resolutions. In addition, the agency may take the initiative to propose alternative resolutions.

*Comment 3:* The proposal, discussion, and adoption of remedies should be conducted in a manner consistent with other Recommended Practices, particularly those on Conduct of Merger Investigations, Procedural Fairness, Transparency, and Interagency Coordination.

- B. The merger review system should provide a transparent framework for the proposal, discussion, and adoption of remedies.**

*WORKING GROUP COMMENTS*  
*Original Comments (June 2005)*

*Comment 1:* Information on the jurisdiction's procedures for proposing, discussing, and adopting remedies should be readily available to those involved in merger review proceedings. Such information may include, as applicable, when, how and to whom remedies should be proposed, the types of remedies that the agency generally prefers and in which instances, and any standard terms or implementation provisions the remedy should include.

*Comment 2:* In the event the competition agency identifies competitive concerns, the agency should provide the merging parties with timely information on those concerns so the parties can consider and propose remedies to address the concerns at least prior to the final enforcement decision. Merger review procedures should provide means to ensure that the competition agency and the merging parties have adequate time to discuss and evaluate suitable remedies. The competition agency should consult appropriate third parties on the effectiveness of the remedy.

**C. Procedures and practices should be established to ensure that remedies are effective and easily administrable.**

*WORKING GROUP COMMENTS*  
*Original Comments (June 2005)*

*Comment 1:* Remedies should be effective in restoring or maintaining competition and easily administrable. Remedies should not require significant administrative intervention by the agency after the transaction is consummated.

*Comment 2:* Remedies can take two basic forms: (a) structural remedies, which involve a change in the market structure (such as commitments to divest assets), and (b) behavioral remedies, which involve constraints on the future conduct of the merged entity (such as commitments with respect to certain contractual clauses). Certain remedies, such as commitments involving licensing of intellectual property rights or access to facilities, may be characterized as structural or behavioral, depending on the circumstances. Remedies adopted in respect of a proposed transaction may consist of structural and/or behavioral components. Structural remedies are easier to administer than behavioral remedies because they do not require medium or long-term monitoring to ensure compliance.

*Comment 3:* To be effective, and to enhance administrability, a remedy should define the parties' compliance requirements clearly and precisely. For example, it should define the businesses or assets covered by a remedy as well as the terms under which the divestiture is to be carried out, the specific characteristics of a suitable buyer, and any applicable deadlines.

*Comment 4:* The remedy's effectiveness may also depend on the identity of the prospective purchaser of the assets to be divested. For a remedy to be effective, it should enable the prospective purchaser to be a viable and long-term competitor in the market in which the competitive harm was identified. Therefore, the agency should retain the authority and have appropriate procedures to approve a prospective purchaser.

*Comment 5:* Remedies should be implemented in a timely manner. In some transactions it may be appropriate for the remedy to be implemented no later than upon consummation of the main transaction, for example, where a rapid divestiture would prevent asset dissipation or where it is not certain that a suitable buyer may be found.

**D. Appropriate means should be provided to ensure implementation, monitoring of compliance, and enforcement of the remedy.**

*WORKING GROUP COMMENTS*  
*Original Comments (June 2005)*

*Comment 1:* The terms of a remedy should identify and bind the entities that are to implement it. The terms should be sufficiently clear and precise to provide the parties adequate guidance in implementing the remedy and to enable the agency to verify whether the remedy has been implemented properly. The remedy should contain adequate means of ensuring its implementation and/or monitoring compliance.

*Comment 2:* Appropriate preservation and hold separate measures should normally be included to maintain the competitive potential of the assets to be divested. It may also be appropriate to include terms on agency approval of one or more trustees who are independent of the parties.

*Comment 3:* The competition agency should have the means to investigate compliance, such as the ability to inspect and copy records or conduct reviews and/or to require periodic or one-time reporting obligations by the parties and/or the trustee(s) on the implementation of one or more components of the remedy.

*Comment 4:* A mechanism should be provided for the adjustment of the remedy in the event of unforeseen and material changes of circumstances.

*Comment 5:* In the event of an implementing party's failure to comply with a remedy, the terms of the remedy should be enforceable by the competition agency directly or through the courts.

*Comment 6:* The terms and means of implementation, monitoring, or enforcement should be specified in generally available statutes or rules or in the remedy agreement or order.

\*\*\*\*\*

## **XII. Competition Agency Powers**

### **A. Competition agencies should have the authority and tools necessary for effective enforcement of applicable merger review laws.**

#### *WORKING GROUP COMMENTS*

*Original Comments (June 2005)*

*Comment 1:* Merger review is fact-intensive; competition agencies therefore require the ability to obtain information relevant to their review of proposed transactions. Competition agencies should be provided with appropriate investigative tools and mechanisms by which the agency can compel merging and third parties to produce relevant information, for example, by providing the competition agency with the ability to seek effective sanctions for non-compliance with formal requests for documents, testimony and other information.

*Comment 2:* For the merger review process to operate effectively, the competition agency must have the ability to initiate enforcement actions against proposed mergers and to seek sanctions for non-compliance with applicable legal requirements and agency decisions and orders. Competition agencies should therefore have the enforcement tools needed to achieve these objectives.

*Comment 3:* Competition agencies should have the authority to permit proposed transactions to proceed subject to conditions that address perceived competitive concerns in the jurisdiction concerned. Where conditional clearance is authorized, the agency should also have effective means to ensure compliance with specified conditions and to seek sanctions for non-compliance.

*Comment 4:* The merger review process should be subject to appropriate procedural safeguards to govern competition agencies in the exercise of their investigative authority and enforcement powers.

### **B. Competition agencies should have sufficient staffing and expertise to discharge their enforcement responsibilities effectively.**

#### *WORKING GROUP COMMENTS*

*Original Comments (June 2005)*

*Comment 1:* Competition agencies should have funding, staffing and expertise commensurate with their merger enforcement responsibilities, including detecting anticompetitive transactions, bringing appropriate enforcement actions, and avoiding unnecessary costs and delay with respect to transactions that do not contravene applicable legal prohibitions.

*Comment 2:* In order to employ a sufficient number of qualified personnel and to fund investigations and other enforcement activities necessary to discharge their enforcement responsibilities efficiently and effectively, competition agencies require adequate financial resources. Competition agencies should seek to optimize their use of available resources by prioritizing their merger enforcement based on the transaction's potential competitive impact in the jurisdiction.

*Comment 3:* Agency staff should include professionals with training and experience in competition law and economics, including merger analysis. Subject to applicable confidentiality safeguards, competition agencies should also be able to consult with independent industry, legal, and economic experts in other agencies and the private sector.

*Comment 4:* Competition agencies should encourage continuing legal and economic training of their professional personnel. This may be accomplished through in-house and inter-agency training programs, as well as through academic institutions and training activities sponsored by private sector organizations (such as bar associations and legal societies).

**C. Competition agencies should have sufficient independence to ensure the objective application and enforcement of merger review laws.**

*WORKING GROUP COMMENTS*  
*Original Comments (June 2005)*

*Comment 1:* The objective application of competition standards in merger enforcement promotes consistency, predictability, and legal certainty. Lack of objectivity—or even a perceived lack of objectivity—tends to frustrate these objectives and, moreover, may undermine public confidence in the competition agency and the merger review process. Enabling legislation and governmental policies and practices should ensure that competition agencies have sufficient independence to discharge their enforcement responsibilities based solely on an objective application of relevant legislation and judicial precedents.

*Comment 2:* Competition agencies should also seek to avoid any perception that their enforcement activities are motivated by considerations other than those in the relevant merger review legislation. Means of achieving this objective include transparency in the merger review process and providing an opportunity for timely review of the competition agency's final decision on the merits by a separate adjudicative body.