

## THE DOOR IS NOT CLOSED FOR AGENCY DIVESTITURES

In recent months, both the Department of Justice's ("DOJ") Antitrust Division and the Federal Trade Commission ("FTC") signaled renewed skepticism of the viability of behavioral and structural remedies as a means to preserve competition in merger control actions. However, despite the agencies' strong pronouncements, the recent outcomes in *In the Matter of Hikma Pharmaceuticals PLC et al.*, and *In the Matter of American Securities Partners VII, L.P. et al.*, suggest that structural remedies continue to be an option at the FTC. In particular, parties in the pharmaceutical space should feel encouraged that the FTC is clearing mergers pursuant to consent orders.

### BACKGROUND

In his January 2022 speech for the New York Bar Association's Antitrust Law Section, Antitrust Division Assistant Attorney General (AAG) Jonathan Kanter noted that the often-used settlement and divestiture practice "miss[ed] the mark" in remedying antitrust concerns. AAG Kanter argued that the best way to preserve competition will often be to seek an injunction to block a merger rather than to allow the merger to proceed with a divestiture.<sup>1</sup>

AAG Kanter emphasized this point in his April 2022 keynote speech at the University of Chicago Stigler Center Conference, noting the agencies' "duty is to litigate, not settle, unless a remedy fully prevents or restrains the violation."<sup>2</sup> Also in April, during the American Bar Association's Antitrust Law Section Spring Meeting, officials from the FTC emphasized that they would continue to examine the effectiveness of remedies and will only pursue strong remedies that benefit the broader public.<sup>3</sup>

<sup>1</sup> Jonathan Kanter, Ass't Att'y Gen., Dep't of Justice, Antitrust Div., Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york>.

<sup>2</sup> Jonathan Kanter, Ass't Att'y Gen., Dep't of Justice, Antitrust Div., "Antitrust Enforcement: The Road to Recovery" (Apr. 21, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler>.

<sup>3</sup> American Bar Association, *Agency Update with the FTC Bureau Directors*, April 18, 2022.

## RECENT MERGERS SETTLED WITH STRUCTURAL REMEDIES

***In the Matter of Hikma Pharmaceuticals PLC et al.*** On April 18, 2022, the FTC, by a unanimous vote, issued a complaint and accepted a proposed consent order as a condition of Hikma Pharmaceuticals PLC ("Hikma")'s \$375 million acquisition of Custopharm, Inc. ("Custopharm"). The complaint alleged that, if consummated without a remedy, the transaction was likely to substantially lessen competition in the U.S. market by eliminating future competition between Hikma and Custopharm in the market for injectable triamcinolone acetonide ("TCA"), a corticosteroid used for severe skin conditions, allergies, and inflammation. Prior to the transaction, Custopharm received FDA approval to market its injectable TCA product on January 19, 2022, which directly overlapped with Hikma's pipeline injectable TCA product. The consent agreement requires that Custopharm's parent company retain and transfer the TCA drug to a subsidiary, Long Grove Pharmaceuticals. Further, the consent order requires Hikma to seek prior approval from the FTC before acquiring, directly or indirectly, through subsidiaries, partnerships, or otherwise, any rights or interests in TCA products or assets, or any rights or interests in the therapeutical equivalent or biosimilar of TCA products. Additionally, Long Grove Pharmaceuticals is required to operate and maintain Custopharm's TCA assets for four years after the date the order is issued.

***In the Matter of American Securities Partners/ Prince International Corporation.*** On April 22, 2022, in another unanimous decision, the FTC announced it had issued a complaint and consent order as a condition for American Securities Partners VII, L.P.'s ("Prince") acquisition of competitor Ferro Corp. ("Ferro") for \$2.1 billion. The complaint alleged that the proposed acquisition would substantially lessen competition in the North American market for porcelain enamel frit and in the worldwide markets for glass enamel and forehearth colorants. To resolve the FTC's competitive concerns, the parties entered into a consent agreement requiring Prince and Ferro to divest three facilities to a third party: a porcelain enamel frit and forehearth colorants plant in Leesburg, Alabama; a porcelain enamel frit and forehearth colorants plant and research center in Bruges, Belgium; and a glass enamel plant in Cambiago, Italy. Under the terms of the consent order, the merged company must obtain prior approval from the FTC for ten years before buying assets to manufacture and sell porcelain enamel frit in North America, or before buying assets to manufacture and sell glass enamel or forehearth colorants anywhere in the world. The consent order also requires the divestiture buyer to obtain prior approval for three years before transferring any of the divested assets to any buyer, and for seven additional years before transferring any of the divested assets to a buyer that manufactures and sells porcelain enamel frit, glass enamel, or forehearth colorants.

## KEY TAKEAWAYS

Despite the agencies clear pronouncements of more aggressive antitrust enforcement, the settlement outcome in the above cases should reassure merging parties that litigation is not a foregone conclusion when transactions include area of competitive overlap. Businesses should be aware, however, that consent agreements may come with additional restrictions, such as the FTC's issuance of

prior approval provisions. As such, when negotiating merger agreements, parties should imbed flexible terms that allow for negotiations with the agencies.

Although the agencies have demonstrated positive news when it comes to structural remedies, there remains general distaste for behavioral remedies.

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