

# *Current and Future Trends in Remedies*

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# 1. What is new in remedies in the EC?

## *Trend to require upfront buyers*

- Upfront buyer required more often
  - Some 10 upfront buyer requirements since 2016 including:
    - *Dow/DuPont*
    - *Bayer/Monsanto*
    - *Abbott/Alere*
    - *Wabtec/Faively*
    - *Hutchison 3G Italy/WIND* (“fix-it-first”)
    - *Liberty Global/BASE Belgium* (“fix-it-first”)
    - *Ball/Rexam*
    - *Boehringer Ingelheim/Sanofi Animal Health* (“fix-it-first”)
  - 2014 to 2015: 10 upfront buyer requirements
  - Less than 10 between 2008 and 2013

## *Trend to require upfront buyers (2)*

- Complex carve-outs and uncertainties as regards the successful transition of divestment packages to the new owner
  - Identity of new owner often critical
  - (EC Remedies Notice, para. 36)
- Partly because of U.S. influence / parallel filings?
  - Although not all examples concerned global markets (*Hutchison 3G Italy*, *Liberty Global/BASE*)
- EC checking that divestments work
  - (EC Remedies Notice, paras 53-55)

## *Remedy (understandably) follows the theory of harm*

- Behavioural remedies to address vertical and conglomerate concerns
  - *Broadcom/Brocade*
  - *Qualcomm/NXP*
  - *Microsoft/LinkedIn*
- Structural remedies to address concerns regarding innovation
  - *Dow/DuPont*
  - *Bayer/Monsanto*
  - *Abbott/Alere*
- Remedies to address concerns over licensing of SEPs and non-SEPs
  - *Qualcomm/NXP*

## 2. Behavioural remedies

## *Preference for structural solutions: reality or rhetoric?*

- *“commitments which are structural in nature, such as the commitment to sell a business unit, are, as a rule, preferable ... Commitments relating to the future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances”* (EC Remedies Notice, para. 15)
- Nevertheless, we have seen a number of high profile clearances following the acceptance of behavioural remedies:
  - *Broadcom/Brocade* (EC, Phase I)
  - *Discovery/Scripps* (EC, Phase I)
  - *Microsoft/LinkedIn* (EC, Phase I)
  - *Qualcomm/NXP* (EC, Phase II)
  - *Mastercard/Vocalink* (UK, Phase I)
- Increase in supply chain and cross-market consolidation resulting in more vertical and conglomerate concerns

## *Vertical and conglomerate concerns*

- Theory of Harm: merged entity has the ability and incentive to engage in certain types of conduct which would result in a *SIEC*
- Vertical Concerns:
  - Customer foreclosure
  - Input foreclosure
- Conglomerate Concerns:
  - Tying (technical criteria/contractual)
  - Bundling (pure/mixed)
  - Other exclusionary practices
- Acknowledgement that non-horizontal effects more capable of being addressed through a non-structural solution



## *Broadcom/Brocade (EC, Phase I)*

- Theories of Harm
  - Interoperability degradation (conglomerate) (10 yrs)
  - Leaking/ misuse of competitor information (vertical) (10 yrs)
- Behavioural Remedies
  - Commitment to ensure level playing field re. interoperability
  - Commitment to ring fence competitors' confidential information

## Qualcomm/NXP Semiconductors (EC, Phase II)

- Theories of Harm
  - Raising royalties/refusal to license (vertical input foreclosure)
  - Mixed bundling and interoperability degradation (conglomerate)
  - Increase in bargaining power from combination of two large IP portfolios (conglomerate)
- Behavioural Remedies
  - Commitment to license MIFARE technology on commercial terms ‘*at least as advantageous*’ as those offered in existing licences (8 yrs)
  - Commitment to ensure level playing field re interoperability (8 yrs)
  - Patent commitment:
    - not to acquire SEPs and certain non-SEPs for 3 yrs (structural element); and
    - not to enforce rights and to grant worldwide royalty free licences to other non-SEPs (for as long as patent owner)

## *Discovery/Scripps (EC Phase I)*

- EC has a history of accepting behavioural remedies in media mergers – recent examples include (i) *Liberty/De Vijver* (2015) and (ii) *Liberty/Ziggo* (2014)
- Theories of harm tend to be vertical concerns relating to input/customer foreclosure in content supply chain
- *Discover/Scripps*
  - Theory of Harm: horizontal unilateral effects in the market for the wholesale supply of basic Pay-TV channels, due to an increase in the merged entity's bargaining power
  - Behavioural Remedy: WMO commitment to make two 'TVN24' channels available to current and future TV distributors in Poland for a reasonable fee determined by reference to comparable agreements (7 yrs)

## *Other notable examples*

- *Mastercard/Vocalink*: IP sub-licensing and network access commitments (UK, Phase I Clearance)
- *Microsoft/LinkedIn*: commitments relating to non-installation/removal; interoperability; and access to “*Microsoft Graph*” (EC, Phase I Clearance)
- *Deutsche Boerse/LSE*; *Cemex Croatia/Heidelberg*; *Hutchinson/02* – all opposed following offer of behavioural remedies

## *Behavioural takeaways*

- Blueprint for behavioural remedies
  - Early engagement with Theories of Harm ✓
  - Keep it simple ✓
  - Include adequate, workable provisions for:
    - Monitoring (Monitoring trustee/ third party monitor) ✓
    - Enforcement ✓
    - Dispute resolution ✓
  - “Call a spade a spade” ✓
  - Allow sufficient time for market testing ✓
- The year ahead:
  - *AT&T/Time Warner*
  - *Apple/Shazam* (EC, Phase II)

### 3. Trend toward structural remedies in innovation intensive sectors

## *Dow/DuPont (EC Phase II)*

- Global divestment of certain assets from DuPont's Herbicide Division and Insecticide Division ("Carve-out")
  - Addressed reduction of competition in a number of markets for existing pesticides, eliminated overlap
- Global R&D Divisions and Divestment Pipeline except the Retained Pipeline (so-called "Reverse carve-out")
  - Removed perceived concerns regarding the parties' reduced incentives to pursue ongoing parallel innovation efforts or to develop and bring to market new pesticides
- Combination of R&D organisation and downstream assets which are integrated preserved viability and competitiveness
- Upfront purchaser requirement (criterion that the purchaser shall be a company already active in the crop protection industry)
- *"any asset or personnel which is not covered by the Commitments but which is both used (exclusively or not) in the Divested Business and necessary for its continued viability and competitiveness, that asset or adequate substitute will be offered to potential purchasers."* [Para. 4036 Decision]

## *Becton Dickinson/Bard (EC Phase I)*

- Divestment of BD's worldwide core needle biopsy device line of business ("Carve-out")
  - Removed overlap and addressed concerns of reduced choice and innovation
- Divestment of pipeline projects related to core needle biopsy products and tissue markers
  - Addressed concerns of elimination of credible future competitor of Bard and reduction in innovation in tissue markers
- Upfront purchaser (criterion that purchaser has proven expertise in interventional radiology, R&D, manufacturing, marketing and sales)



# 4. International remedies

## *Global mergers in recent years*

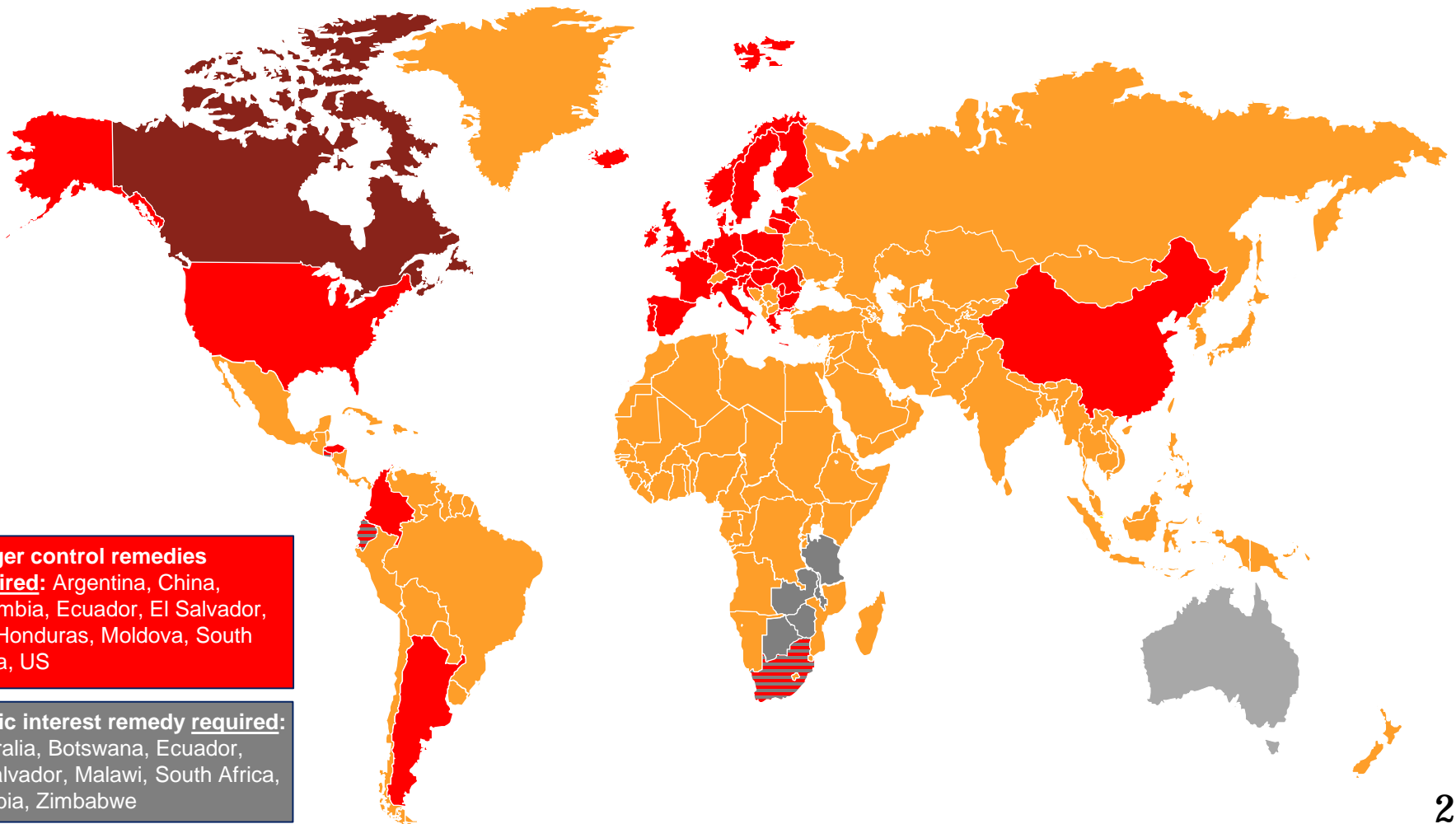
- Proliferation of jurisdictions where transactions need to be notified
  - Uncertainty of timing because of increasing diverging requirements
    - Information to be submitted?
    - Remedies?
- **Cooperation with regulators around the globe is key for a successful process**

# *ABI/SAB Miller – notifications in 29 jurisdictions*



**Notified and cleared:** Argentina, Albania, Australia, Botswana, Canada, Chile, China, Colombia, Ecuador, El Salvador, Ethiopia, EU, Honduras, India, Kenya, Malawi, Mexico, Moldova, Namibia, South Africa, South Korea, Swaziland, Tanzania, Turkey, Ukraine, Uruguay, US, Zambia, Zimbabwe

## *ABI/SAB Miller – remedies in 19 jurisdictions*



**Merger control remedies required:** Argentina, China, Colombia, Ecuador, El Salvador, EU, Honduras, Moldova, South Africa, US

**Public interest remedy required:** Australia, Botswana, Ecuador, El Salvador, Malawi, South Africa, Zambia, Zimbabwe

## *AB InBev's experience in a nutshell*

- ABI's global antitrust strategy was designed to proactively address antitrust concerns
- The parties' geographic footprint was very complementary
- Still, remedies required in a high number of jurisdictions
- Split between behavioural (e.g. South Africa & Australia) and divestment (e.g. EU & US) remedies or both (e.g. Ecuador & US)
- Transaction was governed by the UK Takeover Code; proactively reaching agreements with potential remedy takers around the world was crucial to timing
- **Proactive regulatory strategy allowed us to close a complex transaction (and most of the large disposals) within 11 months from announcement**

## *Lessons learned*

<b>Takeaway</b>	<b>Observations</b>
Cooperation with regulators is key	<ul style="list-style-type: none"> <li>• Achieve desired timeline</li> <li>• Early outreach to identify any potential issues</li> <li>• Can create a “win-win” situation</li> </ul>
Preparation is critical	<ul style="list-style-type: none"> <li>• Feasibility assessment advisable for future major projects</li> <li>• Identify and analyse key legal issues at an early stage</li> </ul>
Stay focused on global objectives	<ul style="list-style-type: none"> <li>• Global perspective is key</li> <li>• Separate “<i>must haves</i>” from “<i>nice to haves</i>” at local level</li> </ul>
Always expect surprises	<ul style="list-style-type: none"> <li>• No amount of preparation can entirely remove uncertainty</li> <li>• However, preparation does allow you to anticipate and react more quickly to issues as they arise</li> </ul>

## *Main themes*

- Many authorities may be concerned now - ICN mergers working group had over 60 members in 2016
- Useful guidance in ICN Practical Guide to International Enforcement Cooperation in Mergers and ICN Merger Remedies Guide
  - <http://www.internationalcompetitionnetwork.org/uploads/library/doc1031.pdf>
  - <http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf>
- Need to align timing of filings and remedy discussions
- International cooperation between agencies on remedies; but some may be local and specific
- Rights to walk away and break fees
- China can be a particular concern
  - Remaining conditions in *Seagate/Samsung* and *Western Digital/Viviti* only lifted in late 2017. But this is an extreme example

# 5. Practical comments/discussion



## *Stating the obvious?*

- Remedy planning is important: If the remedy undermines the core target of the transaction, no point in proceeding
- Remedies are not just about “throwing out the excess ballast” so that the deal floats; regulators require that the divested assets go to a company that will use them
- Need to think about remedy:
  - design; and
  - implementation
- In upfront buyer cases, organizing the sales process, the hold separate etc. and the main transaction agreement is very intensive work

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