ICLE tl;dr

Merger Divestitures: A Valuable Remedy for Competition Concerns

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tl;dr

Background: Divestitures are a common remedy sought by antitrust enforcers like the Federal Trade Commission (FTC) and U.S. Justice Department (DOJ). They have historically been viewed as an appropriate tool to allow mergers to proceed while maintaining competition in particular markets where antitrust concerns might be most acute. The merging parties sell off select assets, often to a competitor. They thereby enable efficiencies in non-overlapping markets, while protecting consumers from anticompetitive effects in localized areas of concern.

But... Some critics argue that divestitures inevitably fail to preserve competition. They point to examples like Washington State-based Haggen Food and Pharmacy's failed acquisition of 146 stores divested from the 2014 merger of U.S. supermarkets Albertsons and Safeway. By 2016, Haggen sold the remaining 29 stores it was still operating back to Albertsons. Concerns about the inadequacy of divestitures have also been raised more recently in the context of the proposed $24.6 billion merger of Kroger Co. and Albertsons Cos. The firms recently announced a $1.9 billion agreement to sell 413 stores and eight distribution centers to C&S Wholesale Grocers to alleviate local concerns about the merger. Critics nonetheless claim that allowing mergers to proceed contingent on divestitures is inadequate to protect consumers.

KEY TAKEAWAYS

DIVESTITURES HAVE SUCCEEDED ACROSS INDUSTRIES WHEN PROPERLY STRUCTURED

Despite criticisms, empirical evidence demonstrates that divestitures have effectively maintained competition after mergers across industries ranging from retail to manufacturing to technology.

The FTC's own retrospective studies of past remedies find that most divestitures (around 80%) succeeded at achieving the high bar of "maintaining or restoring competition in the relevant market." Divestitures succeed by equipping buyers with the assets, capabilities, and transitional support needed to replace lost competition. While an imperfect tool, with experienced buyers and FTC oversight, divested assets usually continue serving customers and thereby preserve pre-merger market dynamics. Ultimately, tailored divestitures can help competitors to navigate the complexities of business transfers to sufficiently replicate pre-merger discipline on the merged firm.

In retail, grocery divestitures have succeeded for combinations like Ahold/Delhaize (81 stores divested) and Albertsons/Safeway (168 stores). Divested assets must go to capable buyers with the expertise and capital to operate and expand them.

In the context of antitrust investigations, the FTC or DOJ oversees the buyer-selection process and integrates transition-assistance requirements into the consent orders it signs with the merging parties. While asset sales are the key to accomplish the goals of divestiture, ongoing agency monitoring is also possible, but requires resources.

TAILORED DIVESTITURE PACKAGES CREATE APPROPRIATE COST-BENEFIT TRADEOFFS

No remedy perfectly maintains pre-merger conditions, and nor should it. Markets are always changing But if structured properly, asset divestitures can effectively preserve competition while allowing merger efficiencies.

Rather than blocking mergers outright, enforcers can approve deals conditioned on acceptable divestitures that target specific competitive concerns. This approach balances consumer protection with the economic benefits of consolidation.

ANTITRUST LAW DEALS IN LIKELIHOODS, NOT CERTAINTIES

In evaluating divestitures, enforcers and courts weigh the probabilities involved in maintaining competition, not hypothetical perfection. No structured resolution can guarantee that divested assets will perform identically to pre-merger conditions in all scenarios.

But antitrust law permits transactions where economic evidence indicates divestitures are reasonably capable of preserving competition post-merger. Enforcers make predictive judgments, while acknowledging that all business deals inherently carry uncertainty.

With proper buyer vetting, transitional support, and ongoing monitoring, empirical data shows that divestitures often succeed. The remote possibility of unforeseen complications does not negate high probabilities of sustained competitiveness.

Even critics agree that divestitures usually maintain some competition. So the key question is one of degree. If well-structured, data indicates divested assets can sufficiently maintain competitive pressures on the merged firm.

THE AGENCIES CAN LEARN FROM PAST FAILURES

Divestitures fail when buyers lack operational capabilities, face high barriers to expansion, take on too much debt, or merging parties act opportunistically to undermine divested assets.

In acquiring the divested Albertsons/Safeway locations, Haggen rapidly expanded from 18 to 168 stores, but quickly failed and entered bankruptcy. Its small size and debt load were vulnerabilities that proved fatal, which partially undid the divestiture plan's pro-competitive effects.

The FTC and DOJ must learn from past divestiture breakdowns to improve future remedies. Merger approval should require experienced buyers with resources to operate assets and transitional support agreements to ensure smooth transfers.

For more on this issue, see the ICLE issue brief "Five Problems with a Potential FTC Challenge to the Kroger/Albertsons Merger." See also "FTC Should Allow Kroger-Albertsons Merger to Go Through" by Eric Fruits and Geoffrey Manne.

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