USE OF MEDIATION IN THE MERGER REVIEW PROCESS: A PROPOSAL TO INCREASE EFFICIENCY AND MINIMIZE FRUSTRATION

Submission to the Federal Trade Commission's
Workshop on Merger Investigation Best Practices

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Using mediation to resolve disputes in the merger review process will provide significant benefits for both the Federal Trade Commission and private parties. Many in the antitrust bar believe that the current merger investigation process is inefficient and unfair. As discussed below, mediation addresses many of these concerns and provides a way for disputes to be raised and resolved to a greater extent than would otherwise occur. Yet mediation is not binding on the parties until they embrace a mutually desirable outcome, so there is no loss of formal authority by the agency. Improved outcomes result from the assistance of a mediator helping the parties find better alternatives and improving their communication and understanding, rather than any loss of control. As proposed below, the FTC should proactively incorporate mediation of disputes in its merger investigation process in order to achieve its goals more efficiently and fairly, with less burden on the private sector.

Introduction: Disputes Are Unavoidable in Merger Investigations

Many in the antitrust bar view the merger review process as needing significant modification. Frustration runs particularly high around the so-called second request process, which is not surprising given the authority of the FTC and the Department of Justice under the Hart-Scott-Rodino Act to hold up mergers until completion of voluminous document requests and interrogatories. While only a modest proportion of transactions are subject to a second

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request, the issuance of a second request can slow down a merger by months and impose millions of dollars of additional costs on the parties.*

Once a second request is issued, the process invariably turns to negotiation with agency staff to determine if there are ways to reduce the scope of the request and the burden of compliance. Widespread agreement exists with the guiding principle that the agency should obtain what it needs from the merging parties to carry out its mission of stopping anticompetitive deals without imposing unnecessary burdens on the parties. The challenge comes in applying that principle, which leads to disputes and frustration. The private sector often pushes hard to try to save time and money by significantly limiting the second request, while the agency assumes that it only has one shot to get everything it may need to block an anticompetitive transaction. Narrowing the request makes the staff's job riskier and gives staff less time to analyze materials as they become available. Yet unnecessarily refusing to narrow the request makes the process less efficient for all involved and may inflict substantial harm on the merging parties. Similar disputes arise over whether the parties are in substantial compliance with the second request. Final determination of what must be produced is in the hands of the agency, which does not have to provide complete explanations and often cannot articulate why certain information is sought without giving away its confidential strategies. Worse, the outcome often turns on the arbitrary assignment of a particular staff attorney to the merger, for there are notable variations in the willingness of staffers to modify second requests.

To address concerns over this unequal relationship, the FTC recently revised its internal appeal process. Under that process, parties who feel that they have not reached a reasonable outcome with the staff attorney may file a formal appeal that is briefed and ultimately decided by the FTC's general counsel. However, despite the very high number of transactions, and numerous second requests that parties felt were not modified appropriately, only two appeals have been taken.

Many in the antitrust bar do not perceive internal appeals as a viable solution for two reasons. First, private parties are extremely reluctant to formally challenge the agency staff attorney who plays a central role in determining whether the transaction will be challenged as anticompetitive, and this is especially true at the beginning of the review process. And apart from the fear of retribution for going over the head of the staffer, there may also be a reluctance to raise suspicions about why the parties are trying so hard to shield certain categories or sources of information from disclosure. Second, there is significant question in the antitrust bar about use of an internal review at the FTC, and whether any agency decision-maker could be sufficiently objective when asked to overrule agency staff.

In short, the private sector clearly believes there is still a substantial problem with the merger investigation process, notwithstanding the FTC's appellate process. Mediation provides many benefits that can help redress those concerns, although it need not replace the appellate process if the Commission wishes to leave it in place.

Mediation Offers Many Benefits in Resolving Second Request Disputes

Many of the disputes that arise from second requests could be resolved through mediation, which would increase the efficiency and fairness of the merger review process.

* While mediation may also be very beneficial in the remedy phase of merger analysis, this paper focuses on the benefits of mediation in the investigation phase, which is the subject of the FTC's current workshop.

Mediation is a form of alternative dispute resolution in which a trained neutral facilitator helps the parties reach a voluntary, mutually agreeable resolution to the dispute. As a voluntary process, a mediator will be involved and obtain information about the merger only with the consent of the parties. The mediator is not a decision-maker and does not hear evidence in order to render a decision, as would a judge or arbitrator. Instead, the mediator focuses on the business interests and concerns of each side and helps the disputants see where their interests converge and where they can find common ground. There are significant benefits to be gained by encouraging use of mediation, and the downside is small as the cost is reasonable and the time commitments modest.

- ***Parties Control Outcome.*** Mediation leaves the parties in control to determine the outcome of the dispute. Mediation does not take away the ultimate authority of the FTC to determine what must be produced in a second request, so staff need not fear a loss of power due to use of mediation. At the same time, explaining in the mediation the need for the information and data requested – and freshly listening to the reasons it may not be needed – can help loosen up entrenched positions and lead to real movement. With mediation there is never fear of a "bad" decision by a third party. If a satisfactory outcome cannot be achieved for both staff and private parties through mediation, all parties are in the same position with the same options as they were prior to mediation.
- ***Confidentiality Is Preserved.*** Mediation is generally confidential; information about a merger or second request would not be revealed to outsiders. Significantly, the mediator also preserves confidences of the individual parties, which can be very helpful in resolving disputes. Thus, each side can reveal confidential strategies and information that will not be shared with the other parties, which permit the mediator to determine if there are overlapping outcomes or compromises possible that the parties could not determine in the absence of a trusted third party. Further, the mediator can confidentially discuss and analyze the staff's rationale for seeking disputed information and then convey to the other parties whether staff's position seems reasonable without revealing the confidential strategy. The mediator can also gauge from confidential conversations with each side whether the parties are close enough to warrant ongoing work to resolve their remaining disagreements.
- ***Mediation Restores or Maintains Relationships.*** Mediation can help parties work together more harmoniously to complete the necessary merger review with the least burden possible. The mediator's involvement can help defuse animosity or frustration that may have built up during unsuccessful negotiations between the parties, and foster a productive environment for subsequent resolution of the merits of the merger and any necessary remedy or conditions for approval. When incorporated as a regular part of the process, use of mediation should cause little concern to agency staff, unlike the current appellate process.
- ***Timeliness.*** Mediation is a fairly expedited process, and often can be scheduled promptly and conducted in a day or less, depending on the extent of the disputes. Due to the highly fact-specific nature of merger proceedings, it is generally desirable for the mediator to spend some time getting up to speed on the issues in advance of the mediation. However, part of the value of mediation comes from each side explaining to the mediator its understanding of the core facts underlying the dispute, which often reveals differences in assumptions and understandings of basic issues and helps disentangle the dispute and lead to breakthroughs.

- ***Mediation Is Inexpensive.*** Along with being expeditious, mediation is relatively inexpensive. With the outcome of disputes over second requests often determining whether merging parties must expend hundreds of thousands of additional dollars and incur weeks of delay, it should be an easy decision to spend a few thousand dollars and a day or less in mediation. While the cost of mediation is typically split between the parties to a dispute, that is not required. In order to encourage use of mediation in the merger review process, the FTC initially may want to cover the entire cost of mediation and proactively propose mediation whenever it is clear that negotiations are stuck and the parties are frustrated by the process. The source of payment does not impact how the mediator is chosen, and certainly should not impact the mediator's professional neutrality. It would nonetheless be possible to use a payment mechanism to prevent the mediator from learning the source of funding.
- ***Superior Outcome Likely.*** Finally, the biggest benefit of mediation is its likelihood of producing a better outcome than other means of resolving disputes. Mediation works to find solutions that satisfy the legitimate interests of the parties to the greatest extent possible, rather than choosing a winner and a loser based on the positions presented, as other processes tend to do. Even when it cannot resolve every aspect of a dispute, mediation often can sufficiently narrow the issues to make it well worth the effort invested, and can yield even greater dividends as the merger analysis proceeds by minimizing animosity and establishing a foundation for future cooperation between staff and the merging parties.

Some of the core principles of mediation – such as the key point of focusing on the parties' interests and getting away from bargaining positions – are often incorporated by sophisticated parties in negotiations. The value added by a mediator when disputes cannot be resolved through direct negotiations is to help parties get beyond the issues blocking resolution in order to achieve the best possible outcome for both the agency and the private parties.

Proposal for Using Mediation to Resolve Second Request Disputes

Due to its many benefits, mediation is becoming increasingly popular for resolving a wide range of complex disputes, including antitrust and other commercial matters. The FTC should take proactive steps to encourage use of mediation when needed in merger investigations in order to resolve disputes in a more satisfactory and efficient manner. Incorporating mediation in the second request process would help the Commission better fulfill its mission and produce excellent results with less friction and hostility.

- ***FTC Initiation of Mediation.*** The FTC should adopt a policy of having staff affirmatively propose mediation whenever discussions or negotiations with the merging parties over the second request are not reaching a satisfactory outcome and frustration is mounting. The agency could institute a screening procedure for all second requests to ensure that mediation is offered whenever it might be beneficial. In addition, the FTC could help spur use of mediation initially by offering to pay the full costs of mediation, although it is desirable always to permit the other participants to split the cost of mediation if they wish. While some initial reluctance among FTC staff is possible, experience would quickly help staff become comfortable with the process and see the benefits to the agency as well as the private sector.

- ***Pilot Project Helpful.*** Creation of a pilot project for mediating second request disputes would be a desirable step. Mediation could be used in five or ten cases to resolve second request disputes and then an analysis conducted to determine the outcome and satisfaction with the process by agency staff attorneys and private parties. This feedback could be used to make any adjustments needed, and to publicize the mediation process within the antitrust bar (with appropriate steps to avoid revealing any confidential information).
- ***Permit Private Initiation.*** The FTC should also indicate its willingness to participate in mediation when requested to do so by a private party to resolve disputes that arise in the merger investigation process. As discussed above, mediation could greatly help to address the serious concerns of the antitrust bar with the second request process.
- ***Choice of Mediators.*** Relying on independent third-party neutrals who have a background in antitrust law (whenever possible) would yield the best results. Using a small group of mediators consistently over time would tend to result in greater uniformity between the various agency staff attorneys in terms of approach, standards applied and the extent to which modifications are granted. Indeed, if similar mediation processes are adopted by the Antitrust Division of the Department of Justice, use of a common pool of mediators would tend to move both agencies toward greater uniformity, which would help reduce arbitrary differences based on the agency or staffer involved. This would be an additional positive development for the merger review process.

Conclusion

Mediation offers proven benefits to help resolve disputes arising out of the FTC's merger review process and make it more efficient and less frustrating for all involved. Use of mediation in the second request process by the FTC is an excellent place to begin, although mediation may also be very useful in the remedy phase of merger analysis, when efforts are made to craft solutions that will permit deals to be consummated once any anticompetitive aspects are resolved.

Mediation of second request disputes can help address many of the concerns of the antitrust bar by bringing a third party into the unequal negotiations over modifications and substantial compliance. As explained, this impact is not the result of any loss of authority by FTC staff, but results from the involvement of a mediator who helps the parties focus on the legitimate interests involved and how best to satisfy those interests. That often may involve eliciting from staff fuller explanations to help private parties understand staff's views, and will naturally result in staff making voluntary modifications when the explanations are unconvincing. In short, the mediation process helps staff exercise power more gently and consistently, helps private parties be realistic about the agency's needs, and provides a reality check for both sides.

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