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Mark J. Botti

Akin Gump Strauss Hauer & Feld LLP

**Observations on the Commission’s *Evanston* Remedy:  
When Is Divestiture, or Any Remedy, Not Appropriate for a  
Consummated Anticompetitive Merger?**

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**O**n April 28, 2008, the U.S. Federal Trade Commission (“Commission”) issued its final order, specifying the remedy for the antitrust violation it determined Evanston Northwestern Healthcare Corporation (“ENHC”) and Highland Park Hospital (“Highland Park”) committed in 2000 when ENHC acquired Highland Park. The Commission had already decided on August 6, 2007, that it would forego a structural remedy (i.e., divestiture) in favor of a conduct remedy. The April order established the specific terms of the remedial conduct order. Perhaps more importantly, it is the most recent decision from an enforcement agency regarding remedies for consummated anticompetitive mergers and stakes out a position significantly different from prior indications.

The Commission’s order should be considered in a broader context. The Commission and the Antitrust Division of the U.S. Department of Justice have stepped up their enforcement activity in the area of consummated mergers in recent years. For example, in 2003, the Director of the Commission’s Bureau of Competition highlighted

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\* The author is a partner at Akin Gump Strauss Hauer & Feld LLP in Washington, DC.

consummated mergers as one area of significant difference between the recent past of merger enforcement and the then present.<sup>1</sup> Both agencies have brought a number of challenges to consummated mergers in addition to the *Evanston* challenge.<sup>2</sup>

This heightened level of scrutiny of consummated mergers increases the importance of the Commission's *Evanston* remedy, particularly because of the sharp contrast between that remedy and general policy statements from the Commission and the Antitrust Division regarding merger remedies. For example, the agencies have jointly explained that "[t]he typical remedy for any competition law violation is designed to restore competition to the *status quo ante*, that is, to return competition to the state that existed before the violation occurred."<sup>3</sup> The agencies so strongly endorse divestiture as the appropriate remedy for an anticompetitive merger that they do not even discuss conduct remedies as an alternative but instead focus on how to assure that the divestiture is adequate by adding remedial provisions.<sup>4</sup> While they recognized that the retrospective

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<sup>1</sup> Joseph J. Simons, Director, Bureau of Competition, Federal Trade Commission, Report from the Bureau of Competition, Remarks Before the 51st Annual ABA Antitrust Section Spring Meeting (Apr. 4, 2003) (footnotes omitted).

<sup>2</sup> See, e.g., *United States of America v. Amsted Industries, Inc.*, Case No. 1:07-CV-00710 (D.D.C. 2007) [hereinafter *U.S. v. Amsted*]; *In the Matter of Chicago Bridge & Iron Co.*, FTC Docket No. 9300 (2005); *In the Matter of Aspen Technology, Inc.*, FTC Docket No. 9310 (2003); and *United States v. Dairy Farmers of America, Inc.*, Case No. 6:03-206 (E.D.Ky 2003).

<sup>3</sup> OECD COMPETITION COMMITTEE, POLICY ROUNDTABLES: MERGER REMEDIES 237, 238 (Oct. 2003) [hereinafter *Merger Remedies*], available at <http://www.oecd.org/dataoecd/61/45/34305995.pdf>. The Division has announced that a "guiding principle" of the Division's approach to merger remedies is the restoration of pre-merger competition, which it describes as the "only appropriate goal with respect to crafting merger remedies." U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 4 (2004) [hereinafter *Division Merger Remedies Guide*], available at <http://www.usdoj.gov/atr/public/guidelines/205108.htm>.

<sup>4</sup> *Division Merger Remedies Guide*, *id.* at 9. For example, the Division's policy is that divestiture of an entire existing business is preferable to partial divestiture, due to the fact that the full existing business has already demonstrated its ability to compete. *Id.* at 12. A partial divestiture, by contrast, may leave a purchaser with a business that is missing some valuable component, such as personnel or other infrastructure. As a caveat to this principle, the Division notes that in some industries, divestiture of *more* than a particular line of business may be necessary to restore competition. *Id.* at 14-15.

circumstances may make a divestiture remedy more challenging, until the *Evanston* decision, neither agency had suggested that something less than divestiture would be required for a consummated merger. Rather, they emphasized that the analysis was the same:

It should be noted, however, that much of the same analysis will apply when seeking to remedy unlawful mergers that have already taken place. In that regard, the law in the United States is clear that a merger may be challenged after it occurs, whether or not it had been subject to the premerger reporting laws. The same law and analysis applies for both consummated and unconsummated mergers. Although the remedy may be more difficult for consummated mergers (that fact being the primary impetus behind the Hart-Scott-Rodino Act), the expiration of waiting periods does not create any legal “safe harbor” for an anticompetitive merger.<sup>5</sup>

They have, in fact, required more than mere divestiture in recent remedies involving consummated mergers.<sup>6</sup>

In *Evanston*, the Commission recognized the uniqueness of its remedial action and emphasized that it chose a conduct remedy over divestiture because of the “extraordinary” circumstances of the case. It contrasted those circumstances to prospective challenges, which will almost always require divestiture, or to retrospective merger challenges, where the Commission gave the parties notice of its concerns and they consummated the merger at their peril. Those distinctions serve to underscore the potential precedential value of *Evanston* where it is addressing a fully consummated merger retrospectively.

The Commission’s order takes an important step in the direction of setting forth an analytical framework for an evaluation of the proper remedy in a consummated

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<sup>5</sup> Merger Remedies, *supra* note 3, at 244, n. 3.

<sup>6</sup> Competitive Impact Statement, *U.S. v. Amsted*, *supra* note 2, at 9-10.

merger case. In past matters, the Commission has merely acknowledged that “the remedy may be more difficult,” but has not elaborated on the topic, and as mentioned above, the agencies generally focus on “what more” should be required, not whether something other than divestiture was appropriate.

In *Evanston*, the Commission considered the likely effectiveness of the divestiture in rejecting that remedy. It observed that divestiture *might have* left Highland Park without the volume to support a cardiac surgery program that was developed and implemented after the merger, which in turn *might have* meant that a stand-alone Highland Park would not be an effective competitor and competition *might not have* been restored. The Commission, in this regard, certainly identified a relevant issue (i.e., whether the proposed remedy was likely effective). The Commission did not say, however, whether it believed that its conduct remedy was more likely than the possibly inadequate divestiture remedy to restore competition. The Commission, of course, in stressing that divestiture is normally the appropriate remedy necessarily understood that its conduct remedy was also less than the ideal remedy and also *might not* restore competition. Its opinion is equally consistent with the proposition that divestiture, despite the potential failure of the cardiac surgery program, is the more *efficacious* remedy, but the Commission thought the costs of achieving it too great.

The Commission also stressed equitable considerations, principally, the potential loss of Highland Park’s cardiac surgery service, which was an “improvement” to Highland Park. The Commission’s original opinion expressed concern that the “quality of

patient care to the community would suffer” if the program ended. Its later opinion focused on the fairness to the merging parties, contrasting the case before it to one in which the acquiring party had been warned that it closed “at its peril,” and thus suggesting that such private equities play a significant role in the divestiture decision in retrospective mergers.

The Commission’s *Evanston* decisions thus articulate the problems with the divestiture remedy but do not say how it weighed the relevant factors to decide that the divestiture remedy, even if flawed, was not the best of the options available. For example, while the Commission focused on the potential impact on Highland Park as a competitor if it lost its cardiac surgery program, the Commission did not address why that mattered to the competition analysis. The Commission did not say whether a divested Highland Park *sans* a cardiac surgery program would have restored the status quo *ante* the merger. Alternatively, was the Commission concerned about preserving the competitiveness of an enhanced Highland Park with the cardiac surgery program? Similarly, the Commission did not address why it chose to address the potential weaknesses of Highland Park as a stand-alone competitor through a conduct remedy without divestiture as opposed to ordering a divestiture and including remedial provisions intended to bolster Highland Park as an independent competitor.<sup>7</sup> In weighing the options, the Commission might well have addressed how they compared to the imperfections attendant to the conduct remedy on which it settled. The Commission’s staff in fact argued that the conduct remedy would

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<sup>7</sup> See Press Release, Federal Trade Commission, FTC Orders Aspen Technology, Inc. to Divest Assets from its 2002 Purchase of Hyprotech, Ltd. (Jul. 15, 2004) (explaining additional relief required beyond divestiture of acquired assets).

not remedy the harm from the merger.<sup>8</sup> A group of leading healthcare economists urged the Commission not to adopt a conduct remedy over the structural remedy, because doing so would not only fail to protect against the merged entity exercising market power but also would affirmatively harm consumers.<sup>9</sup> The Commission, however, did not address whether the conduct remedy would have any potential negative consequences, similar to its discussion of whether a divestiture remedy might have those consequences.

The implications of the Commission's order may not be limited to the question of whether divestiture or some other remedy is the appropriate response to an anticompetitive merger. The issues posed by the factors considered by the Commission suggest that in some circumstances the better course may be to forego a remedy for an anticompetitive merger. The Commission, as noted above, failed to evaluate the likelihood that its conduct remedy would substantially restore competition other than in conclusive terms. Similarly, the issue raised by the economics professors is a fair one, namely, is the cure worse than the disease? These points do not refute the Commission's concerns that in this circumstance a divestiture is an inappropriate remedy because of questions regarding its effectiveness and because of potential harm resulting from the divestiture. In the end, if neither remedy substantially restores competition, and both cause harm, then a more fundamental question is presented as to whether any remedy, if none other is identifiable, was the appropriate outcome.

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<sup>8</sup> Answering and Cross-Appeal Brief of Complaint Counsel, In the matter of *Evanston Nw. Healthcare Corp.*, FTC Docket No. 9315 (Feb. 10, 2006), at 80, available at <http://www.ftc.gov/os/adjpro/d9315/060210ccattachmntpursuantrule.pdf>.

<sup>9</sup> Brief *Amicus Curiae* of Economics Professors, In the matter of *Evanston Nw. Healthcare Corp.*, FTC Docket No. 9315 (Oct. 16, 2007), available at <http://www.ftc.gov/os/adjpro/d9315/071017econprofsamicusbrief.pdf>.

While the Commission strongly asserts that the *Evanston* remedy is limited to the facts of the extraordinary circumstances before it, the questions raised by the remedy cannot be so easily contained. Some of the relevant considerations are raised and addressed briefly by the Commission and some are not addressed; but the decision does not address why the facts of *Evanston* are extraordinary if compared to other fully consummated mergers. In the next consummate merger before the Commission or the Antitrust Division, would the agencies ignore arguments of the parties that they had made improvements following the merger which would be lost, to the detriment of consumers, if the merger is undone? In this regard, the *Evanston* remedial order substantially advances the dialogue and consideration of what are the appropriate remedies generally for retrospective mergers. At a minimum, it undeniably decides that at least in some circumstances, divestiture is not an appropriate remedy for an anticompetitive merger.