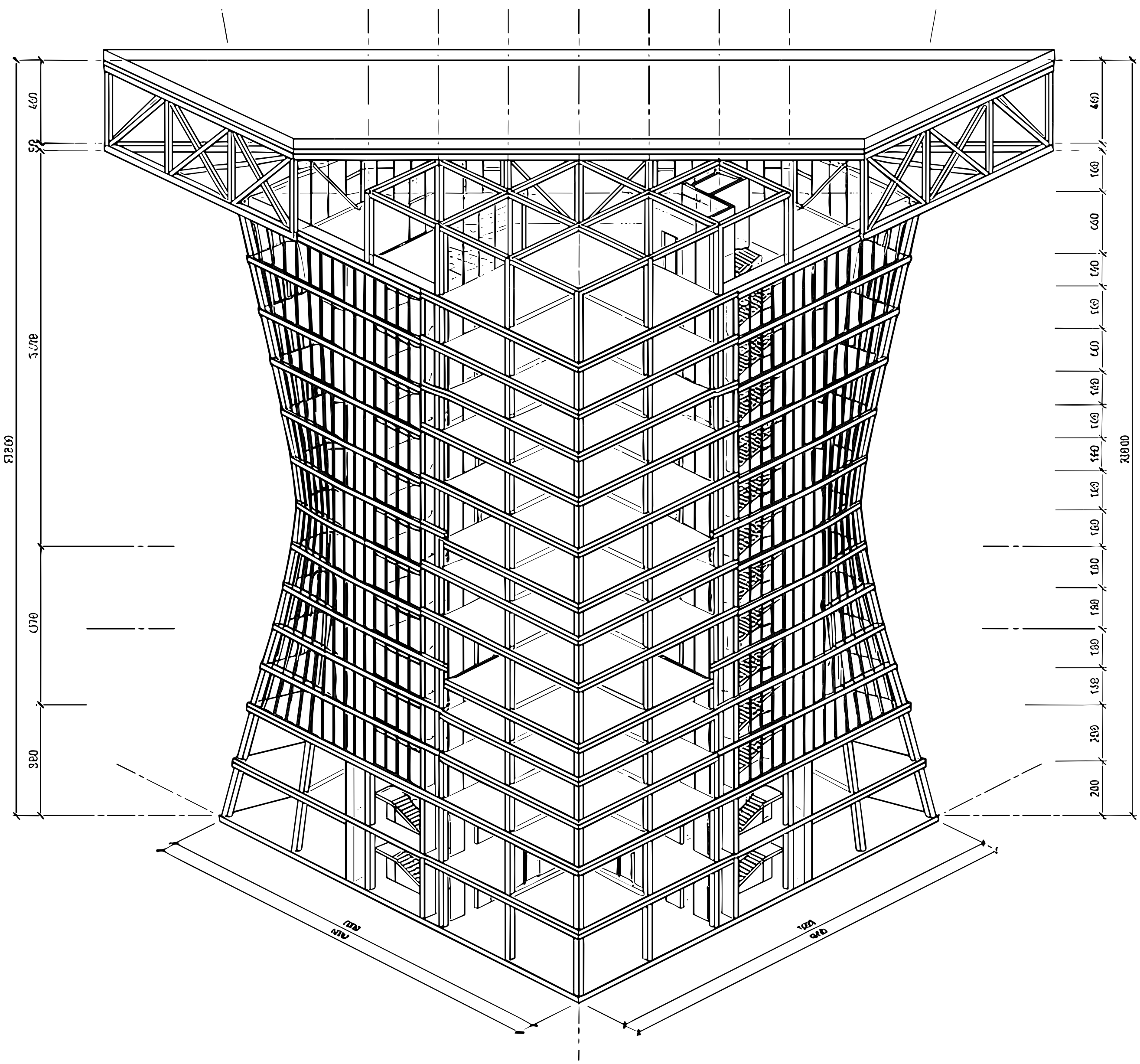
# Antitrust® Chronicle

JUNE 2026 · VOLUME 1



# Structural Remedies

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# REASSESSING MIX-AND-MATCH DIVESTITURES

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Divestitures are the most common and preferred remedy in antitrust enforcement. In principle, the assets divested in a transaction need not be confined to a single merging party, a single product market, or a single buyer. Rather, remedies may involve what is described as "mix-and-match" divestitures: assets drawn from more than one merging party, operating across different markets, or sold to multiple buyers.

Such "mix-and-match" divestitures have been criticized for several reasons, but also have some neglected advantages. Most notably, they can foster competition among the divestiture buyers and, as a practical matter, expand the set of potential buyers and divestiture assets. Greater choice can facilitate the process of finding suitable divestiture buyers—for example, finding "up-front" buyers with relevant industry experience, buyers with limited presence in the markets of concern, or buyers who do not have any entanglements with the merging parties. At the same time, greater choice of divestiture assets may allow the enforcement agencies and the parties to assemble a divestiture package that is better tailored both to the antitrust concern and the capabilities of the buyers (e.g., creating synergies with the buyers' assets). These advantages suggest that one should not neglect the potential for mix-and-match divestitures to achieve the goals of antitrust remedies.

# I. INTRODUCTION

Merger remedies aim to address the anticompetitive effects of mergers while preserving the pro-competitive efficiencies. Among merger remedies, divestiture has been the most common and most preferred one in many jurisdictions for the past several decades.[2]

Although the agencies do not define mix-and-match divestitures precisely, a divestiture of a customized package of assets assembled from both merging firms, rather than one business unit from one merging party, would be considered by the antitrust agencies to be a "mix-and-match" divestiture.[3] The agencies tend to look at these with skepticism on the grounds that they may be less likely to preserve competition than the divestiture of a single ongoing business.

In this article, we rely on a broader definition of mix-and-match divestiture. We define a divestiture to be mix-and-match if the assets sold have at least one of the following two characteristics: the assets are from *multiple sellers* or sold to *multiple buyers*. Additional complexity may arise when the assets operate in multiple product or geographic markets, such that they may not necessarily operate together post-merger, but we do not consider this aspect alone to make a divestiture mix-and-match.

A recent example of a mix-and-match divestiture occurred in the acquisition of Amedisys by UnitedHealth Group. In that transaction, the divestiture package negotiated with the U.S. Department of Justice included both mix-and-match characteristics: first, the divested assets were drawn from two sellers—the acquirer, UnitedHealth Group (more specifically, its affiliate LHC), and the target, Amedisys. Second, the assets were sold to two different buyers, BrightSpring Health Services and Pennant Group. In addition, the divested assets operated in many geographic markets and primarily in two distinct product markets: home health and hospice services.[4]

The antitrust agencies have expressed several concerns regarding mix-and-match divestitures. In broad terms, the agencies are concerned that some aspects of mix-and-match divestitures make the divested assets less likely to be successfully operated by the buyers and therefore less likely to preserve competition.[5] These are legitimate competition issues that warrant careful scrutiny in any particular case. At the same time, an assessment of mix-and-match divestitures should proceed with a balanced understanding that they entail not only potential drawbacks but also potentially meaningful advantages. While much of the existing commentary focuses on the downsides, this discussion complements that perspective by highlighting some relatively neglected upsides. Namely, mix-and-match

2 See e.g. Matt Reilly, Rich Cunningham & Ben Wallace, *Merger Remedy Divestitures: the Agencies Zig and the Courts Zag*, 37 ANTITRUST 3, 13-18 (2023); David A. Balto and Richard G. Parker, *The Evolving Approach to Merger Remedies*, FTC Public Statement, reprinted in ANTITRUST REPORT (2000), at 2; *id.*, at 4 ("In most cases divestiture is the preferred remedy."); Fed. Trade Comm'n, The FTC's Merger Remedies 2006-2012, A Report of the Bureaus of Competition and Economics (Jan. 2017), at 12 ("The Commission most often addresses the horizontal effects of mergers that harm competition in one or more relevant markets by ordering a divestiture."); European Comm'n, Commission Notice on Remedies Acceptable Under Council Regulation (EC) No. 139/2004 and Under Commission Regulation (EC) No. 802/2004 (2008). ¶ 17 ("[D]ivestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps."); Competition & Mkts. Auth., Merger Remedy Evaluations (June 18, 2019) ¶ 1.4.

3 U.S. Dep't of Justice, Antitrust Div., Merger Remedies Manual (Sept. 2020, withdrawn Apr. 2022), at 11; Fed. Trade Comm'n, Bureau of Competition, Negotiating Merger Remedies: Statement of the Bureau of Competition of the Federal Trade Commission (Jan. 2012), at 6-7.

4 See *United States v. UnitedHealth Group, Inc. and Amedisys, Inc.*, No. 1:24-cv-03267-JKB, Competitive Impact Statement (D. Maryland 2025), §§ I and III.A, and Schedules A-D.

5 See additional discussion and references in Section II below.

divestitures broaden the sets of available divestiture buyers and assets that the merging parties and the agencies can use to design effective remedies.

There are many examples across jurisdictions of the use of mix-and-match divestitures, presumably because these achieve the goals of remedies and have other advantages. In addition to the UnitedHealth Group-Amedisys case mentioned above, recent cases in the United States and the European Union include:[6]

- *United States v. Waste Management, Inc.*, where many trash transfer stations and landfills of both Waste Management, Inc. and Advanced Disposal Services, Inc. were divested to GFL Environmental, Inc.[7]
- *United States v. Nexstar Media Group., Inc.*, in which certain TV stations of Nexstar were divested to Circle City Broadcasting, certain TV stations of Tribune to Scripps, and certain TV stations of Nexstar and Tribune to TEGNA.
- Boeing's acquisition of Spirit AeroSystems Holdings, Inc., which included divesting Spirit's businesses that supply Airbus to Airbus, and divesting Spirit's site in Malaysia to Composites Technology Research Malaysia Sdn. Bhd.

In all these mergers, the antitrust agencies in the relevant jurisdictions allowed the transaction to proceed, stating that the remedies fully addressed the competition concerns. We infer that, at least in these cases, the advantages of mix-and-match divestitures outweighed any disadvantages, which we turn to next.

## II. COMMON CRITIQUES OF MIX-AND-MATCH DIVESTITURES

Most of the critiques of mix-and-match divestitures reflect the concern that these may increase the risk that the divested assets would not be able to successfully compete in the market. The arguments that the agencies and other commentators have advanced in support of this concern include:[8]

- Buyers may be hampered by the fact that the assets from two different sellers have never operated together, which may lead to challenges in their integration. For example, the buyer may later find out that the assets are incompatible.
- If a seller's assets were operating together and are divided among buyers, then synergies among these assets may be lost or a buyer may not receive all the resources necessary to compete effectively (e.g., one buyer does not receive R&D capabilities).
- Smaller buyers may lack the scale, scope, or full product line necessary to compete, which one larger buyer that acquires all the divested assets is more likely to have.
- The merging parties may select assets for divestiture based on the parties' least efficient production facilities, which means that the divestiture buyer may not be able to impose sufficient competitive discipline on the merged parties.

All these arguments are theoretically plausible. Empirical evidence, however, remains limited and presents a mixed picture. For example, a study by the FTC found that some divestiture buyers were unsuccessful because they did not receive all the assets necessary to compete. Such a finding could be interpreted as an argument against divesting assets from multiple sellers—if such assets are less likely to be compatible. The same study, however, also found that smaller divestiture buyers succeeded more frequently than larger firms. Such a finding could be interpreted as an argument in favor of having multiple small divestiture buyers instead of one large buyer—the more so if multiple divestiture buyers also contribute to mitigate structural (concentration) concerns.[9]

## III. ADVANTAGES OF MIX-AND-MATCH DIVESTITURES

Below, we discuss certain potential advantages of mix-and-match divestitures over single-seller and single-buyer divestitures with respect to achieving the goals of remedies.

6 An example of an older case with mix-and-match divestitures is the Albertsons/American Stores merger, where the divestiture included stores from both firms. See Fed. Trade Comm'n, FTC Agreement with Albertson's and American Stores Requires Selling of 144 Stores in Order to Preserve Supermarket Competition in California, Nevada and New Mexico (June 22, 1999).

7 *United States v. Waste Management, Inc.*, No. 1:20-cv-03063 (D.D.C. 2021), §IV.A., Appendix A.

8 See, e.g., U.S. Dep't of Justice, Antitrust Div., Antitrust Division Policy Guide to Merger Remedies (Oct. 2004), at 14; U.S. Dep't of Justice, Antitrust Div., Merger Remedies Manual (Sept. 2020, withdrawn Apr. 2022), at 9-11; Fed. Trade Comm'n, A Study of the Commission's Divestiture Process (1999), at 3-4; Fed. Trade Comm'n, Negotiating Merger Remedies: Statement of the Bureau of Competition of the Federal Trade Commission (Jan. 2012), at 6-7.

9 Fed. Trade Comm'n, A Study of the Commission's Divestiture Process (1999), at 14, 28, 35.

### *A. Goals of Remedies*

Remedies should prevent harm to competition in the markets where the merger may increase market power while preserving the pro-competitive efficiencies of the transaction in the remaining markets. Antitrust agencies and practitioners have found that the remedies most effective at preserving competition tend to have the following characteristics (among others):[10]

- "Self-enforcing" – remedies that give the post-merger market participants the incentive to compete provide permanent relief from competition problems and avoid the need for ongoing governmental monitoring and regulation.
- Rapid removal of potential anticompetitive effects. This means that the remedy must be rapidly implementable and take effect quickly.
- Enforceability, in the sense that checking whether the merging parties comply with the remedy order should be easy.
- Divestiture buyers should have no ongoing entanglements (such as joint ventures, financial or supply relationships) with the merging parties.

As discussed below, mix-and-match divestitures can have all these characteristics of effective remedies, sometimes to a greater extent than single-asset divestitures.

### *B. Mix-and-Match Divestitures Can Contribute to Achieving the Goals of Antitrust Remedies*

A divestiture to multiple buyers may create a greater incentive to compete than a divestiture of the same assets to a single buyer because the multiple buyers may already compete among themselves—or they may be potential competitors if they currently compete in different geographic or product markets. As such, a mix-and-match divestiture may result in increased competition, reduced multi-market contact with the seller, and/or reduced likelihood of coordinated behavior, compared to divesting to a single buyer. In this sense, mix-and-match divestitures are more likely to be self-enforcing than divestitures to single buyers.

The same logic may also apply to concerns related to monopsony power in labor markets and markets for other inputs. For example, although home health and hospice agencies typically do not compete for the same patients (hospice patients are in the last six months of life, whereas home health patients are typically recovering after hospital treatment), both home health and hospice agencies hire nurses, nurse schedulers, clinical directors or managers, and other related health professionals. As such, a divestiture of home health and hospice agencies in the same geographic market to different buyers would contribute more to mitigating competition concerns in the labor markets than a divestiture of both lines of business to the same buyer.

In some cases, mix-and-match divestitures can be implemented and take effect as rapidly as single-asset divestitures, because all the asset sales can occur in parallel. And, to the extent that is it is straightforward for the agencies to check that the assets are sold and to whom, the enforceability of mix-and-match divestitures should not impose any substantial burden beyond what is necessary in a single-asset divestiture. Similarly, a mix-and-match divestiture is no more likely than a single-asset divestiture to require governmental monitoring or regulation. In principle, it provides the same sort of structural incentives to divestiture buyers as a single-asset divestiture, in that divestiture buyers are separate entities with their own profit-maximization objective, so it is in their self-interest to compete.

### *C. Mix-and-Match Divestitures Broaden the Set of Potential Buyers*

One key advantage of mix-and-match divestitures is that it broadens the set of potential buyers. Finding acceptable divestiture buyers may be easier when mix-and-match is allowed simply because there are more alternatives to choose from. In particular, the merging parties may be more likely to find "up-front" buyers who can readily operate the assets, as recommended by the enforcement agencies.[11]

In many industries, smaller firms outnumber larger ones, so allowing mix-and-match divestitures can expand the set of potential buyers. In some cases, there might not exist a suitable or willing single buyer for the totality of the divested assets. For example, suppose that in at least two markets where the merging parties operate, each of them has a 25% market share and the only other firm willing to buy all the divested assets has a 50% share. Divesting either merging party's operations to the large buyer in any of these markets would not mitigate structural concerns, because concentration increases more than it would without the divestiture. However, suppose that for each of these markets, there are smaller firms that would be able to enter by purchasing the operations of one of the merging parties. Divesting to one of the smaller firms

10 See e.g. Mary Coleman & David A. Weiskopf, *Non-Self-Enforcing Remedies and the Recent Modification to the Ticketmaster/Live Nation Merger Consent Decree*, CPI ANTITRUST CHRONICLE, 37-41 (April 2020), at 38-41; U.S. Dep't of Justice, Antitrust Div., Antitrust Division Policy Guide to Merger Remedies (Oct. 2004), at 5-6; U.S. Dep't of Justice, Antitrust Div., Merger Remedies Manual (Sept. 2020, withdrawn Apr. 2022), at 13, 21, 27.

11 See e.g. U.S. Dep't of Justice, Antitrust Div., Merger Remedies Manual (Sept. 2020, withdrawn Apr. 2022), at 11, 22; Fed. Trade Comm'n, Bureau of Competition, Negotiating Merger Remedies: Statement of the Bureau of Competition of the Federal Trade Commission (Jan. 2012) at 7.

does not increase concentration and may even increase competition. If no smaller firm is willing or able to enter all the problematic markets simultaneously, then only a mix-and-match divestiture (in the sense that assets in different markets are sold to different buyers) can solve the concentration problem and enable the merger synergies to be realized.

In the case of UnitedHealth Group's acquisition of Amedisys, the larger of the buyers already operated in one region in which the parties intended to divest agencies (Tennessee), so to the extent that the geographic markets were local, divestitures to that buyer in Tennessee would not have substantially reduced concentration. By adding another buyer with no presence in Tennessee (but the with the ability to compete using the acquired assets), the merging parties were able to offer a divestiture package that preserved competition in all regions.

A mix-and-match approach also increases the likelihood that the merging parties would find fast-growing, aggressive competitors as divestiture buyers.[12] Fast-growing smaller firms may impose a stronger competitive constraint than larger, mature firms. As mentioned above, the FTC has found that in some cases smaller firms performed better than larger firms when acquiring divested assets.[13]

Expanding the pool of buyers enables better alignment of the remedies with the geographic and product markets of concern. Restricting to a single buyer requires finding one firm that has expertise in all areas of the divestiture, and interest and ability to enter all the areas. Similarly, finding buyers without any entanglements with the seller is easier if there are more buyers to choose from. Buyers who are not competing in the problematic areas pre-divestiture but who wish to acquire operations there to make geographic extensions of their ongoing businesses are less likely to have joint ventures or supply relationships with the merging parties.

More generally, selecting the most suitable buyers from a broader choice set is likely to yield better outcomes on several dimensions than relying on a single buyer drawn from a narrower pool. Such dimensions may include relevant industry experience, ownership of complementary assets, existing relationships with customers and third parties, and possession of the required regulatory approvals, among other attributes that can be critical to the buyers' ability to operate the divested assets effectively.

### *D. Mix-and-Match Divestitures Expand the Choice of Assets to Divest*

Mix-and-match divestitures may allow assembling a more competitively viable asset package by drawing assets from both merging parties when neither party alone can sell all the necessary assets in each relevant market. For example, if operating in the industry requires both factories and warehouses, and merging party A has relatively more factories while B has relatively more warehouses, then divesting a factory of A and a warehouse of B may be more attractive in terms of preserving competition than divesting both a factory and a warehouse from one of the merging parties (which may end up handicapped and reduce output). The factory of A and warehouse of B may also be close to each other, creating synergies for the buyer. Even if each merging party could divest all the assets that a buyer needs to compete, giving the buyer additional assets from both merging parties may further improve its competitiveness. Such assets may include licenses, programs, know-how, and other complementary products and services.

Allowing mix-and-match divestitures expands the set of asset combinations eligible for sale, thereby improving the fit between the asset package and the buyer (or buyers). The reasoning mirrors the logic why a broader pool of potential buyers is beneficial: holding everything else constant, the best choice drawn from a larger feasible set is at least as good as the best option drawn from any smaller subset.

## IV. CONCLUSION

Mix-and-match divestitures have a long history across jurisdictions, but have also been criticized on several grounds. Common concerns include that the assets from different sellers may lack synergies, a strong or coherent brand, or technical and operational interoperability, creating integration challenges for buyers. Critics also contend that smaller buyers may lack the scale or scope needed to compete effectively. While these disadvantages may be present in some cases, mix-and-match divestitures also offer a number of potential advantages. In particular, they may give the divestiture buyers a greater incentive to compete, thus reducing the need for governmental monitoring and regulation. In principle, mix-and-match divestitures may have similar implementation speed and enforceability as single-asset divestitures, but they broaden the sets of available divestiture buyers and asset packages. This broader choice set enables better tailoring of both buyers and assets to the specific competition concerns presented by a given transaction. Such flexibility may explain why mix-and-match divestitures have often proven effective in practice and why smaller buyers may be more likely to successfully use the divested assets to compete in the markets of concern.

12 For example, in UnitedHealth Group's acquisition of Amedisys, both BrightSpring and Pennant had a history of rapid growth, including by acquisitions.

13 Fed. Trade Comm'n, A Study of the Commission's Divestiture Process (1999), at 14, 35.