FTC and DOJ Enforcement Actions Highlight Scrutiny of Divestiture Orders Compliance

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Recent enforcement actions by the Federal Trade Commission (FTC or Commission) and the Department of Justice (DOJ) demonstrate the agencies' continued close scrutiny of merging parties' compliance with divestiture orders. Last month, the FTC required Alimentation Couche-Tard Inc. (ACT), a gas station and convenience store operator, to pay a $3.5 million fine to settle allegations that it violated an order requiring the divestiture of certain stores to secure approval of its acquisition of Holiday Stationstores, Inc. (Holiday). This month, the DOJ announced a settlement with CenturyLink for violations of a 2018 merger consent decree, whereby the DOJ required CenturyLink to extend the terms of its original settlement agreement related to the acquisition of Level 3 Communications, Inc. (Level 3) and enter into certain additional conditions. The agencies took action when they found that the parties missed divestiture deadlines, provided insufficient compliance reporting and violated other obligations in the consent agreements.

Federal Trade Commission Action

On July 6, 2020, ACT agreed to pay a $3.5 million fine to settle FTC allegations that it violated the terms of the consent order into which it entered in 2018 following its acquisition of approximately 380 locations from Holiday.[1] The Commission alleged that ACT failed to make the required divestitures by the agreed-upon deadlines in the consent order, and did not maintain the viability of a divested location or provide sufficiently detailed compliance reports. In a 5-0 statement, the FTC explained that the "settlement sends a strong message to the public: the Commission takes its orders seriously, and parties should too."[2]

ACT had purchased approximately 380 retail fuel outlets with attached convenience stores from Holiday in 10 states. When the FTC alleged that the transaction would reduce competition in the retail sale of gasoline and diesel fuel in 10 local markets in Minnesota and Wisconsin, ACT entered into a consent agreement with the FTC that required, among other things: (i) divestiture of 10 locations within 120 days of the order; (ii) the maintenance of the viability, marketability and competitiveness of the operations of the divested locations; and (iii) monthly reporting that provided information about the status of the divestiture efforts and compliance with the rest of the order's obligations. The FTC alleged that the parties breached each of those three commitments.[3]

- **Missed Divestiture Deadline:** The FTC walleged that ACT missed the June 15, 2018, divestiture deadline, and therefore was in violation of the consent agreement for every day between June 15, 2018, and the actual divestiture dates, resulting in civil penalties pursuant to the FTC Act (up to $42,530 per day, per violation). ACT had filed petitions to the FTC for approval of several of the divestiture packages prior to the June 15, 2018, deadline; however, the Commission identified issues with one package regarding the St. Paul-Oakdale location, which required ACT to revise the divestiture assets. Ultimately, three divestiture petitions were approved by the FTC following public comment and completed, but all approvals occurred after the June 15, 2018, deadline.

[1] Press Release, "Alimentation Couche-Tard Inc. and CrossAmerica Partners LP Agree to Pay $3.5 Million Civil Penalty to Settle FTC Allegations that they Violated 2018 Order."

[2] Statement of the Commission, *In re: Alimentation Couce-Tard and CrossAmerica Partners, LP*, No. C-4635 (Jul. 6, 2020).

[3] Complaint, *In re: Alimentation Couce-Tard and CrossAmerica Partners, LP*, No. C-4635 (D.D.C. Jul. 6, 2020).

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- **Failure to Maintain Viability:** The FTC also alleged that ACT failed to maintain the viability of the Hibbing, Minnesota location before it was divested. At the time of the consent agreement, the Hibbing location was operated by a lessee-dealer, but ACT failed to renew the lease and the store closed before it could be divested.
- **Reporting Obligations:** Finally, the FTC took issue with ACT's efforts to meet its reporting obligations under the consent agreement. According to the FTC, compliance reports submitted prior to the June 15, 2018, divestiture deadline did not contain sufficient details about ACT's efforts to divest the stores. The FTC also alleged that these reports did not inform the FTC that the Hibbing location had closed and ceased operations until long after the fact.

In announcing the $3.5 million fine, the FTC emphasized that it "will not permit parties to profit from order violations of any kind, including late divestitures."[4]

Department of Justice Action

On August 14, 2020, the DOJ filed an unopposed motion to modify its final judgment with CenturyLink, stemming from the company's acquisition of Level 3. In connection with CenturyLink's acquisition in October 2016, the company entered into a consent agreement with the DOJ, whereby CenturyLink agreed to divest Level 3's local fiber optic networks and certain facilities, and committed not to initiate customer-specific communications to solicit customers of the divested assets for two years.[5] According to the DOJ's motion, CenturyLink's sales associates contacted customers of one of the divestiture buyers in violation of the consent agreement.[6]

CenturyLink agreed to extend the nonsolicitation requirement for two years to settle the DOJ's allegations, and further agreed to pay $250,000 to the DOJ to reimburse "costs and attorney fees." CenturyLink also agreed to the appointment of an independent trustee to monitor its compliance with the terms of the agreement and to certain "procedural provisions designed to promote compliance and make the enforcement of the new proposed [agreement] as effective as possible."[7] The DOJ has been requiring most of these provisions in consent decrees since the beginning of the Trump Administration[8], and here they specifically included:

- Allowing the DOJ to establish a violation by "a preponderance of the evidence;"
- Agreement that CenturyLink could be held in contempt for future violations of the consent agreement;
- Future reimbursement for the fees and expenses incurred by the DOJ to enforce the agreement; and
- A four-year limitations period after the expiration of the consent agreement in which the DOJ may file an action against CenturyLink for violations of the agreement.

In a press release, Assistant Attorney General Makan Delrahim explained that the amended settlement "ensures that consumers get the benefit of competition otherwise lost by CenturyLink's acquisition of Level 3 Communications,"[9] adding that "[w]hen a defendant violates the terms of a settlement decree, it must be held accountable to its obligations to the department and the American consumer."[10]

Following the CenturyLink settlement, Assistant Attorney General Delrahim announced the reorganization of the DOJ Antitrust Division's civil enforcement program and the creation of the Office of Decree Enforcement and Compliance.[11] The Office of Decree Enforcement and Compliance will enforce judgment and consent decrees in civil matters, which will include working with monitors and compliance officers to ensure compliance with decrees. Lawrence Reicher, who recently served as counsel to the assistant attorney general, will lead the office.[12] Assistant Attorney General Delrahim described the reorganization as "building on our recent successes," including CenturyLink, which "show how important it is to enforce our consent decrees vigilantly."[13]

[4] Statement of the Commission, *In re: Alimentation Couce-Tard and CrossAmerica Partners, LP*, No. C-4635 (Jul. 6, 2020).

[5] Plaintiff United States' Memorandum in Support of Unopposed Motion to Modify Final Judgment and Enter Amended Final Judgment at 1-3, *United States v. CenturyLink*, No. 17-cv-02028 (D.D.C. August 14, 2018).

[6] *Id.* at 3-4.

[7] *Id.* at 4-6.

[8] Remarks of Hon. Andrew C. Finch, Principal Deputy Assistant Attorney General, "Improving the Antitrust Consensus" (Jan. 25, 2018).

[9] Press Release, "Justice Department Brings Enforcement Action Against CenturyLink" (Aug. 14, 2020).

[10] Press Release, "Justice Department Brings Enforcement Action Against Century Link" (Aug. 14, 2020).

[11] Press Release, "Assistant Attorney General Makan Delrahim Announces Re-Organization of the Antitrust Division's Civil Enforcement Program" (Aug. 20, 2020).

[12] *Id.*

[13] *Id.*

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Takeaways

These recent enforcement actions reinforce the importance of compliance with consent orders and highlight the agencies' current emphasis on prosecuting violations, including extension of order obligations, fines and even attorneys' fees. Merging parties can, however, mitigate these risks by:

- Frontloading divestiture efforts during the investigation, rather than waiting, especially in buyer-upfront situations, and choosing divestiture buyers that the agencies will approve;
- Taking into consideration all third-party actions that could delay the divestitures or otherwise interfere with compliance (*e.g.*, foreign antitrust approvals, lessors, IP holders, etc.);
- Including terms in the divestiture agreement that maintain buyer responsibility for delays and other complications;
- Negotiating realistic divestiture deadlines and obligations with the agencies;
- Keeping agency staff fully informed on divestiture efforts and any anticipated delays or challenges with meeting agreed-upon timetables;
- Documenting the order negotiation with the agencies in case a subsequent dispute arises regarding the meaning of terms or the parties' intent; and
- Working with counsel to monitor compliance and fully meet reporting obligations.