Appraising Crown Jewel Provisions in the United States, Canada, and Europe

Elai Katz and Lauren Perlgut[1]

Earlier this year, Sapa Holding AB bought out Indalex Holdings Finance Inc., which was in bankruptcy proceedings, for roughly $150 million. According to the Department of Justice, the two were the only companies in the United States that manufactured aluminum sheathing, used to make coaxial cables purchased by cable television providers, and the Department asserted that, unless modified, their proposed merger would substantially lessen competition.[2] In order to proceed with the acquisition, Sapa agreed to sell its Catawba, North Carolina aluminum sheathing manufacturing plant or Indalex's aluminum sheathing facility at its Burlington, North Carolina plant within 90 days. The consent decree also included a clause providing that if the parties fail to divest one of the aluminum sheathing facilities, a trustee would be appointed to sell Indalex's entire Burlington aluminum facility.[3] The Burlington plant produced a variety of fabricated aluminum products, such as conduit and aluminum shapes, in addition to the aluminum sheathing that concerned the Department of Justice.

While such alternative remedy clauses in merger review settlement agreements, commonly known as "crown jewel" provisions, have been routinely used by the Federal Trade Commission (FTC), as well as agencies in Canada and Europe, the inclusion by the Antitrust Division of the Department of Justice (DOJ) represented a marked departure from their stated guidelines and recent practice.

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[1] Partner and associate, respectively, at Cahill Gordon & Reindel LLP . The authors thank David Shamshovich, an associate at Cahill, for his research assistance.

[2] See Department of Justice Press Release, "Justice Department Requires Divestiture in Sapa's Acquisition of Indalex," (July 30, 2009), available at http://www.justice.gov/atr/public/press_releases/2009/248514.pdf.

[3] See [Proposed] Final Judgment, United States v. Sapa Holdings, A.B. and Indalex Holdings Finance, Inc., (D.D.C. 2009), available at http://www.justice.gov/atr/cases/f248600/248632.htm.

A "crown jewel" provision in a merger consent decree or settlement typically defines an expanded or alternative package of assets that could be divested if a planned divestiture package does not sell within a specified time period, usually three to six months. The crown jewel assets are meant to be a more marketable package of assets, and can either encompass the original assets or designate an entirely different set.[4]

This article examines the rationales behind policies endorsing or disfavoring the use of crown jewel provisions as expressed by enforcement agencies in the United States and abroad, as well their current practices with regard to inclusion of these provisions.

United States

The two United States enforcement agencies, DOJ and FTC, sharply diverge in their policies on crown jewel provisions, which DOJ denounces but the FTC sanctions. This divergence reflects a core procedural difference between the two agencies relating to divestiture remedies: DOJ focuses on identifying an "appropriate set of assets to be divested quickly rather than on the identification of an acceptable buyer,"[5] while the FTC focuses on finding an acceptable buyer, relying on crown jewel provisions where such a buyer cannot be found.[6]

Department of Justice Antitrust Division

DOJ's official policy is that it "disfavors the use of crown jewel provisions," because, if triggered, the subsequent larger-than-intended relief demonstrates either that the merger was not adequate as structured, or conversely,

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[4] See, e.g., Frequently Asked Questions About Merger Consent Order Provisions, available at http://www.ftc.gov/bc/mergerfaq.shtm#Crown%20Jewels.

[5] See the Antitrust Division Policy Guide to Merger Remedies (Oct. 2004), available at http://www.usdoj.gov/atr/public/guidelines/205108.htm.

[6] Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies, available at http://www.ftc.gov/bc/bestpractices/bestpractices030401.shtm.

that the relief granted was larger than necessary to remedy the competitive harm.[7] DOJ prefers that its staff determine and remedy the problem prior to the merger rather than allowing the market to dictate the terms. This is, in part, because crown jewel provisions (required to be disclosed as part of the consent decree) can provide buyers an opportunity for price manipulation: "they may intentionally delay negotiating for the agreed-upon divestiture assets so they may later purchase the crown jewels at an attractive price."[8] DOJ also notes that "restoring competition, rather than punishing the merging firm, is the goal of a merger remedy."[9]

DOJ has nonetheless occasionally used crown jewel consent decree provisions in the past. Former Deputy Assistant Attorney General Deborah Platt Majoras commented in 2002 that DOJ has historically used crown jewel provisions in cases where there is a complex divestiture process or anticipation of the difficulty of divesting one set of assets.[10] For example, to increase the likelihood a single purchaser would be found, DOJ required Thomson Corporation to invite bids on two asset packages—the second containing all of the assets of the first plus additional assets—in its acquisition of the computer-based testing business of Harcourt General, Inc. from Reed Elsevier, Inc.[11] And there continue to be isolated recent examples, as well. In addition to Indalex, discussed above, DOJ included a crown jewel provision in the Consent Decree with Monsanto Company in 2007. Monsanto agreed to divest all of the target Delta

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[7] See the Antitrust Division Policy Guide to Merger Remedies (Oct. 2004), available at http://www.usdoj.gov/atr/public/guidelines/205108.htm.

[8] Id.

[9] Id.

[10] See Deborah Platt Majoras, "Houston, We Have A Competitive Problem: How Can We Remedy It?", Speech Before the Houston Bar Association Antitrust and Trade Regulation Section, Houston Texas, April 17, 2002, available at http://www.usdoj.gov/atr/public/speeches/11112.htm.

[11] Id.

and Pine Land Company, a major cotton seed breeder, if it did not find a suitable buyer for another proposed divestiture within six months.[12]

To date, however, DOJ has actually triggered a crown jewel provision only a single time, in Mittal Steel Company's recent $33 billion acquisition of Arcelor, and there is some dispute as to whether it was a true crown jewel provision. DOJ began its review of the transaction when it was a hostile tender offer (which later became friendly) and found that Arcelor, together with its subsidiary Dofasco, provided a significant competitive restraint on Mittal and the other largest integrated steel producer in the United States.[13] The consent decree required Mittal to use its best efforts to sell Dofasco, but DOJ anticipated difficulty in the sale because Arcelor placed Dofasco in a Dutch trust, or "stichting," as a defensive measure when the Mittal tender offer was first announced. If Mittal was unable to find an acceptable buyer, DOJ could select either the Sparrows Point or Weirton facilities for divestiture, and ultimately did select the Sparrows Point mill.[14]

During a panel discussion sponsored by the Mergers & Acquisitions Committee, Maribeth Petrizzi, Section Chief, Litigation II recently reaffirmed that for the majority of cases, DOJ finds that disadvantages of including a crown jewel provision would outweigh the advantages.[15] She did indicate, however, that DOJ would consider the specific facts of a given case with the goal, always, of restoring competition. A crown jewel provision was appropriate in Indalex, she

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[12] See Final Judgment at http://www.usdoj.gov/atr/cases/f239400/239476.htm

[13] See Department of Justice Press Release, "Justice Department Requires Divestiture in Mittal Steel's Acquisition of Arcelor," (Aug. 1 2006), available at http://www.justice.gov/atr/public/press_releases/2006/217516.htm.

[14] See Department of Justice Press Release, "Justice Department Requires Mittal Steel to Divest Sparrows Point Steel Mill," (Feb. 20, 2007), available at http://www.justice.gov/atr/public/press_releases/2007/221503.htm.

[15] Panel Discussion sponsored by the American Bar Association Section of Antitrust Law, Mergers and Acquisitions Committee, "Merger Remedies Forum: Current Agency Practice on Crown Jewels," October 27, 2009, audio available at http://www.abanet.org/antitrust/at-bb/audio/09/10-09.shtml [hereinafter, "Crown Jewel Panel"].

explained, when the timing was rushed to meet the schedule of the bankruptcy court and DOJ's ability to engage with the parties was reduced. The crown jewel could thus provide some necessary flexibility.[16]

Federal Trade Commission

The FTC has published merger remedy guidelines stating that a crown jewel provision is appropriate "where there is a risk that, if the respondent fails to divest the original divestiture package on time (including to an up front buyer) or if the original divestiture falls through for some reason, a divestiture trustee may need an expanded or alternative package of assets to accomplish the divestiture remedy."[17] Former Bureau of Competition Director William Baer called the rationale for crown jewel provisions "obvious": they increase the incentive for the company to accomplish the divestiture within the specified time period and provide a more attractive package for sale if the company is unsuccessful.[18] Baer stated that crown jewel provisions are particularly appropriate where there are uncertainties about the salability of the proposed divestiture package. He also suggested that a company's opposition to such a provision could indicate serious questions about the viability of the proposed settlement.

To date, the FTC has had to require the divestiture of the crown jewels only a single time, in the merger forming the pharmaceutical firm Aventis, which Baer argued demonstrates the incentive value of such provisions in encouraging the sale of the first proposed assets.[19] In the case of Aventis, the FTC required Hoechst and Rhône-Poulenc to divest certain assets including those relating to Rhône-Poulenc's direct thrombin inhibitor drug Revasc, used to treat blood

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[16] Id.

[17] Frequently Asked Questions About Merger Consent Order Provisions, available at http://www.ftc.gov/bc/mergerfaq.shtm#Crown%20Jewels.

[18] See William J. Baer, Prepared Remarks Before the Conference Board, Washington D.C., October 29, 1996, available at http://www.ftc.gov/speeches/other/hsrspeec.htm.

[19] Id.

clotting diseases.[20] If Aventis could not find a buyer for Revasc, which was not yet available in the U.S. but expected to receive FDA approval in short order, a Trustee would be appointed to divest either Revasc or Hoechst's comparable drug Refludan, the only direct thrombin inhibitor then on the U.S. market. The Trustee ultimately procured a buyer for the Refludan assets with the full consent of the parties.[21] Notably, this wasn't a classic crown jewel provision because the alternate divestiture asset was limited to the affected relevant product market, unlike more typical crown jewel provisions that require divestiture of larger business units embracing products beyond the immediate scope of the alleged violation. .

Daniel P. Ducore, Assistant Director of the FTC's Compliance Division recently addressed some of DOJ's other concerns during the M&A Committee panel discussion. He stated that the FTC has seen no evidence of purchaser manipulation with regard to crown jewel provisions, and speculated that buyers do not delay the process in hopes of forcing a later crown jewel fire sale, because to do so could ultimately put them at the mercy of a trustee who might decide to sell to another buyer entirely.[22]

The FTC guidelines also explicitly address another DOJ concern: that crown jewel provisions could be perceived as a penalty or punishment for a company's failure to divest its assets in a timely manner. Rejecting this notion, the guidelines note that in addition to any relief specifically granted by the

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[20] See, Decision and Order, In the Matter of Hoechst AG, a corporation; and Rhône-Poulenc S.A., a corporation; to be renamed Aventis S.A., a corporation, Docket No. C-3919, available at http://www.ftc.gov/os/1999/12/hoechst.do.htm; Analysis of Proposed Consent Order to Aid Public Comment, available at http://www.ftc.gov/os/1999/12/hoechstrana.htm.

[21] See Application to Divest the Refludan Assets, In the Matter of Hoechst AG, a corporation; and Rhône-Poulenc S.A., a corporation; to be renamed Aventis S.A., a corporation, Docket No. C-3919, available at http://www.ftc.gov/os/2001/08/hoechst.pdf.

[22] Crown Jewel Panel.

consent order itself, there are independent civil penalties under section 5(l) of the FTC Act, 15 U.S.C. § 45(l).[23]

In 1997, George S. Cary, Senior Deputy Director of the Bureau of Competition, stated that the FTC would continue to press for such provisions going forward.[24] He also stated that the requirement for an upfront buyer would not necessarily eliminate the need for a crown jewel provision, as agreements with upfront buyer provisions could fall through or upfront buyers could otherwise be disqualified for failure to obtain necessary approvals or licenses.[25]

Ducore indicated, however, that the current FTC preference and practice is for an upfront buyer provision rather than a crown jewel, though this is assessed on a case-by-case basis. [26] He also noted that FTC orders almost never include both types of provisions.[27]

Competition Bureau of Canada

The Competition Bureau of Canada (the "Bureau") also promotes the use of crown jewel provisions in circumstances where there is uncertainty about the viability of a divestiture. The Information Bulletin on Merger Remedies in Canada released by the Bureau on September 22, 2006, clarified that the goals of such provisions include (1) providing the parties with incentive to sell the original divestiture package, and (2) assuring the Bureau that a viable remedy will be available even if the original divestiture package is unsuccessful.[28] At the same

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[23] Frequently Asked Questions About Merger Consent Order Provisions, available at http://www.ftc.gov/bc/mergerfaq.shtm#Crown%20Jewels.

[24] George S. Cary, Senior Deputy Director Bureau of Competition, Federal Trade Commission, Prepared Remarks before the American Bar Association Antitrust Spring Meeting, Washington, D.C., April 10, 1997, available at http://www.ftc.gov/speeches/other/aba397.shtm

[25] Id.

[26] Crown Jewel Panel.

[27] Id.

[28] See Information Bulletin on Merger Remedies in Canada, Competition Bureau of Canada at 12-13 (Sept. 22, 2006), available at http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/02170.html ["the

time, however, because crown jewel provisions are not meant to be punitive in nature, the assets that comprise the crown jewel should relate, as much as possible, to the competitive harm caused by the merger.[29] To address concerns about buyer manipulation, the Bulletin provides that "[b]oth the existence and content of crown jewel provisions are not made public until the trustee period commences."[30]

Despite the Bureau's endorsement of such alternative remedy packages, there is some evidence that agreements actually containing them may be rarer than expected in practice. In August 2007, Sheridan Scott, Commissioner of Competition, commented regarding crown jewel provisions that "their use is becoming more frequent."[31] Just a few months later, however, Melanie L. Aitken, then Senior Deputy Commissioner of Competition, clarified that "while it was initially expected that crown jewel provisions would be incorporated more frequently after the Bulletin was published, in practice, owing to the fact that the

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Bulletin"] (stating that "an additional asset package (commonly referred to as a 'crown jewel') may be required as part of the remedy in order to reduce any such uncertainty.")

[29] Id. at 13.

[30] Id. A Draft Bulletin made available for public comment had indicated that under the Bureau's initial proposed policy the existence of a crown jewel provision may not be kept confidential, although the specific crown jewel assets would not be disclosed. Draft Bulletin at 17 ("[T]he Bureau may agree to let certain provisions of a negotiated settlement requiring divestitures remain confidential during the initial sales period. In particular . . . the specific assets that form part of the crown jewel package, as opposed to the fact that crown jewels exist at all."), available at http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/vwapj/info_bulletin_mergerremedies_051017_e.pdf/$FILE/info_bulletin_mergerremedies_051017_e.pdf.

The American Bar Association's Section of Antitrust Law was among the groups who commented that the existence of a crown jewel should be kept confidential, though this is not the practice of either United States agency. See Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law on the Competition Bureau (Canada) Draft Information Bulletin on Merger Remedies in Canada, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02131.html.

[31] Speaking Notes for Sheridan Scott, Commissioner of Competition, text at n.23 (August 10-12, 2007), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02393.html.

Bureau has taken care only to include them in circumstances appropriate to the stated objectives, there have not been any to date."[32]

European Commission

The European Commission (EC) has stated that it "cannot take the risk" that effective competition will not be maintained in circumstances where there is uncertainty as to the implementation of the divestiture, either due to third party rights or difficulty in finding a suitable purchaser.[33] In such situations, the EC will require a divestiture commitment for a viable business, as well as an alternative and typically larger secondary divestiture package, which should be at least as attractive as the primary package and which should be capable of being implemented clearly and quickly. The company must also agree to hold separate the assets of the crown jewel during the interim period. The guidelines note, however, that up-front buyer agreements also alleviate divestiture risk concerns and can be used in place of crown jewel divestiture provisions.[34]

A "Merger Remedies Study" published by the EC in October 2005 indicated that the EC accepted "alternative divestiture remedies in cases where the parties' preferred divestiture package would be acceptable, if implemented, but where the complexities of the particular case indicate that implementation of the 'first choice' remedy might not be possible."[35] This arose infrequently: of the 84

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[32] Melanie L. Aitken Senior Deputy Commissioner of Competition, Speaking Notes (November 16, 2007), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02554.html. Aitken is currently Canada's Commissioner of Competition.

[33] Commission Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2007), Official Journal C 267, 22.10.2008, p. 1-27, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:267:0001:0027:EN:PDF

[34] Id.

[35] European Commission, DG Competition Merger Remedies Study at 147 (October 2005), available at http://ec.europa.eu/competition/mergers/studies_reports/remedies_study.pdf.

cases reviewed: only four contained crown jewel provisions, though the crown jewel was required to be divested in three of the four.[36]

According to the EC Merger Remedies Study, sellers reported that alternative remedies were more costly than remedies with only one option, effectively doubling the resources and efforts required to preserve assets during the interim period, including the costs of two hold-separate processes and trustee oversight of two businesses.[37] Other drawbacks were the uncertainty for the companies involved and delay in the ability to implement cost-saving pro-competitive efficiencies. On the other hand, the EC Merger Remedies Study also identified eight cases where crown jewels would have been likely to significantly improve the remedy by either putting greater pressure on the seller to divest in a timely manner or avoiding the costs associated with a stalemate where the seller could not find a suitable purchaser for its initial package.[38]

United Kingdom Competition Commission

The UK Competition Commission's Merger Remedies Guidelines are somewhat similar to the FTC guidelines and call for alternative divestiture packages in appropriate situations, such as where there is doubt as to the salability of the primary package, or where a business could be subject to rapid deterioration if not sold quickly.[39] One notable difference, however, is that the UK Competition Commission's Guidelines provide for the omission of any alternative remedy package from the published version of the report in order to prevent the existence of the crown jewel from undermining divestiture of the

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[36] Id. at 54.

[37] Id. at 57.

[38] Id. at 56.

[39] Merger Remedies: Competition Commission Guidelines at 19 (November 2008), available at http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc8.pdf.

initial package by possibly encouraging potential buyers in divestiture to take unreasonably aggressive negotiating positions.[40]

Conclusion

Antitrust enforcement agencies around the globe have formulated varying policies to address the risk that a company would not be able to complete an agreed-upon divestiture. Of these, the United States Department of Justice stands apart in its outspoken criticism of the use of crown jewel provisions. Despite the strong policy differences between DOJ's Antitrust Division and most other agencies, however, the use of crown jewel provisions in practice does not vary quite as widely. Such provisions tend to be used in the unique circumstances where there is a specific risk that the planned divestiture package could not be sold quickly, and in which time pressure or other circumstances prevent reaching a complete solution earlier in the process, which would otherwise be preferred.

[40] Id.