ICN Training on Demand Module IV-2: Merger Remedies

[Slide 1 - ICN Training on Demand Module]

[Slide 2 - Introduction by Overall Moderator]

MELANIE AITKEN: Welcome to the ICN Training on Demand Module on the subject of merger remedies. The vision for the ICN Training on Demand project is to create, over time, a comprehensive library of training materials to serve as a virtual and practical interactive guide covering the key areas of competition for the benefit of competition agency officials. The different training modules made up of video lecture and written materials have been and continue to be designed with input from a diverse group of international academics, practitioners and current and former enforcement officials. The goal is to provide an online and readily accessible interactive, educational resource for competition agencies everywhere.

This particular program will focus on merger remedies. Through the video, we will explore the principles underlying the need for and identification of remedies appropriate to the anticompetitive concerns in a particular case. We will discuss the different kinds of remedies and when and where the circumstances may call for particular resolutions. As well, we will hope to tease out for the audience some of the more common practical considerations, such as timing, elements of the remedy package, challenges in identifying effective buyers, international coordination, and after-the-fact monitoring and compliance.

In developing this program, we have drawn from the 2016 Merger Remedies Guide and commend it to you.

For our introductory panel, let me introduce our first presenters, Omar Wakil and Hiram Andrews, to give us a primer on key concepts that will be addressed in more detail as we move through this module and the 2016 guide.

[Slide 3 - Introductory Panel]

[Slide 4 - Overarching Principles]

HIRAM ANDREWS: The purpose of a remedy is to maintain or restore competition otherwise lost due to a merger while permitting, if possible, the realization of efficiencies and other benefits. Our role as the competition authority is to determine the nature and scope of the competitive harm within our jurisdiction before requiring or agreeing to proposed remedies. In multi-jurisdictional transactions, each jurisdiction's competition authority will independently reach enforcement decisions having regard to their own legal framework, guidelines, economic analysis and case law.

[Slide 5 - Remedies Tailored to Harm]

OMAR WAKIL: It must be stressed that remedies are not industrial planning tools. Remedies should only be imposed to the extent required to address anticompetitive issues identified by the competition authority. In other words, they should be tailored to address the transaction's competitive harm, but no more. If a competition authority's proposed remedies go beyond what the merging parties are willing to agree to, the merger may be abandoned altogether or we could be in litigation.

HIRAM ANDREWS: In multi-jurisdictional transactions, the same competition concerns may extend across borders. And so we may consider remedies that are the same or similar to those in other jurisdictions.

[Slide 6 - Need for Effectiveness of Remedies]

OMAR WAKIL: Premerger analysis is inherently risky as it involves a degree of crystal ball gazing or trying to predict the future. Risks that are inherent to determining the appropriate remedies include deterioration of the proposed divestiture assets, identifying appropriate purchasers for the proposed divestitures and the potential failure of the effect of implementation of the remedy.

HIRAM ANDREWS: Of course, an effective remedial approach tries to mitigate these risks in a cost-effective way with regards to several important factors, namely its competitive impact, duration and practicality.

[Slide 7 - Timing Issues]

HIRAM ANDREWS: Best practices underscore the importance of parties considering remedies as early as possible, even before merger notification, particularly in multi-jurisdictional transactions where multiple competition authorities are evaluating the same transaction.

OMAR WAKIL: Yes, it's important to get the ball rolling and coordinate on the timing of remedy procedures to ensure alignment and compatibility of remedies across jurisdictions.

HIRAM ANDREWS: One practical step competition authorities can take in achieving alignment on remedies is having calls either jointly or separately with the merging parties to discuss how they can facilitate alignment of key decision-making stages through timing of their notifications or responses to information requests, providing confidentiality waivers, providing detailed remedy proposals, and requesting or agreeing to timing extensions.

OMAR WAKIL: It's also helpful if competition authorities and merging parties share timetables and processes with one another. Communicating with the parties about the respective timetables and processes, including eternal deadlines, timing on when competition authorities expect to have initial views on potential remedies and when parties expect to submit proposals.

HIRAM ANDREWS: And, lastly, but no less importantly, competition authorities should communicate early with one another about potential remedy proposals, to share views and concerns prior to approving common proposals and buyers.

OMAR WAKIL: At the end of the day, this can be a long and complex process and starting discussions early and keeping a communications line open will make everything go much more smoothly.

[Slide 8 - Structural/Behavioral and Combined]

HIRAM ANDREWS: We spent a lot of time discussing what overarching principles should apply to remedies, but what about the remedies themselves. We conventionally think of remedies as being either structural or nonstructural.

OMAR WAKIL: Structural remedies are one-time remedies intended to maintain or restore the competitive structure of the market and usually involve the sale of businesses or assets, including intellectual property to another competitor with the aim of strengthening existing competitors, creating new competitors or both. These are referred to as divestitures.

HIRAM ANDREWS: Nonstructural remedies, sometimes referred to as conduct or behavioral remedies, on the other hand, are designed to modify or constrain the future conduct of merging firms. They don't require any restructuring of the merging parties, but subject them instead to certain operating rules. Examples include interim supply agreements, exclusive long-term supply agreements, ensuring access to key facilities or inputs and granting of licenses to intellectual property.

OMAR WAKIL: In some cases, an effective remedy will require a hybrid of both structural and nonstructural elements.

[Slide 9 - Types of Mergers (i.e Vertical/Horizontal) and Implications for Remedies]

OMAR WAKIL: Different remedies may be appropriate depending on whether a transaction is a vertical merger or a horizontal merger. Nonstructural remedies can be particularly effective in vertical mergers to ensure upstream competitor supply of inputs to downstream markets remains uninterrupted.

HIRAM ANDREWS: Hybrid remedies may be effective where mergers involve multiple markets or products and a structural remedy is effective in one market while a nonstructural remedy is effective in another. Beyond the structural/nonstructural dichotomy, remedies can also differ in duration.

[Slide 10 - Time Limited Remedies]

OMAR WAKIL: Limited nonstructural remedies, like short-term or interim supply agreements or technical assistance between the merged entity and the purchaser of the divested business may be appropriate to ensure the viability of the vested business on a transitional basis.

HIRAM ANDREWS: By that same token, however, an ongoing relationship between the merged entity and the purchaser of divestitures can eventually become detrimental to competition. Therefore, it’s imperative that the scope of the remedy be clearly defined in the remedy order.

[Slide 11 - Divestiture Packages and Crown Jewels]

HIRAM ANDREWS: After considering what type of remedy is appropriate, we have to consider the adequacy of the proposed remedy.

OMAR WAKIL: A divestiture package must be limited to giving the purchaser the assets and resources necessary to maintain or restore competition that would otherwise be lost by the merger.

HIRAM ANDREWS: Sometimes it's not clear whether a purchaser would be interested in a proposed divestiture package. In such cases, a competition authority may consider including additional valuable assets in a remedy order, sometimes called crown jewels. The inclusion of crown jewels in a divestiture package is intended to attract a suitable purchaser if the initial divestiture package cannot be sold on its own.

[Slide 12 - Market Testing]

HIRAM ANDREWS: To help us in actually determining whether a proposed divestiture package would be effective, we sometimes market test remedies by soliciting third-party feedback from customers, suppliers and/or competitors.

OMAR WAKIL: Recognizing that market testing may be a useful tool for the competition authorities, there are also concerns with market testing, in particular, competition authorities should be mindful of the confidentiality concerns of the merging parties, including early disclosure of the outcome of a merger review, as well as the biases of third parties with commercial interests in the outcome of a proposed transaction.

HIRAM ANDREWS: That's a really good point. It's on us to critically evaluate third-party feedback and assess it relative to the totality of the information obtained during our investigation. In some jurisdictions where market testing is uncommon, a remedy order may be published for public comment before being finalized or third parties may participate in a public hearing process. Third parties may also be able to challenge remedies after acceptance by a competition authority.

[Slide 13 - Trustees and Third Parties]

HIRAM ANDREWS: On the topic of third parties, monitoring and divestiture trustees are often appointed to oversee and implement merger remedies given their independence and specialized expertise.

OMAR WAKIL: Competition authorities sometimes appoint a third party to aid in certain aspects of the implementation of a divestiture package, including hold separate obligations and ongoing behavioral commitments. With respect to ongoing behavioral commitments, the monitoring trustee is responsible for interpreting the application of commitments, providing nonbinding views to a competition authority concerning the implementation or effectiveness of the remedy order and presenting periodic reports on the process of the remedy's implementation.

HIRAM ANDREWS: A divestiture trustee may be appointed to carry out and oversee the divestiture process if the merging parties are unable to complete a divestiture within a period specified in the remedy order.

OMAR WAKIL: Separately, a whole separate manager may be appointed to manage the day-to-day operations of the divestiture assets to ensure their independence and competitiveness from the merged firm so as to protect the effectiveness of the remedy. These individuals often come from within the executive ranks of the business to be divested.

HIRAM ANDREWS: We routinely depend on third parties' specialized expertise to lessen the burden on our own resources affected by the merger. Therefore, it is important we properly vet the trustees and managers to ensure that they are qualified to the task and are not conflicted. The scope of their responsibilities should be clearly set out in any consent order or related documents.

Let's shift our focus now to collaboration with our international counterparts in ensuring the effectiveness of remedies worldwide.

[Slide 14 - International Coordination]

HIRAM ANDREWS: In multi-jurisdictional mergers, it is often helpful to discuss remedy choice and design with our counterparts in other countries as legal frameworks differ from county to country. Sometimes we coordinate with our counterparts to avoid conflicting remedies and whether separate remedies are appropriate. In other cases, we may require the merging parties to comply with the remedy accepted by another competition authority. Lastly, there are cases where we rely entirely on a remedy imposed by another competition authority and we do not issue our own remedy order.

In all cases, however, it is imperative that we coordinate with other competition authorities to ensure that competition concerns are adequately addressed across all jurisdictions.

OMAR WAKIL: However, competition authorities should consider the enforceability of remedies across jurisdictions. Some competition authorities may obtain a remedy involving the sale of assets in another jurisdiction while others may not. Competition authorities that are informed of remedies offered elsewhere will be able to have more efficient and effective negotiations with the merged parties when seeking to address their own concerns.

[Slide 15 - Compliance Issues]

HIRAM ANDREWS: It's important that we, as the competition authority, have adequate powers to enforce remedies in order to preserve effective post-merger competition. Compliance enforcement may take the form of periodic reports from the merging parties and trustees, allowing us to monitor the implementation of the remedies. Established procedures and processes are critical in addressing noncompliance. Depending on the legal framework, this could mean the unilateral imposition of measures on the merging parties or seeking judicial orders to address merging parties' failure to comply with a remedy order.

OMAR WAKIL: While competition authorities may withdraw approval or clearance of a merger, they should consider all the tools at their disposal, including substituting or seeking new measures.

HIRAM ANDREWS: To respond to that, if the initial remedy order would remain effective if properly implemented, we or the courts should order that the merging parties comply with the remedy or, if appropriate, impose fines.

OMAR WAKIL: Your point's well taken, but sometimes merging parties' failure to properly implement a remedy order may not be delivered and may be due to factors beyond their control, be they difficulty in finding a suitable buyer or unforseen changes in market conditions.

HIRAM ANDREWS: In those cases, we may consider whether alternative remedies would be effective to address our competition concerns. For example, the crown jewel provision we discussed earlier may mitigate issues like difficulty in finding a suitable buyer. Where the legal framework allows it and permits it, revising the remedy order to include alternative remedies is an effective way to deal with those issues.

[Slide 16 - Introduce Initial Scenario]

MELANIE AITKEN: As we have just heard presented by Omar and Hiram, there are many challenges inherent in the merger remedy design and implementation processes identifying the need for and then the right remedy that serves the legitimate and demonstrable remedial goal is the opening challenge. But that's only the beginning. In designing a remedy that has a real likelihood of fulfilling its intended purpose, issues such as timing, effective implementation, international coordination and the burdens of monitoring and compliance all very much need to be taken into consideration.

To unpack these key issues, we turn now to scenario one where we are flies on the wall while big firm lawyer, James Young, played by James Musgrove, has the task of exploring some pretty academic sounding and certainly not especially welcome news with his client, Doug McMahon, the EVP business development at Fantasy Beverage Group, played by Majid Charania. James is joined by an IO economist, Marta Sebastian, played by Kristina Mulligan, that he's retained to support the effort and to help substantiate the messages to the client. We will watch while economist and lawyer condition the client as to what the agency will be concerned about, as well as what the agency can be expected to assist upon as remedies.

At the same time, James and Marta will lead a discussion seeking input from the client exploring various options in an effort to identify the least intrusive potential remedies that have some chance of ultimately being accepted by the agency. As is common, they develop a series of alternative positions and send the client home to test out the various options with his broader leadership group.

[Slide 17 - Initial Scenario]

[Slide 18 - First Scenario: Introductory]

JAMES: Mr. McMahon, thank you very much for coming in this afternoon. As you know, we're getting towards the conclusion of our review with the competition agency here, and I thought it was important to discuss where we stand both in relation to their views and also how we're going to move forward. As you know, we've been coordinating with your counsel around the world, and as I say, we're getting towards the short strokes of this thing. So as I say, I want to explain where we are, plan for the future and put together an approach that I think we'll have to use involving economic input as well as legal input.

And in that regard, we've got Utility Economics Consulting who's joined us as part of the team. They're the best in the business here. They're practical, they're clear in their articulation of the issues. And Marta Sebastian was able to join us today as their lead consultant in this area. So our goal today is to go over that.

[Slide 19 - First Scenario: Stage Setting]

JAMES: Now, I don't want to go over unnecessary ground, but just a quick recap of where we stand. The agency's been looking at this transaction now for quite a while. They're close to making determinations on their views and we have to explain why the purchase of Just Energy by Fantasy is procompetitive and efficiency-enhancing. Now, we should note Just Energy is the leading supplier of energy drinks and their brand, Thrive, has about a 67 or 70 percent share across the country, although that's decreasing over time with the new entrants. Fantasy, of course, your company, has the Emerge product, which is the second largest brand with about a 15 percent share.

Now, you take those two shares combined, that's a pretty high combination. However, because the product can only move about 300 kilometers from the plant of manufacture, we've really got four principal areas of overlap in the continent where there's going to be antitrust concerns. We've made the argument with the agency over the last few months that energy drinks, which you both produce, is not the right market. What they should be looking at is nonalcoholic beverages generally or at least functional beverages, all functional beverages. We've argued and continued to argue that point.

We've also argued that entry into the business is relatively easy, having new brands coming in all the time. And, finally, we've made the argument that competition for shelf space is the key, that really the retailers control this business. So those are the arguments about the substance of the transaction we've been making and we will continue to make.

However, we're starting to get some pretty good pushback from the agency and we thought it would be useful in preparation for a possible meeting to have some discussions with you about those issues but also to explore possible remedies should we have to go down that path.

[Slide 20 - First Scenario: Timing of Remedies Discussion]

JAMES: We're not throwing the towel in or trying to convince them not to kill the deal as it is, but the timing is getting tight now and my experience tells me that very soon we're going to have to engage substantively on some remedies discussion to keep the ball rolling. We're going to keep pushing on clearing the deal entirely. We're also going to have to have a second arrow in our quiver about remedies. As I say, we push on the main front, but we get ready to fight on the remedies front as well. And at least we have to understand our options as to what the remedies are or are not and what we can do.

MARTA: Forgive me for jumping in on this, but the answer to that question is no. The agency is sophisticated at these kinds of discussions and understands that just because you're exploring remedies does not mean either side has conceded to anything. The reality, however, is that figuring out effective remedies is detailed, time-consuming work. So you need to give yourself enough runway to get there.

[Slide 21 - First Scenario: Address the Harm]

JAMES: So that's an interesting idea. Marta, I wonder if you could share your experience with that kind of a remedy.

MARTA: My experience with respect to a promise not to raise prices is that it's made in a lot of meetings like this and sometimes in meetings with the agency. But I have never seen it actually work as a remedy. There are a couple of reasons for that. As a starting point, the exercise the agency is going through is trying to figure out if there is a competition problem, and if there is one, what is the remedy, short of killing the whole deal, that can solve that problem. That is, they want a remedy which actually addresses the competition problem as identified, which addresses the actual harm to competition which they think the deal creates. That is their proper job.

Promising to hold prices constant doesn't do that for a couple of reasons. The primary reason is that today's price is not necessarily the competitive price tomorrow. The agency wants the competitive price. Maybe that is higher than today's price, maybe it's lower. And the way to find out is to let the market determine the price. Just agreeing to hold a price constant does not do that. So that remedy does not solve the competition problem. As well, the promise to keep the price steady has to be policed by the agency. Is that in constant dollars? Is it with inflation? Is it net price? How do we address rebates, advertising incentives? There can be a lot of complexity.

The agency does not want to try and police those kinds of things if they can help it. It would rather put in place arrangements so that the market policies itself.

JAMES: But, Doug, the question that you asked does bring to mind two principal types of remedies that exist in merger cases. The first, the kind we've been talking about here with Marta is called in the antitrust lingo a behavioral remedy. It's a promise to behave in a certain way, as this case, not to raise prices. Sometimes those kinds of remedies can work. But they are typically not favored by the agency, indeed our agency or agencies anywhere. As Marta said, they take policing and they tend to lock things into stone rather than adapt with the changing marketplace.

They're a lot more common when you've got a regulator in a regulated industry of some sort, which we don't have here, or where the issue involves what we call vertical issues, that is different levels of distribution. And here, there's some of that to talk about in this case, but the principal issue we've got is Fantasy and Just are horizontal direct competitors against one another.

The other principal type of remedy, the one that the agencies tend to favor in this kind of case is called a structural remedy. That means it changes the structure of the industry you're in. The classic example is you sell something off, you change the structure of the industry, and so that thing you sold off is available to compete in the market. That is once you sell it, it's part of the structure of the marketplace competition. So those are the two principal pieces -- approaches to remedies that the agencies think of.

[Slide 22 - First Scenario: The Structural Remedy]

JAMES: Well, if we're successful in persuading them that the marketplace is all beverages or functional beverages rather than they think the market is limited to energy drinks, then we're looking at a combined market share. If we don't succeed in that, a combined market share is, as I said, about 85 percent. We have to also make arguments that entry is relatively easy and we've seen some examples of entry. But we know that getting on the shelf is key. So I expect the agency is going to be looking for a couple of possible kinds of remedies.

The first, as I said, would be a structural remedy. That's the go-to agency approach. Fantasy has a huge beverage supplier and has distribution systems. It only has a 15 percent market share for its Emerge drink whereas Just Thrive has about a 70 percent share. Now, I know you want to put the two beverages together, but the real synergies in this transaction come from using your beverage marketing distribution system to get their beverage out to the market. So if you had to divest the Emerge brand, and I'm not saying we're going to be there, but if you had to, as I understand the numbers of this deal, it's still very attractive. It's not what you want, but it would still be a meaningfully attractive deal.

MARTA: Well, I have to tell you that from the agency's point of view, the structural fix or possible fixes here may not be ideal for a couple of reasons. The first is that all things being equal, they would rather you sold off something you were acquiring that is not integrated into your business rather than something that is an integral part of your business. Emerge isn't a stand-alone entity, it isn't a subsidiary, it doesn't have its own separate management. In some cases, it is produced in bottling facilities which produce other of your products, so disentangling Emerge from the rest of Fantasy's business and selling it off as a stand-alone business won't be simple.

The agency is going to need comfort that Emerge can become an effective stand-alone competitor that doesn't have to lean too heavily on your facilities or systems. That means we are going to have to find someone who the agency will recognize as an effective buyer and operator of that asset, someone with the managerial and industry expertise and the financial ability to compete. Ideally, someone who can move the production of Emerge out of your factories and off your systems quickly. What the agency is looking for is an effective stand-alone competitor.

JAMES: When you're divesting less than a full business, the agency is very cautious that you have to have a big enough package of assets that you're selling to make it attractive to a buyer and to be viable. The agency doesn't want to make you divest more than is necessary to solve the competitive problem. But when it's not a full business, frankly, they're going to err on the side of over-inclusiveness to make sure the remedy really works. So the relevant patents, trademarks, marketing arrangements, production facilities, to the extent they can be disentangled from what other production you have, all that's necessary to make Emerge a successful stand-alone brand at the hands of a new purchaser. That's what they're going to look for.

MARTA: There may be another way this can [indiscernible] as well. There are really only four geographic regions where Fantasy has relevant plants close enough to a Thrive plant since the economic shipping distance is only about 300 kilometers. If you were to sell those four Just Energy and Thrive plants, but keep the others, you could get a deal with little geographic overlap. Now, that may or may not be possible. The issue may not be so much the physical production overlap, but the brand, that is would keeping the brand, even if you sell the plants, be a problem? But it is another possible approach to a structural remedy which we can consider and possibly explore with the agency. We would have to see whether spinning those four plants off can work as an effective stand-alone competitor even without the brand.

JAMES: Well, if that really is true, then there may be something to that, although presumably the distribution contracts, et cetera, which go with it would also be necessary, maybe some formulas, et cetera. But licensing and trademark is some -- I told you there was a structural and a behavioral remedy. Licensing and trademark is sometimes called a quasi-structural remedy because it looks like a structural remedy. It looks like you're selling something, but you're doing it by contract.

In this case, you'd have to likely have a permanent license, so it would work essentially like a divestiture, but by contractual means. If, however, the license, in the hands of an effective buyer, would create effective competition, that may do the trick. We'd have to see.

MARTA: Mm-hmm. In divesting the Emerge business or maybe the four overlapping Thrive plants, the purchaser may need some short-term transitional services on your IT platforms or the like as they get up and running independently. We would have to structure those so it would not give you any influence over the new business and they should be as short as possible, as the agency really doesn't like those continued entanglements.

JAMES: Do you have any, Doug, preliminary ideas to who might be a good buyer either for the four Thrive plants or for the Emerge business or maybe the trademark license?

Well, that's the kind of purchaser we're looking for except that they really have to be truly independent of you. They can't be partially owned by you. The agency won't see that as effective independent competition.

There are a couple of different models to do that. If we could find the right buyer and they seem to us to be capable of running the thing and they're paying you a price you want, then we could go to the agency up-front and say, we know you've got this concern, we've got a buyer, we can structure it so that the buyer will take possession of the asset at the same time that we complete the main transaction. That's one model. However, we might not be able to find such a buyer quickly enough. We might alternately, and this is the more common approach, simply have to go to them and say, we agree to sell these assets as soon as we can and -- but we close our deal and we hold those assets separately from the other assets until we find the buyer and can consummate that second transaction.

MARTA: Well, it might break your heart because the agency is not going to allow that to go on very long, three to six months at the most, during which time you have got a hold separate regime and a hold separate monitor in your business, which you are not going to like. But that has got to be there to make sure the businesses are being run separately.

Second, almost certainly the agency will require that if we fail to sell a merge within some period of time, maybe three months, it will step in with a sale trustee with the right to offer and sell the business with no reserve floor price at all. In other words, it could be a zero dollar sale.

Finally, the agency may even insist on what they call a crown jewel, maybe in this case your whole Midwest bottling facility. The idea of a crown jewel is an asset which is likely to be so attractive that it will more or less ensure there will be a buyer. If no buyer shows up for the emerged business alone, they have the right to throw in the crown jewel to make it more attractive. So a deal where we find a buyer for Emerge up-front, if we could, would be a lot more attractive and a lot more certain for us and for the agency than looking for a buyer with no reserve price after closing.

JAMES: One other thing that we need to keep in mind is the need to think about coordinating remedies with other agencies reviewing the deal. The agencies are talking to one another and whatever remedy we come up with here has to work with the remedies that other agencies are looking for. You don’t want to have to come up with two different, maybe conflicting and certainly cumulative, remedies.

[Slide 23 - First Scenario: The Behavioral Remedy]

JAMES: Well, as we said, agencies generally don’t like behavioral remedies because they take policing and they don’t necessarily restore competition the way a structural remedy does. So if we end up discussing remedies, we can certainly try for the behavioral remedy, but you shouldn’t hold your breath about it. And, in fact, there’s a danger they could want both a behavioral and a structural remedy.

MARTA: Well, as you know, this market has what we economists call vertical features, which are interesting. That is, the key to marketing energy drinks is getting shelf space in stores. Fantasy has a lot of arrangements by way of shelf listing allowances, exclusive and quasi-exclusive arrangements, preferential placement allowances, et cetera, for the placing of its beverages, including Emerge. Just Energy has some similar, although less significant, arrangements for Thrive. There are a number of new energy drink entrants in the marketplace, like Meta, Tilt, Star and Bumdia. Bumdia is the fastest-growing. But even still they are all in the low single-digit market shares. They say that is because they are having trouble getting shelf space.

JAMES: So part of our pitch to the agency is that entry into the market is easy. There's been entry. The agency has pushed back and said that these various shelf listing allowances and placement allowances, et cetera, are making it hard for people to enter the marketplace. So one obvious remedy in respect of this vertical issue could be an agreement to withdraw some or all of those listing restrictions, at least for a time, to give the new entrants an opportunity to get some shelf space.

Well, I'm not sure it will save you the money. That is, the agency isn't going to care whether you pay the money or not. They're not going to wave a wand and void the contract; they'll just say you can't enforce the restrictions within the contract.

Well, I bear bad news after bad news, but remember one of the issues that the agencies have with behavioral remedies is it has to police them and it doesn't like to spend its time and resources trying to do that. Typically, you have to enter into some sort of consent agreement, which is registered and has the force of law, saying what you will and will not do, like not enforcing the shelf listing restrictions, and the agency will insist on a monitor in place to make sure you're complying with those obligations. And to add some fun to the injury, you pay for the monitor.

MARTA: Well, it will depend on how effective we are in explaining to them when successful new entry is likely to occur. The agency does not like these kinds of things to go on forever. I would think, in this case, you would have to agree to it for at least three years since the evidence is that it takes two to three years for a new brand to really get established.

JAMES: All remedies also have to set out very clear terms. That is, you have to be able to articulate them precisely so that people know what they have to do and the agency knows when you are or are not complying by them. So as I say, once we figure out what the offer of the remedy is in this regard, the behavioral remedy, we have to be able to articulate it very specifically. So those full set of arrangements about exclusivity, et cetera, we have to define what they are and what you can and cannot do with precision.

[Slide 24 - First Scenario: Conclusion]

JAMES: Look, I know this hasn't been your favorite set of issues to discuss today, but as we get down to the short strokes with the agency, we have to consider what remedies may or may not be possible and potentially necessary to get the deal closed. This has been a good initial review of where we stand, but we've got some more work to do.

[Slide 25 - Summarize Key Issues and Introduce Scenario Two]

MELANIE AITKEN: During this exchange among the client, his lawyer and economist, we've heard a fairly true-to-reality discussion about the types of remedies merging parties typically prefer. There is often, as we see here, the process of educating clients that accompanies the tough discussions leading to engagement with the agency on remedy design. This is a fair portrayal of how challenging those first discussions with the client can be when confronted with what they see as regulators trying to gut the value from the deal they fought so hard to negotiate.

As we hear from James and Marta, agencies often have a preference for certain kinds of remedies and not necessarily the ones most favored by the merging parties. We also hear about the important distinction between structural and behavioral remedies and get a sense of what is generally understood to be the agency's philosophical approach. As is usual, James and Marta, with input from Doug, try to come up with model remedies that might satisfy the agency while preserving the synergies as much as possible to retain the drivers of value in the deal.

Licensing, sharing manufacturing capacity or distribution assets and other not purely structural remedies can be appropriate in some circumstances, but will be met with skepticism. The muted enthusiasm from James reflects counsel's experience around the likelihood of satisfying the agency with such proposals, at least at first instance.

Now, we get a chance to peek into the agency process, one that, of course, takes place outside the view of the merging parties. In setting the stage for this scene, the parties have already proposed a remedy to the agency consistent with what we have just heard from James and Marta, and the agency has had some opportunity to digest the proposal and to test it.

To illustrate the dynamics and guiding considerations inside the agency, we have three new thespians for a day, Randall Hofley playing the role of merger branch manager, Alexander Cordero playing merger team leader, and Tom Stieber playing the role of merger team economist.

[Slide 26 - Second Scenario]

[Slide 27 - Second Scenario]

RANDALL: Alexander, as you know, I am here representing the merger team, along with Tom. And the team has been undertaking a review of the Fantasy Beverage proposed acquisition of Just Energy. We've reached conclusions with respect to the competitive impact of the proposed transaction and we have preliminary thoughts with respect to a remedy that could be pursued to address the issues identified. And the parties have identified this on a withoutprejudice basis and we will review that as well.

ALEXANDER: So could you remind me of the competitive impact issue that Tom has identified.

RANDALL: Will do. So as you might recall, Fantasy and Just Energy both produce and market to retailers energy drinks, having an established brand, Emerge, and remember they're a distinct second, but slowly gaining market traction, and the leading brand, Thrive. They're very strong, but they're losing some traction.

We've concluded that energy drinks is the proper product market and regardless of the relevant geographic market, the combined market share of the parties ranges between 75 and 95 percent, and indeed 85 percent on a North American basis, with the Fantasy Emerge product representing a share of approximately 15 percent.

Now, the retailers who purchase energy drinks include large grocery and convenience store chains, but they also include small independent grocery and convenience stores. As with most products, these large chains require a payment for shelf space, slotting allowances, for lack of a better term, but the parties, and it's primarily Just Energy as the leading brand, had required that this payment come with exclusivity and/or a preferred or minimum percentage of shelf space conditions. Now, our market contacts indicate that the fees and these clauses have hindered both expansion by existing brands and entry by new brands.

Now, while there were a number of new or attempted entrants in the middle part of this last decade, the number of entrants have dwindled significantly in the last year and we identified only one rumored significant new entrant on the horizon, a company called Pangea.

Now, while there are four major energy drink brands in distribution in addition to

Emerge and Thrive, they are only in 40 to 65 percent of the major metropolitan markets. So only Fantasy and Just Energy brands have near total geographic coverage. Indeed, these companies have the highest individual and combined market shares in regions where they have nearby production facilities, as these facilities seem to dissuade other companies from pursing distribution in those areas vigorously.

Now, perhaps because energy drink consumers see themselves in a different light than other functional beverage or soft drink consumers, there is some degree of science required both for the formulation and the production of energy drinks. Now, this also acts as a barrier to entry as does the cost for a Greenfield production facility. A further barrier to entry to be identified is the need for production facilities that are geographically close to the major markets and dispersed if one wants to achieve broader geographic coverage, and that's because the weight and handling requirements associated with shipping energy drink products further than 300 kilometers from the production facility is economically prohibitive.

TOM: And given these cost constraints with respect to shipping, seemingly reflected in the regional market shares of energy drink product, there's a good argument to be made that the geographic markets for energy drinks are regional, certainly for the most populous parts of the U.S. and, we expect, Canada. Thus, the combination of the parties in the Northwest U.S., Southwest Canada, Southwest Coast U.S., Mideast Coast U.S., and Western New York/Southeastern Ontario regions, where the merging parties each have production facilities close by and, frankly, dominant the local markets, will have the most significant detrimental effect on competition.

There is a question whether our focus, in addition to the above regions, should also be on the South Central U.S. and the U.S. farm belt, given the parties' respective plant production facilities in those areas.

ALEXANDER: Understood. So having heard [indiscernible] issue at minimum within certain geographical regions and vertical barriers to horizontal competition, do you see any other vertical foreclosure issue in light of Fantasy's 15 percent stake in express [indiscernible] grocery and convenience store retailers?

TOM: Well, we have considered that but do not see any basis to suggest that the proposed merger enhances materially the risk of input or customer foreclosure through this relationship. So our vertical focus is on the supplier/customer exclusivity or shelf space provisions and their effect if extended to all of Fantasy's customers.

ALEXANDER: Sounds right. So it seems we have assessed the matter carefully and have identified a need for a remedy to address loss or prohibition of competition as a result of the merger. I understand that these concerns have been discussed with the parties and [indiscernible] the standard advocacy about how our theories or -- of harm are without merit. Have they proposed any remedies for our consideration?

RANDALL: Well, they have, and you will not be surprised to hear that the first proposal was that Fantasy undertake not to increase its prices of any energy drink products for two years. You know, we promptly responded that this type of remedy would not be acceptable in this case. After some clearly preplanned complaining by a Fantasy business person and their senior competition lawyer, the parties offered to render inoperative all the provisions in their supply agreements with retailers that provided their energy drink brands with exclusivity, preferential shelf placement or a certain percentage of the shelf space for a period of two years.

They also offered to undertake not to enter into any such new agreements during that period. Fantasy claims that this will ensure expansion and entry by competitors.

ALEXANDER: What's the team's view of the adequacy of that proposal and any risks associated with its implementation and/or compliance?

RANDALL: Well, simply said, our view is that while the proposal would go some way in encouraging expansion from existing competitors or possibly entry from new competitors, it would not be sufficient to remove the anticompetitive effects of the merger for a number of reasons. Now, most notably, it would not address the effects of combining two of the three major brands, indeed, in some regions, the one and two brands, of energy drinks and, importantly, their overlapping production facilities in certain regions.

Now, as you know, in assessing the adequacy of a remedy proposal, we look at first the competitive impact of the merger with a focus on how the proposed remedy changes the competitive dynamics of the market and the merging parties' incentives post remedy. While the proposal addresses the merged parties' enhanced ability to hinder competition through vertical restrictions, it does not get to the core of the market power that would result from the merger.

As for the second thing we look at, and that's duration, the proposal is for the remedy to remain in place for two years. Now, we think that the effect of a two-year remedy would be transient. Now, although it would be immediate, which is important, that would be insufficient, in our view, to encourage the investment required for expansion or entry.

Now, third, we consider it from a practicality perspective. Now, a commitment by the parties to render inoperative the existing provisions with retailers is difficult to monitor and enforce and would involve agency resources for the duration of the commitment. While preventing Fantasy from entering into new contractual provisions may be easier to monitor using a pre-notification system than identifying all the existing agreements, it will surely take additional agency resources to review those proposed agreements.

Of course, detection and thus the enforcement of a breach of such an agreement, for example, through an understanding of the shelf space that would be purchased by a certain dollar fee or by minimum sales volume commitments would be very difficult for the agency and would be time consuming.

So the fourth factor we considered was the risk. In addition to the monitoring enforcement issue risks we've just talked about, there would also be risks inherent to describing the provisions that would be prohibited in any remedy order. Certainly, if one was trying to cover off all possible analogous future such provisions and, therefore, we think there would be uncertainty with respect to provisions which may be introduced subsequent to the remedy order, which governs the supplier/retailer relationship.

Now, in addition to the costs posed on the agency to monitor this, there would also be costs on Fantasy to comply with the prohibition, as well as on third parties, for example, the retailer contracting with Fantasy, at least in terms of the delay and uncertainty that agency review would involve. And, finally, there could also be potential losses of efficiencies associated with prohibiting exclusivity or related contractual provisions.

ALEXANDER: All that suggests to me that the party-proposed remedy will not be adequate to remedy our concern with the proposed merger. Assuming that we are not suggesting that the only appropriate remedy is a block or [indiscernible] block through divesting GA [indiscernible]. Is the team is suggesting that we require the divestiture of Fantasy's Emerge brand or something more than the brand?

RANDALL: So that's a good question. Your question identifies really the two issues that are most important to the team's assessment of the requirement structural remedy. Competitive impact and risk. And when I say that, I think duration and practicality are actually addressed by a structural remedy if we properly paper it.

So simply stated, to our mind, the issue we face is would a divestiture of the Emerge brand and all related intellectual property be sufficient to maintain Emerge as an existing and growing competitor or would it be necessary for the parties to divest related production facilities, related production sales, marketing and executive personnel and/or distribution assets. Now, our answer to this question will depend on the identity, and by that I mean the products and the assets and the personnel of the purchaser. And there's a substantial risk that a remedy short of a stand-alone business would fail unless, at a bare minimum, the purchaser was thoroughly vetted before we could make any agreement with respect to any remedy that only involved the Emerge brand and related intellectual property.

Even then, if the purchaser as an existing energy drink supplier, there would be a question as to whether such a purchaser would address the competitive impact of the proposed merger, especially in certain regions. So given these issues, it would seem that any such remedy would best be contemplated only in a fix-it-first context. In fact absent a fix-it-first, the team is of the view that the parties would have to be willing and able to create a stand-alone Emerge business out of its existing beverage business for purpose of any sale by a divestiture trustee should the initial sale process fail.

In short, we will need to be certain that the parties will be prepared to divest a stand-alone business should any deal short of a stand-alone business not go through so that an alternative purchaser can rapidly operate the Emerge business as it currently operates and plans to operate. I mean, frankly, to the extent that the parties do not want to engage in a fix-it-first, the package that would have to be sold at least by a divestiture trustee will have to be very robust so as to ensure it will be sold and operated as the Emerge business has operated and is anticipated to operate in the future. To be safe, this would require that any divestiture package include production facilities capable of making Emerge.

Now, as Emerge is made in Fantasy beverage plants that also make other beverage products, the team will have to consider whether a long-term tolling contract will be sufficient to ensure safe and cost-effective Emerge supply or whether the Just Energy production facilities must be included in the divestiture package. The team will also have to consider whether the divestiture package must include the in-house transportation and distribution arm of one of the parties or relevant supply contracts.

ALEXANDER: These are the right questions to ask, but before we get there, would the competitive compact issue -- issues the team has identified be resolved if we simply required the divestiture, for example, to a newer, better potential energy drink's entrants of the Emerge brand and related to intellectual property and one of the two production facilities, for example, Just Energy facilities in areas where Emerge and Thrive production facilities overlap? If seems that I am hearing that our biggest competition concern is in those regional markets where the parties' facilities overlap and the competition, at least from major brands, is less than in other regions.

While I am asking questions, if the package I have just described would not be sufficient, would that package be sufficient if the remedy also addressed the contractual provisions with retailers? Of course, if a more limited remedy is viable, we will have to ensure to every greatest extent that we are in lock-step with our neighboring agents, given that the overlapping plants in two regions in the North are on different sides of the U.S. or Canada border, and the two overlapping plants in the South Central U.S. would serve Mexican consumers, indeed the Plains and existing Texas facility would also serve Mexican consumers.

TOM: While I expect we would hear from the parties that it is sufficient to license the Emerge brand to another beverage business full-stop, I would certainly caution against accepting such a remedy, certainly, irrespective of the purchaser. For example, as the license would have to be permanent and without any conditions, so effectively a divestiture. I would certainly want to understand why a license was preferable to the sale of the entire brand.

If one were to consider a divestiture short of a stand-alone business for the buyer to step in the shoes of Fantasy, there would need to be a provision for transitional services, including with respect to any multi-purpose production facilities, product transport, distribution, information technology system structured to ensure that Fantasy could have no influence and to be in effect for as short a duration as is possible.

With respect to a divestiture that involved only the overlapping production facilities, I would note that while our assessment indicates that the anticompetitive effects would be most acute in the overlap regions, they remain significant elsewhere as well. Moreover, acquiring the overlap facilities would not come close to replacing the coverage Emerge has across the relevant areas with the economies of scale that provides, but would instead simply create a weaker brand than Emerge in those areas with the hope it can expand elsewhere to effectively replicate Emerge's existing business.

If the buyer already has access to other geographically disperse production facilities, a divestiture of just the overlap facilities would do the trick, but one would want to undertake the due diligence on the purchaser, typical of a fix-it-first remedy as it would be very difficult to craft the conditions that the purchaser would have to meet to qualify for this overlap facility divestiture. Indeed, I just can't see how this would be practical outside a fix-it-first context given that for the alternative divestiture trustee package to be effective, the parties would have to go to the effort upon closing of the proposed transaction to establish a robust Emerge stand-alone business pending any sale of the overlapping production facilities.

ALEXANDER: Perhaps we can debate the sufficiency of my more limited divestiture scenarios in the coming days, but this all suggests to me [indiscernible] with assurance that the deal will not close any time soon and the fix-it-first proposal that our [indiscernible] should be on the feasibility of creating and divesting a stand-alone merged business, at minimal for hold separate or divestiture [indiscernible] proposed and the willingness of the parties to go there.

RANDALL: Well, we agree with that. So we will first determine if such a remedy is something that the parties are willing to explore, absent a fix-it-first and a timing agreement, and if so, coordinate with our neighboring competition law agencies to ensure that all are on side, vis-a-vis, what will be required, how it will be operationalized and how and when it will be implemented. We'll also need to think about whether some crown jewel, in addition to a stand-alone business, if that is necessary, would be required and what that crown jewel might be.

Now, I assume that if the divestiture is to occur post-closing, it will be subject to our standard, hold separate, initial sale and divestiture trustee sale provisions, as well as all the appropriate monitoring provisions.

[Slide 28 - Summarize Key Issues and Reintroduce Panel One]

MELANIE AITKEN: As we have witnessed, the agency personnel are somewhat skeptical about the remedy proposed in this case, and that skepticism here, as is almost invariably the case, has two principal foundations. The first is adequacy. Will the proposed remedy sufficiently cure the harm, even assuming it can be effectively implemented? In other words, does it blunt the market power potentially available as a result of the transaction.

Second, and very practically speaking, the agency is concerned about the risks to successful implementation and ongoing efficacy. So, for example, we hear anxiety around how difficult it might be to find an acceptable buyer in all the circumstances. Moreover, the staff is clearly concerned that the behavioral elements of the remedy would have to stay in place for a long period of time to provide the runway the buyer would need to pose the competitive discipline felt necessary. Related to that, staff is reluctant to sign on to the monitoring and enforcement responsibilities inherent in behavioral or even quasi-behavioral type remedies, such as licensing.

Finally, their savvy manager notes the significance of coordination with counterparts in other jurisdictions to ensure that the remedy is not stunted through mere inadvertence or inconsistency.

[Slide 29 - Concluding Panel]

[Slide 30 - Overarching Principles]

HIRAM ANDREWS: As the ICN Merger Remedies Guide points out, the three overarching principles for remedial action are, one, need for remedy; two, tailored to harm; and three, effectiveness. These three principles were explored in the first scenario with Fantasy Beverage, who wanted to complete its acquisition of Just Energy, and also in the second scenario with the enforcement agency analyzing why the transaction presented competitive issues and how to construct an appropriately tailored remedy to address those issues.

[Slide 31 - Concluding Panel: Need for Remedy]

OMAR WAKIL: In the first scenario, we heard how James and Marta explained to their client, Doug McMahon at Fantasy Beverage, that despite their arguments about why the transaction would not harm competition, the agencies continued to push back on the merits of their arguments. Many arguments tied back to whether the market should be defined as simply energy drinks or instead something broader.

HIRAM ANDREWS: The team at the enforcement agency, including Randall, Alexander and Thomas, explained why the transaction would harm competition, particularly in light of the combined market shares of over 70 percent and the barriers to entry such as requirements for the formulation and production of the energy drinks. They concluded that the horizontal overlap, as well as the potential vertical issue, would require a remedy in order to maintain the same level of competition that existed prior to the transaction.

[Slide 32 - Concluding Panel: Tailored to Harm]

OMAR WAKIL: Given that the enforcement agency had decided that remedies would be required, James and Marta explored with Doug potential ways to tailor an appropriate remedy. Doug proposed his solution of simply agreeing not to raise prices for a period of time to address precisely the perceived risk that Fantasy would increase prices after it acquired Just

Energy.

HIRAM ANDREWS: Marta explained why this remedy, which was indeed narrowly tailored, would not be accepted by the enforcement agency, given the numerous complexities of such a proposal, including how today's price might not be the competitive price of tomorrow and how the enforcement agency would be reluctant to become a price regulator and police the prices of the company after the transaction closes. She correctly anticipates the reaction of the enforcement agency officials who dismissed this form of behavioral remedy out of hand at their meeting.

OMAR WAKIL: A potential remedy perhaps more likely to gain traction would be the possibility of divesting the Just Energy plant in the geographic areas where the two parties overlap. This structural remedy could address one aspect of the competitive concern, i.e., barriers to entry and production, but divesting the plants alone could be seen as insufficient in the eyes of the enforcement agencies.

HIRAM ANDREWS: And while we're talking about potential divestiture options, another option could be to consider divesting the Emerge brand itself to a suitable buyer. The challenge here is whether divesting simply the brand would allow someone to maintain the same level of competition that existed prior to the transaction. This may be possible, but it would depend on the resources and capabilities of the buyer.

OMAR WAKIL: It's important to note that issues identified by the enforcement agency were not limited to horizontal concerns. They also had concerns about potential foreclosure of access to shelf space. There may be ways to tailor the remedy to address this potential harm as well. Indeed, one option explored by Fantasy was simply agreeing not to enforce its exclusivity and preferential shelf placement rights for a period of time. This would help lower barriers to entry for smaller players in the energy drinks market and would be specifically tailored to address the concern of limited access to shelf space.

HIRAM ANDREWS: Yeah, that's right, but the enforcement agencies expressed reservations about this proposal, not so much from the perspective of whether it's tailored to the specific harm, but whether it would be effective in restoring the same level of competition that existed previously. This brings us to the third guiding principle for merger remedies, effectiveness.

[Slide 33 - Concluding Panel: Effectiveness]

OMAR WAKIL: If parties to a transaction are to be successful in convincing enforcement agencies to take the remedy proposals seriously, it's critical for them to demonstrate that the proposed remedy will be effective in restoring competition. As noted in the ICN Merger Remedy Guide, several important factors come into play when evaluating effectiveness, including competitive impact, duration, practicality and risk.

HIRAM ANDREWS: When one designs a proposed remedy, one needs to take into account how the remedy will change the competitive dynamics of the market post-remedy. It's critical to avoid creating a remedy that the parties to the transaction could easily thwart. In examining Fantasy's proposed remedy of not enforcing its exclusivity and preferential shelf placement rights, as Alexander pointed out in the scenario, the proposal falls short in addressing the full competitive impact of the transaction, specifically with regards to the anticompetitive effects resulting from the horizontal overlap and the parties' substantial combined shares.

OMAR WAKIL: That's right. And as Alexander also noted, the duration of this proposal may be too short at two years to facilitate sufficient entry. And, more importantly, it may also not be practical for an enforcement agency to monitor or enforce this behavioral remedy. In terms of risks, this remedy could also prevent issues with regard to how these obligations would be incorporated into a remedy order.

[Slide 34 - Concluding Panel: Possible Solution That Would Reconcile Positions]

OMAR WAKIL: So do we think Fantasy and the enforcement agency might be able to agree on a remedy that would be effective and appropriately tailored to the perceived term? Will the complexity of the potential remedies be too significant for the enforcement agency to see a path forward consistent with the overarching principles for merger remedies? Fantasy clearly sees value in the transaction, even if it were required to divest its own energy drink product, Emerge. As acknowledged by James in the first scenario, the transaction still would result in substantial synergies in combining Fantasy's beverage marketing distribution system and the leading energy drink, Thrive. And, thus, still have substantial value even if Fantasy divested Emerge.

This is an important consideration because, otherwise, Fantasy might not have the incentive to work with the enforcement agency to come up with a solution that would allow Fantasy to realize these synergies by completing the transaction.

HIRAM ANDREWS: Fantasy clearly has the motivation to find a solution, but divesting the Emerge brand would only work if Fantasy found a suitable buyer that had the requisite infrastructure, as well as the marketing and distribution system to make acquiring merely the Emerge brand successful. The enforcement agency would examine closely whether the proposed buyer would have the ability and incentive to maintain the same level of competition that existed prior to the transaction.

OMAR WAKIL: This leads to a procedural consideration, specifically whether a fix-it-first remedy should be required. When assets to be divested do not comprise an ongoing concern or stand-alone business, enforcement agencies may require a fix-it-first remedy, pursuant to which the parties will need to identify a suitable purchaser of the divested assets prior to closing. A fix-it-first remedy may make sense if there is any uncertainty about whether the parties could divest the assets to a suitable buyer within a short period of time after closing.

HIRAM ANDREWS: Fantasy could consider finding a suitable purchaser of just the four Just Energy plants in the geographic areas where the combined market share of Emerge and Thrive are substantial. Indeed, Fantasy may not need the capacity of both plants and could see selling these plants as a potential cost synergy. Fantasy also could explore a combination of these potential remedies, i.e., a structural remedy including the divestiture of the four Just Energy plants, as well as a divestiture of the Emerge brand. Enforcement agencies might see this as a viable path forward, but given that even a brand combined with four plants is not a stand-alone business, it still may be necessary, first, to identify the suitable purchaser or buyer and have the enforcement agencies approve the purchaser after concluding that the remedy would fully maintain the same level of competition that existed prior to Fantasy's proposed acquisition of Just Energy.

OMAR WAKIL: Before we conclude, one additional consideration mentioned in both scenarios is the importance of having enforcement agencies work closely with each other in deciding on which remedy will sufficiently address the competitive issue in both or several jurisdictions.

HIRAM ANDREWS: Indeed, that is one of the benefits of the ICN. Enforcement agencies have become quite good at picking up the phone and calling colleagues in other jurisdictions. This also is in merging parties' interests because having conflicting remedies imposed by different enforcement agencies has the potential to result in unworkable or, in fact, conflicting requirements or divestitures. Thus, cooperation among agencies often can be helpful in arriving at better outcomes for the merging parties as well as consumers in both jurisdictions.

[Slide 35 - Conclusion]

MELANIE AITKEN: We hope this module has been informative and even perhaps a little entertaining. There can be no question that the design of effective and efficient merger remedies poses a significant challenge to agencies and parties alike. There are some biases in that design that will be challenged. As such, agencies should be confident that they have tested and exhausted less intrusive means and are genuinely satisfied that nothing short of what they are insisting upon will sufficiently address the likely anticompetitive impact of the deal.

If confident that's the case and that the analysis supporting that position can be substantiated, while counsel will always complain, they will recognize the battle ahead if they don't persuade the client to play ball. In this process, the twin concerns of adequacy in design and risk in implementation animate the internal deliberations at the agency and drive the negotiation with the merging parties.

On behalf of all the ICN members, I would like to express our thanks to our able actors today who put a lot of work into designing a hypothetical and a script that illustrates some of the key issues to be alive to when confronting a problematic merger requiring some kind of

remedial approach. And thanks to our experts, James Musgrove, Hiram Andrews, Omar Wakil, Terry Calvani, Majid Charania, Kristina Mulligan, Randall Hofley, Alexander Cordero and Thomas Stieber. And, of course, to the generous staff at the FTC for all the work in putting this module together and arranging the logistics made more challenging by the diversity of our participants' home jurisdictions.