THE MERGER CONTROL REVIEW

FOURTEENTH EDITION

Editor
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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions such as Malaysia are continuing to consider imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, the international business community had a wake-up call when, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is imperative, therefore, that counsel develop a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file a notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 25 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely developments.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers and nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard (China having consolidated its three antitrust agencies into one agency in 2018). Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany amended its law to ensure that it has the opportunity to review transactions in which, although the parties' turnovers do not reach the threshold, the value of the transaction is significant (e.g., social media, new economy, internet transactions). Other jurisdictions are also focused on ensuring that acquisitions involving smaller internet, online and data companies or, in other high-technology settings, a nascent competitor, do not escape review.

Newly adopted laws have tried to vest jurisdiction on these transactions by focusing on the 'value of the consideration' rather than turnover for acquisitions of nascent firms, particularly in the digital economy (e.g., in Austria and Germany). Some jurisdictions have also adopted a process to call in transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability to review and take action in non-reportable transactions (see discussion of *Google/Fitbit* in the International Merger Remedies and Japan chapters), and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time. To provide the ability to review acquisitions of nascent but potentially important rivals, the European Commission (EC) has adopted potentially the most significant change in its rules: to use the referral process from Member States to vest jurisdiction in transactions that fall below its thresholds but that could have Community-wide significance. In one such matter, *Illumina/GRAIL*, the EC invited national competition authorities to request a referral of the transaction, even though it did not meet the review thresholds of the EU Merger Regulation or any national merger control rules (in fact, GRAIL had no sales at all in the European Union). At the time of writing, according to reports, the EC has since accepted Article 22 referral requests in three other cases (*Meta/Kustomer*, *Viasat/Inmarsat* and *Cochlear/Oticon Medical*), although in each of these the transaction triggered the national merger control thresholds in at least one EU Member State.

There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction; however, there are some that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be any effect on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there is similarly no 'local' effect required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a self-assessment of whether the transaction will meet certain levels and, if so, should notify the agency to avoid a potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa have been in connection with these considerations. Notably, the current leadership at the US antitrust authorities have similarly suggested that their mandate under the antitrust laws is broader than the traditional focus on consumers and consumer welfare to include impact on labour, diversity and other considerations. It is unclear at this point how this shift will affect enforcement decisions and judicial challenges. Although a growing number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, competition law provides that the government can prohibit a merger if it determines that the merger could potentially affect national security.

Some jurisdictions are exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands, where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing firm defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed owing to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even when the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriarche group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing. In 2021, Morocco similarly imposed a fine for failure to notify a transaction in excess of US$1 million.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for late notifications (e.g., Bosnia and Herzegovina, Indonesia and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

The United States and the EC both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as gun-jumping, even fining companies that are found to be in violation. For example, the EC imposed a €124.5 million fine on Altice and, in 2023, fined Illumina €432 million for its closing of the *Grail* transaction. Other jurisdictions have become increasingly aggressive in the imposition of fines. Brazil, for instance, issued its first gun-jumping fine in 2014 and later issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively

sensitive information before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority; however, in Canada – like the United States – the Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction; however, the KFTC continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. This list of jurisdictions is illustrative rather than comprehensive and is consistent with the overarching concerns expressed above regarding catching transactions that may have fallen below the radar but are subsequently deemed problematic. In the same spirit, the EC has fined companies on the basis that the information provided at the outset was misleading (for instance, it fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based on the size of the transaction; however, some jurisdictions determine the fee after filing or provide different fees based on the complexity of the transaction.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the JFTC announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Even within the EC, there remain some jurisdictions that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria. Finally, some jurisdictions have developed a fast-track process for transactions that are unlikely to raise antitrust concerns (e.g., because the parties' combined shares of potential relevant markets are all below a certain threshold or because of the size of the transaction). China and the EC are two such regimes in which the adoption of this fast-track process can make a significant difference to the review period.

The role of third parties also varies across jurisdictions. In some (e.g., Japan), there is no explicit right of intervention by third parties but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal; the

Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In other jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was fined by the antitrust authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). In Hong Kong, the authority has six months post-consummation to challenge a transaction. Norway is also a bit unusual in that the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

In large cross-border transactions raising competition concerns, it is becoming the norm for the US, Canadian, Mexican, EC and UK authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's competition authority, which, in turn, has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the EC in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including, most recently, Peru and India. China has consulted with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the US Federal Trade Commission and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other

jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have raised the size threshold at which filings are mandated (e.g., Austria), others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an acquisition of control. Many of these jurisdictions, however, will include, as a reportable situation, the creation of joint control, negative (e.g., veto) control rights to the extent that they may give rise to *de jure* or de facto control (e.g., Turkey), or a change from joint control to sole control (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which an interest of only 10 per cent or less is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use as the benchmark the effect that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has material influence (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers have also been the subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an acquisition subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute, to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that structural remedies are preferable to behavioural conditions, a number of jurisdictions in the past few years have imposed a variety of behavioural remedies (e.g., China, the EC, France, Italy, Japan, the Netherlands, Norway, South Africa, Ukraine and Vietnam). This is particularly the case when non-compete or exclusive dealing relationships raise concerns (e.g., in Mexico and the United States). Some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers*

transaction, China's Ministry of Commerce remedy in *Glencore/Xstrata* and France's decision in the *Numericable/SFR* transaction). It is important to note, however, that one of the areas flagged for change by the new leadership at the US antitrust authorities is the willingness to consider behavioural remedies, or, for that matter, any remedies, rather than bringing enforcement actions to challenge the transaction itself.

In many of the key enforcement regimes (e.g., the United States, Canada, China and the United Kingdom), we are at a potentially transformational point in competition policy enforcement; however, this book should provide a useful starting point in navigating cross-border transactions in this changing enforcement environment.

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Chapter 1

INTERNATIONAL MERGER REMEDIES

Frédéric Louis and Cormac O'Daly[1]

I INTRODUCTION

When planning an acquisition or merger involving global companies, merging parties often concentrate on obtaining merger approvals in the United States and the European Union, in the expectation that other countries' regulators would follow the substantive lead provided by those authorities. However, with the growth in national merger control systems and other regulators' increased activity, other countries' regulators may also significantly affect a deal. Similarly, the extent of international cooperation on mergers has grown steadily.[2] For example, the International Competition Network (ICN) mergers working group included 21 countries in 2006 but that had risen to more than 60 in 2020.[3]

So, while in practice the United States and the European Union – and, especially since Brexit, perhaps also the Competition and Markets Authority (CMA) in the United Kingdom – remain priority jurisdictions because of the economic importance of the territories they cover and their influence, parties should also consider the possible need for remedies in other jurisdictions, tailored to deal with other specific concerns, or the application of similar principles to local markets.

Some local interventions remain pragmatic rather than strict, because sometimes a competition authority in a smaller country may consider that it cannot enforce its will on a big deal occurring abroad when there are no local assets in that country, or because the

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2 For example, the European Commission (EC) relied on cooperation with multiple foreign antitrust authorities in 55 per cent of all cases it investigated in 2016 and 2017, including merger and antitrust cases. See mLex report of 4 May 2018. In 2021, several antitrust authorities, including the EC, the US Federal Trade Commission (FTC), the Canadian Competition Bureau (CCB) and the UK Competition and Markets Authority (CMA), launched a multilateral working group to analyse the effects of mergers in the pharmaceutical sector. See EC press release, IP/21/1203, 16 March 2021.

3 See International Competition Network (ICN), 'Merger Working Group 2020–2023 – Working Group structure and 3-year plan', at p. 1 (www.internationalcompetitionnetwork.org/wp-content/uploads/2020/09/Workplan2020-23MWG.pdf (accessed 13 June 2023)).

authority may be concerned that if it presses a company too far, the company might withdraw from the local market.[4] However, even then, such a situation may still lead to behavioural remedies in that country.

With all this in mind, merger planning should cover (1) aligning the timing of filings, (2) substantive assessments and (3) remedy design worldwide, dealing with any jurisdiction where substantial lessening of competition or dominance issues could arise.[5] The review should also assess whether other national economic or public interest factors could exist.

Parties must also take account of authorities' most recent practice regarding remedies. A critical development in this context is the apparent increasing reluctance by the United States to accept behavioural remedies, or even any remedies at all. The US Federal Trade Commission (FTC) has refused to accept remedies in several recent transactions and instead wanted them blocked.[6] In January 2022, Jonathan Kanter, Assistant Attorney General of the Antitrust Division at the US Department of Justice (DOJ), went further and also indicated that he would rather block mergers that are likely to lessen competition than accept complex settlements, whether behavioural or structural:

> *I am concerned that merger remedies short of blocking a transaction too often miss the mark. Complex settlements, whether behavioral or structural, suffer from significant deficiencies. Therefore, in my view, when the division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction. It is the surest way to preserve competition.*[7]

As at May 2023, the DOJ has not entered a consent decree to resolve a merger investigation. Moreover, several high-level FTC officials have also expressed scepticism about remedies, albeit the FTC has kept open the possibility of resolving merger investigations with consent

4 See, for example, the Business and Industry Advisory Committee (BIAC) contribution to the Organisation for Economic Co-operation and Development (OECD) Roundtable on 'Cross-Border Merger Control: Challenges for Developing and Emerging Countries', February 2011 (OECD Roundtable, 2011) at pp. 316–19.

5 See, for example, the European Union (EU) and Australia contributions to the OECD Roundtable, 2011 (op. cit. note 4), pp. 153 and 105, respectively.

6 See, e.g., *Illumina/GRAIL* FTC Matter/File No. 201 0144, Docket No. 9401; *Lockheed/Aerojet* FTC Matter/File No. 211 0052, Docket No. 9405; *Nvidia/Arm* FTC Matter/File No.2110015, Docket No. 9404. Nvidia offered commitments to address the EC's preliminary concerns about its proposed acquisition of Arm; however, the EC considered them insufficient and did not test them with market participants. See the EC's press release, IP/21/6262, 24 November 2021 and Nvidia's press release of 7 February 2022, 'NVIDIA and SoftBank Group Announce Termination of NVIDIA's Acquisition of Arm Limited' (https://nvidianews.nvidia.com/news/nvidia-and-softbank-group-announce-termination-of-nvidias-acquisition-of-arm-limited (accessed 12 June 2023)).

7 See US Department of Justice (DOJ) press release of 24 January 2022, 'Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section' (www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york (accessed 12 June 2023)).

decrees.[8] In June 2022, for example, FTC chair Lina Khan said that the pattern of negotiating with transaction parties to remedy their deals is 'not work the agency should have to do'.[9] She added that the FTC would focus 'resources on litigating, rather than on settling'.[10]

This new trend in the United States is expected to incentivise transaction parties to consider fix-it-first strategies, whereby they enter into an agreement with a third party during the agency review, or even conclude a divestment before submitting a Hart-Scott-Rodino notification.[11] How this will affect other countries remains to be seen but there is a clear risk that the scope of the fix-it-first proposal, or the identity of the buyer of the divested business, will not remedy concerns that other reviewing agencies may have.

In Section II, we highlight some prominent cases that illustrate the diverse issues raised in international merger remedies: (1) the *Seagate/Samsung* and *Western Digital/Viviti* cases; (2) *Dow/DuPont*; (3) *Glencore/Xstrata*; (4) two examples of particularly effective cooperation between agencies: *Cisco/Tandberg* and *UTC/Goodrich*; (5) *Danaher/GE Healthcare Life Sciences Biopharma*; and (6) *Cargotec/Konecranes*.[12] We then outline some of the key context, drawing on Organisation for Economic Co-operation and Development (OECD) studies[13] (see Section III). We also refer to the ICN's Merger Guides. Finally, we offer some practical conclusions for companies and their advisers (see Section IV).

II PROMINENT CASES

i Seagate/Samsung and Western Digital/Viviti

Although not recent examples, these two global mergers remain particularly interesting for international merger remedies.

8 See WilmerHale client alert, Leon B Greenfield, Hartmut Schneider, Dominic Vote, Joseph B Conahan, Jennifer Milici and Jonathan R Wright, 'Fix-It-First: Navigating a Seismic Shift in US Antitrust Agency Approaches to Merger Remedies' (20 April 2023) (https://www.wilmerhale.com/en/insights/client-alerts/20230420-fixitfirst-navigating-a-seismic-shift-in-us-antitrust-agency-approaches-to-merger-remedies (accessed 12 June 2023)).

9 Margaret Harding McGill 'FTC's new stance: Litigate, don't negotiate', AXIOS (9 June 2022) (https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan (accessed 12 June 2023)).

10 id. Similarly, in February 2023, FTC Bureau of Competition director Holly Vedova observed that the FTC was moving away from remedies with 'numerous, complicated, and long-standing entanglements'. See 'Update from the FTC's Bureau of Competition, Remarks at 12th Annual GCR Live: Law Leaders Global Conference' (3 February 2023) (https://www.ftc.gov/system/files/ftc_gov/pdf/vedova-gcr-law-leaders-global-conference.pdf (accessed 12 June 2023)).

11 Forterra SEC 8-K Filing of 24 November 2021 (https://www.sec.gov/ix?doc=/Archives/edgar/data/0001678463/000167846321000078/frta-20211124.htm (accessed 12 June 2023)); Forterra SEC 8-K Filing of 13 December 2021 (https://www.sec.gov/ix?doc=/Archives/edgar/data/0001678463/000167846321000082/frta-20211213.htm (accessed 12 June 2023)); Forterra SEC 8-K Filing of 16 February 2022 (https://www.sec.gov/ix?doc=/Archives/edgar/data/0001678463/000167846322000013/frta-20220216.htm (accessed 12 June 2023)).

12 Other notable transactions that required review and remedies in numerous jurisdictions are listed in the annexe at the end of this chapter.

13 OECD Roundtable, 2011 (op. cit. note 4) and Policy Roundtable on Remedies in Cross-Border Merger Cases 2013 (OECD Roundtable, 2013) (see www.oecd.org/daf/competition/Remedies_Merger_Cases_2013.pdf (accessed 12 June 2023)).

As a result of the two transactions, five hard disk drive (HDD) manufacturers became three and, in some market segments, the level of concentration was greater.[14] Ultimately, most jurisdictions decided to clear the transactions in the sector for HDDs for storage of digital data on the condition that Western Digital (WD) sold some production assets to Toshiba. However, although China's Ministry of Commerce (MOFCOM)[15] allowed the transactions to go through, it imposed materially different remedies with worldwide impact.

The European Union, the United States and China each had different approaches to the essentially simultaneous transactions. The European Commission (EC) treated them under a 'first come, first served' rule, so that *Seagate/Samsung*, which was notified to the EC one day before *WD/Viviti*, was assessed against the market situation before the *WD/Viviti* transaction, whereas *WD/Viviti* was assessed against the backdrop of *Seagate/Samsung*.[16] The FTC treated both cases as occurring simultaneously. MOFCOM assessed each deal separately, as if the other had not happened.

Both the US and EU authorities[17] cleared the *Seagate/Samsung* transaction without any remedy, whereas MOFCOM required the two businesses to be held separate until potential subsequent approval.

The EU, US, Japanese and Korean authorities diverged from China on what remedies were required in *WD/Viviti*. The European Union required *WD/Viviti* to divest certain production assets, including a production plant, to an approved third party before closing the deal.[18] The United States did the same, requiring a named up-front buyer (Toshiba).[19] The Japanese and Korean authorities also required similar divestitures.[20] However, in addition to this divestiture, MOFCOM required that WD and Viviti be held as separate businesses until approved.[21]

14 See the EC's decisions in Case COMP/M.6214, *Seagate/HDD Business of Samsung* (http://ec.europa.eu/competition/mergers/cases/decisions/m6214_3520_2.pdf (accessed 12 June 2023)); and Case COMP/M.6203, *Western Digital Ireland/Viviti Technologies* (http://ec.europa.eu/competition/mergers/cases/decisions/m6203_20111123_20600_3212692_EN.pdf (accessed 12 June 2023))

15 Since May 2018, the State Administration for Market Regulation (SAMR) has been responsible for Chinese merger control.

16 Similarly, when assessing three deals in the agricultural chemicals sector, the EC assessed the transactions on a priority or on a first come, first served basis. *Dow/DuPont*, which was the first transaction notified to the EC and which is discussed in greater detail in Section II.ii, was analysed in light of the market conditions that existed at the time of that notification so ChemChina's (then future) acquisition of Syngenta and Bayer's (then future) proposed acquisition of Monsanto were not taken into account. When assessing Bayer's acquisition of Monsanto, the EC took account of both the *Dow/DuPont* and *ChemChina/Syngenta* deals and the remedies offered in those two proceedings.

17 EC press release, IP/11/213, 19 October 2011; Federal Register, Vol. 77, No. 48, 12 March 2012, p. 14525.

18 EC press release, IP/11/1395, 23 November 2011.

19 Federal Register (op. cit. note 17), pp. 14523–25; *In the matter of Western Digital Corporation*, FTC Decision and Order (www.ftc.gov/os/caselist/1110122/120305westerndigitaldo.pdf (accessed 12 June 2023))

20 See, for example, www.jftc.go.jp/en/pressreleases/yearly-2011/dec/individual-000460_files/2011_Dec_28.pdf (accessed 12 June 2023).

21 In December 2014, Western Digital (WD) announced that it agreed to pay a fine of approximately US$100,000 for not having fully complied with its hold-separate requirement (see http://investor.wdc.com/releasedetail.cfm?ReleaseID=886733 (accessed 12 June 2023).

MOFCOM imposed other behavioural obligations;[22] for example, Seagate was required to invest significant sums during each of the next three years to bring forward more innovative products.

There was widespread cooperation between the competition authorities: for example, the FTC states that its staff cooperated with authorities in Australia, Canada, China, the European Union, Japan, Korea, Mexico, New Zealand, Singapore and Turkey, including working closely on potential remedies.[23] Since many of these authorities did not have bilateral or multilateral cooperation agreements, one can only imagine that this was a varied and informal process.

Finally, at a practical level, the same trustees were appointed in the United States and the European Union for the *WD/Viviti* divestiture remedy, while others were appointed in China.

MOFCOM's approach raised several points

Many of the customers (the computer companies buying the HDDs) manufacture in China. Some of the merging parties' production facilities were also in China, which therefore had a particularly strong interest in these cases.

In both decisions, MOFCOM emphasised its concern to allow large computer manufacturers to keep their 'procurement model', in which they divide their demand among two to four manufacturers.[24] MOFCOM was also evidently concerned by the prospect of reduced competition; it noted that when WD lost HDD production capacity because of floods in Thailand in 2011 and raised selling product prices, other HDD manufacturers followed, with some product prices rising by more than 100 per cent.[25]

One may interpret MOFCOM's imposition of hold-separate remedies as being diplomatic to its US and EU counterparts when it was not comfortable with the level of concentration if the two transactions went through. Rather than outright prohibitions, the hold-separates gave opportunities to see whether things might change in the future and whether Toshiba, with its new assets, could develop to become a third force in HDD.

However, the problem for the parties was clearly that it left them unable to achieve the desired synergies from their investments and that they faced considerable uncertainty as to what the future held. In short: although the equity transfers could occur, the parties did not know when, if at all, they would be able to fully integrate the businesses, or if they would later face an order to divest.

In October 2015, MOFCOM partially lifted the hold-separate obligation on *WD/Viviti* and, in November 2015, MOFCOM removed the hold-separate obligation on

22 China's Ministry of Commerce (MOFCOM) continued to impose additional behavioural remedies in international transactions. For example, in 2017, it imposed behavioural remedies in the *Dow/DuPont* case discussed in Section II.ii. In *Broadcom/Brocade*, MOFCOM imposed a prohibition on tying or bundling of certain products in addition to remedies designed to maintain interoperability and confidentiality of business secrets (see http://english.mofcom.gov.cn/article/policyrelease/announcement/201709/20170902639616.shtml (accessed 12 June 2023); remedies relating to interoperability and confidentiality were also imposed in both the EU and the United States (US).

23 Federal Register (op. cit. note 17), p. 14525, column 3.

24 See MOFCOM *Seagate/Samsung* and *WD/Viviti* decisions, both at Paragraph 2.3. This procurement position was also noted in the EC *Seagate/Samsung* decision; see Paragraph 329.

25 MOFCOM *Seagate/Samsung* and *WD/Viviti* decisions, Paragraph 2.6.

the *Seagate/Samsung* transaction, allowing full integration (while still maintaining certain other behavioural commitments).[26] In both cases, the remaining conditions were valid until October 2017 and they lapsed some five or six years after the transactions closed.

Hold-separate remedies of this kind are not usual in the United States or the European Union, mainly because, if they accept remedies, authorities favour clear-cut structural remedies. The use of such remedies, therefore, is a topic of some controversy.[27]

ii Dow/DuPont

The merger between Dow and DuPont is a good example of a transaction requiring clearance in multiple jurisdictions and of regulators requiring differing remedies.[28] Both parties were leading agrochemical companies and they had overlapping activities in many markets, including crop protection and pesticide markets (such as herbicides, insecticides and fungicides) and petrochemical markets.

In March 2017, the EC cleared the transaction subject to extensive structural remedies.[29] Among other things, the EC found that the merger would have reduced competition in some EU Member States on the markets for certain pesticides. To address these concerns, the parties proposed, among other things, to divest DuPont's pesticide business. The divestment was subject to an up-front buyer requirement, so the parties could not close their transaction until the EC approved the buyer.[30]

In addition, the EC was concerned that the transaction would reduce innovation.[31] Controversially, its decision highlights not only potential competition between the parties and their overlapping pipeline products but also reduced innovation at the overall industry level, rather than on particular relevant antitrust markets. To address these concerns, the EC required that the parties divest almost all of DuPont's global research and development organisation.[32]

In May 2017, MOFCOM also cleared the transaction, albeit subject to both structural and behavioural remedies.[33] MOFCOM's structural remedies largely mirror those entered into with the EC. In addition, however, MOFCOM required behavioural commitments apparently to address issues that were specific to China. These included obligations to supply

26 See http://english.mofcom.gov.cn/article/policyrelease/announcement/201510/20151001148009.shtml and the mLex report of 16 November 2015.

27 In November 2017, MOFCOM imposed a hold-separate remedy in Advanced Semiconductor Engineering's acquisition of Silicon Precision Industries (see http://english.mofcom.gov.cn/article/policyrelease/buwei/201711/20171102677556.shtml (accessed 12 June 2023)). This investigation concerned two companies that were based in Taiwan and engaged in outsourcing services for semiconductor packaging and testing. This was the first time that MOFCOM had imposed a hold-separate remedy since 2013 (*MediaTek/MStar*) – see mLex report of 29 November 2017. Interestingly, the hold-separate imposed in *Advanced Semiconductor Engineering/Silicon Precision Industries* automatically expired after 24 months, which was much clearer for the parties than the continuing review imposed on Seagate and WD.

28 In addition to the jurisdictions discussed here, the transaction was also reviewed in some 20 other countries, including Australia, Brazil, Canada and India.

29 Case M.7932, *Dow/DuPont* (http://ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.pdf (accessed 12 June 2023)).

30 See decision, Paragraph 4044.

31 See decision, Section V.8, Paragraphs 2000–20 and Section V.8.4.1, which outline the EC's theory of harm.

32 See decision, Paragraphs 4032–35.

33 See http://english.mofcom.gov.cn/article/policyrelease/announcement/201705/20170502577349.shtml (accessed 12 June 2023).

relevant products to Chinese customers 'at reasonable prices (i.e., not higher than the average price over the past 12 months)' for a period of five years and an obligation not to require distributors to sell certain products exclusively during the same period.[34]

In June 2017, the DOJ announced that it would require divestments of a number of crop protection and petrochemical products before the deal could proceed.[35] Unlike the EC, however, the DOJ did not require any divestments to address a potential reduction in competition in innovation. Noting its close cooperation with the EC during its review of the transaction, the DOJ's press release states: 'Like the European Commission, the Antitrust Division examined the effect of the merger on development of new crop protection chemicals but, in the context of this investigation, the market conditions in the US did not provide a basis for a similar conclusion at this time.'[36] The DOJ also did not require any behavioural remedies.

iii Glencore/Xstrata

In October 2012, the South African Competition Commission (SACC) recommended clearance, with remedies, of the acquisition of Xstrata's mining business by Glencore's trading and production group, after close scrutiny of the acquisition's implications for coal supply in South Africa.[37] The SACC found that there was no substantial lessening of competition. However, in the public interest, conditions were imposed regarding proposed job losses, limiting them to 80 employees initially, with a further loss of 100 lower-level employees a year later and a financial contribution towards their retraining. Similar conditions have been imposed in many other cases.[38]

In April 2013, MOFCOM cleared the acquisition, subject to different remedies compared with those previously agreed with the European Union.[39] MOFCOM raised concerns despite market share levels on a worldwide or Chinese basis that generally would not raise concern in other jurisdictions.

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34 ibid., at Section VI at Obligations III, IV and V.

35 See www.justice.gov/opa/pr/justice-department-requires-divestiture-certain-herbicides-insecticides-and-plastics (accessed 12 June 2023).

36 In contrast, reduced competition in innovation was a concern in Canada (www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04247.html (accessed 12 June 2023)). The Australian Competition and Consumer Commission (ACCC) noted that its competition concerns would 'be addressed by the global divestments' (www.accc.gov.au/media-release/accc-wont-oppose-proposed-merger-of-dow-and-dupont-in-australia (accessed 12 June 2023)).

37 See South African Competition Commission (SACC), 2012/13 Annual Report, p. 17 (www.compcom.co.za/wp-content/uploads/2019/10/annual-report-2012-2013.pdf (accessed 12 June 2023)).

38 See, for example, the SACC's decision in *AB InBev/SABMiller* (www.reuters.com/article/us-sabmiller-m-a-abinbev/south-africa-clears-ab-inbevs-takeover-of-sabmiller-idUSKCN0ZG1DH (accessed 12 June 2023)).

39 See WilmerHale, Lester Ross and Kenneth Zhou, 'China Clears Glencore's Acquisition of Xstrata Subject to Remedies', 26 April 2013 (www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=10737421260 (accessed 12 June 2023)). The Chinese text is available at http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400091222.shtml (accessed 12 June 2023). See also EC press release, IP/12/1252, 22 November 2012.

Nevertheless, MOFCOM imposed structural and behavioural remedies, apparently after consultations with other government departments. Glencore agreed to:

a dispose of Xstrata's Las Bambas copper mine project in Peru by June 2015;[40]

b guarantee a minimum supply of copper concentrate to Chinese companies until 2020, including pre-defined volumes at negotiated prices; and

c continue to sell zinc and lead to Chinese producers under both long-term and spot prices at fair and reasonable levels until 2020.

It appears, therefore, that the Chinese authorities were concerned about national economic development goals and the fragmented nature of Chinese buyers with weak bargaining power, given Chinese dependency on imports of these metals.[41]

The risk of broader factors being a basis for intervention and remedies is therefore another important factor to bear in mind in some jurisdictions.

iv Cisco/Tandberg and United Technologies Corporation/Goodrich

Cisco's acquisition of Tandberg, which led to overlaps in videoconferencing solutions, and United Technologies Corporation's (UTC) acquisition of Goodrich in the aviation sector, are two examples of effective cooperation between regulators, here the EC and the DOJ and, in *UTC/Goodrich*, additionally with the Canadian Competition Bureau (CCB).

In *Cisco/Tandberg*, Cisco proposed remedies to the EC to increase interoperability between its products and those of its competitors.[42] The DOJ's press release, announcing that it would not challenge Cisco's acquisition, expressly noted the commitment entered into with the EC. Assistant Attorney General Christine Varney noted: 'This investigation was a model of international cooperation between the US and the European Commission. The parties should be commended for making every effort to facilitate the close working relationship between the Department of Justice and the European Commission.'[43]

Similarly, in *UTC/Goodrich*, the EC, the DOJ and the CCB all approved UTC's acquisition on the same day. The EC and the DOJ accepted very similar remedies, which were of both a structural and a behavioural nature.[44] The CCB noted that these remedies 'appear to

40 As far as we are aware, the first instance of MOFCOM requiring divestiture of assets outside China was Panasonic's acquisition of Sanyo in 2009 (for further discussion on this, see the 2014 edition of *The Merger Control Review*, at p. 492). MOFCOM is clearly not the only authority to require divestitures outside its jurisdiction. For example, in *Anheuser-Busch Inbev/Grupo Modelo*, the DOJ required the sale of a Mexican brewery, which was located only five miles from the US border and had good transport links to the US, and which was therefore a key part of a US remedy (see www.justice.gov/opa/pr/justice-department-reaches-settlement-anheuser-busch-inbev-and-grupo-modelo-beer-case (accessed 12 June 2023)). The purchaser was also required to expand the brewery's capacity and meet defined expansion milestones.

41 Similar issues appear to have arisen when MOFCOM cleared *Marubeni/Gavilon*, which involved the acquisition by Marubeni, the Japanese trading house, of the agricultural trader, Gavilon (see http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400100376.shtml (Chinese text) (accessed 12 June 2023)).

42 See the EC's decision in Case No. COMP/M.5669, *Cisco/Tandberg* (http://ec.europa.eu/competition/mergers/cases/decisions/m5669_2153_2.pdf (accessed 12 June 2023)).

43 www.justice.gov/atr/public/press_releases/2010/257173.htm (accessed 12 June 2023).

44 See the EC's press release (http://europa.eu/rapid/press-release_IP-12-858_en.htm (accessed 12 June 2023)) and the DOJ's press release (www.justice.gov/opa/pr/justice-department-requires-divestitures-order-united-technologies-corporation-proceed-its (accessed 12 June 2023)).

sufficiently mitigate the potential anticompetitive effects in Canada' and, in particular, since no Canadian assets were involved, it decided not to impose any remedies.[45] It appears that the three authorities were in frequent contact throughout this investigation. The EC and the DOJ worked closely on implementation of the remedies, jointly approving the hold-separate manager and monitoring trustee.[46] The DOJ's press release also noted its discussions with the Federal Competition Commission in Mexico and the Administrative Council for Economic Defence in Brazil.

v Danaher/GE Healthcare Life Sciences Biopharma

Danaher's acquisition of GE Healthcare Life Sciences' Biopharma business (GE Biopharma) is also an interesting example of a merger involving cooperation between multiple agencies, in this case in Brazil, China, the European Union, Israel, Korea and the United States, both in analysing the transaction and the remedies.[47]

Given the complexity of the markets,[48] the cooperation appears to have been useful in aligning remedies.

Both parties were suppliers of products and services used in the bioprocessing industries and the merger involved overlaps in several markets.[49] The Brazilian and Japanese authorities approved the transaction without any remedy,[50] whereas the parties offered to divest several businesses to alleviate competitive concerns raised by the agencies in China, the European Union, Korea and the United States.

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45 See PaRR report of 26 July 2012, 'Canadian Competition Bureau issues a no action letter for Goodrich/United Technologies due to remedial orders issued by US and European antitrust authorities' and OECD Roundtable, 2013 (op. cit. note 13), at p. 36.

46 See OECD Roundtable, 2013 (op. cit. note 13), at pp. 92 and 93, and https://centrocedec.files.wordpress.com/2015/07/icn-merger-working-group-interim-report-on-the-status-of-the-international-merger-enforcement-cooperation-project2014.pdf (accessed 4 July 2023), at p. 20.

47 See FTC press release of 19 March 2020, 'FTC Imposes Conditions on Danaher Corporation's Acquisition of GE Biopharma' (www.ftc.gov/news-events/press-releases/2020/03/ftc-imposes-conditions-danaher-corporations-acquisition-ge (accessed 12 June 2023)); PaRR report of 4 February 2020, 'GE/Danaher conditionally approved by Korean antitrust regulator'. The *Danaher/GE Biopharma* transaction was also approved by the Russian Competition Authority; see Danaher press release of 19 March 2020, 'Danaher Receives Clearance from U.S. Federal Trade Commission for the Acquisition of the Biopharma Business of General Electric Life Sciences' (https://investors.danaher.com/2020-03-19-Danaher-Receives-Clearance-From-U-S-Federal-Trade-Commission-For-The-Acquisition-Of-The-Biopharma-Business-Of-General-Electric-Life-Sciences (accessed 12 June 2023)).

48 The Korean authority stated that the conditional approval of this merger was its first remedy required in a merger in the bioprocess product market; see PaRR report of 4 February 2020, 'GE/Danaher conditionally approved by Korean antitrust regulator'.

49 For example, the EC concluded that the merger would lead to concerns regarding certain products in microcarriers, bioprocess filtration, chromatography and molecular characterisation markets, but did not find any competition issues in other markets that are part of the single-use technology, bioprocess filtration, chromatography and other life sciences areas; see EC press release of 18 December 2019, 'Mergers: Commission approves Danaher's acquisition of GE Healthcare Life Sciences' Biopharma Business, subject to conditions' (https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6809 (accessed 12 June 2023)). The Korean authority found that the merger would not lead to competitive concerns in 24 of 32 product markets: PaRR Reporting on 'GE/Danaher conditionally approved by Korean antitrust regulator'.

50 mLex report of 4 February 2020, 'Danaher–GE Biopharma approved in South Korea, with bioprocessing divestment conditions'.

The remedies, mainly focusing on concerns around actual competition, consisted of the divestment of several of Danaher's businesses. China's State Administration for Market Regulation (SAMR) also had concerns regarding potential competition, requiring Danaher to also provide the purchaser of the divested business package with an unfinished project and to continue research and development for two years after the closing of the deal, in addition to divestment of several businesses.[51]

As for the timing of the regulatory process, following the announcement of the deal in February 2019,[52] the merger control review procedures took different paths in the European Union, the United States and China. The parties notified the merger to the EC in November 2019 and obtained conditional approval in December 2019 after a Phase I review of the transaction. The EC granted purchaser approval in a separate decision in March 2020.[53] This is another example of the time constraints in a Phase I review not allowing the EC to review and approve the purchaser at the same time as it analysed the main transaction[54] (even though the proposed purchaser was already known).[55]

In China, the parties first notified in April 2019 and then withdrew the notification to refile in December 2019. The SAMR conditionally approved the merger in February 2020. Similar to the EC procedure, the SAMR approved the same proposed purchaser of the divestment businesses in a separate decision. Danaher completed the sale of the divestiture to Sartorius on 30 April 2020.[56]

In contrast to the two-step procedure in China and the European Union, the last regulatory authority to approve the *Danaher/GE Biopharma* transaction conditionally, the FTC, announced its approval of the main transaction and the proposed purchaser at the same time.[57]

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51 mLex report of 25 March 2020, 'Danaher's purchase of GE Healthcare biopharma unit wins conditional antitrust clearance in China'.

52 See Danaher press release of 25 February 2019, 'Danaher to Acquire the Biopharma Business of General Electric Life Sciences for $21.4 Billion' (https://investors.danaher.com/2019-02-25-Danaher-to-Acquire-the-Biopharma-Business-of-General-Electric-Life-Sciences-for-21-4-Billion (accessed 12 June 2023)).

53 According to its public case register, the EC approved the purchaser on 18 March 2020 (https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9331 (accessed 13 June 2023)).

54 For a recent analysis of the EC's purchaser approval decisions, see Virginia Del Pozo and John Ratliff, 'Fad or future: Is the growth in EU "upfront buyer" and "fix-it-first" remedies just a trend or here to stay?', *Competition Law Insight*, September 2018, Vol. 17-9, p. 3.

55 See Danaher press release of 21 October 2019, 'Danaher Reaches Agreement to Sell Certain Businesses to Sartorius AG as Part of the GE Biopharma Acquisition Regulatory Process' (http://investors.danaher.com/2019-10-21-Danaher-Reaches-Agreement-To-Sell-Certain-Businesses-To-Sartorius-AG-As-Part-Of-The-GE-Biopharma-Acquisition-Regulatory-Process (accessed 13 June 2023)).

56 See Danaher press release of 30 April 2020, 'Danaher Completes Sale of Certain Businesses To Sartorius AG To Satisfy Regulatory Requirement For Cytiva Acquisition' (http://investors.danaher.com/2020-04-30-Danaher-Completes-Sale-Of-Certain-Businesses-To-Sartorius-AG-To-Satisfy-Regulatory-Requirement-For-Cytiva-Acquisition (accessed 13 June 2023).

57 See FTC press release of 19 March 2020, 'FTC Imposes Conditions on Danaher Corporation's Acquisition of GE Biopharma' (www.ftc.gov/news-events/press-releases/2020/03/ftc-imposes-conditions-danaher-corporations-acquisition-ge (accessed 13 June 2023)).

Interestingly, it appears that the same monitoring trustee was appointed, at least in the United States and the European Union, offering efficiencies in the implementation and oversight of the divestment plan.[58]

vi Cargotec/Konecranes

Cargotec's proposed merger with Konecranes – both of which are global leaders in container and cargo handling equipment – is an example of antitrust agencies adopting diverging approaches regarding remedies despite an apparently close and constructive collaboration[59] among, notably, the DOJ, the Australian Competition and Consumer Commission (ACCC), the EC and the CMA. Although the EC cleared the transaction with structural remedies on 24 February 2022,[60] the parties abandoned the transaction on 29 March 2022 following a prohibition from the CMA.[61] One day before the CMA's prohibition, the DOJ had informed the parties that the proposed settlement also did not address its concerns.[62]

Although the EC's conditional clearance was an exception compared with the approaches adopted elsewhere, this does not mean that there was not valuable cooperation between the different authorities; on the contrary, the authorities reiterated the importance of joint efforts and their commitment to cooperation. The Assistant Attorney General in the DOJ's Antitrust Division underlined that the authorities reached similar substantive outcomes and that 'efforts to engage in regulatory arbitrage didn't work'.[63] EU Executive Vice President Vestager emphasised that EU and UK regulators had the same analysis of the problems posed by the deals, but a different approach to the remedies.[64] Notably she

58 See FTC, Order to Hold Separate and Maintain Assets of 19 March 2020 (www.ftc.gov/system/files/documents/cases/c4710gedanahermaintainassets.pdf (accessed 13 June 2023)); also see the EC's approval of the monitoring trustee on 20 December 2019 (https://ec.europa.eu/competition/mergers/cases/additional_data/m9331_3268_3.pdf (accessed 13 June 2023)). The SAMR and the Korean authority did not publish press releases on the monitoring trustee or the procedures following the conditional approval of the main transaction.

59 See DOJ press release of 29 March 2022, 'Shipping Equipment Giants Cargotec and Konecranes Abandon Merger After Justice Department Threatens to Sue' (www.justice.gov/opa/pr/shipping-equipment-giants-cargotec-and-konecranes-abandon-merger-after-justice-department (accessed 13 June 2023)).

60 See EC press release, IP/22/1329, 24 February 2022.

61 See CMA press release of 29 March 2022 (www.gov.uk/government/news/cma-blocks-planned-cargotec-konecranes-merger (accessed 13 June 2023)).

62 See DOJ press release of 29 March 2022, 'Shipping Equipment Giants Cargotec and Konecranes Abandon Merger After Justice Department Threatens to Sue' (op. cit. note 59).

63 mLex report of 8 April 2022, 'International divergence on Cargotec-Konecranes merger doesn't undermine cooperation, enforcers say'.

64 mLex report of 31 March 2022, 'Cargotec and Konecranes resolved EU competition concerns, Vestager insists'. One month before its *Cargotec/Konecranes* decision, the CMA cleared the *S&P Global/IHS Markit* deal with remedies. The EC had previously cleared this transaction unconditionally. The CMA's senior director of mergers, Joel Bamford, emphasised the importance of early engagement between authorities even if outcomes are not identical across jurisdictions; see mLex report of 18 November 2021, 'S&P Global-IHS Markit review is a model for merger cooperation, CMA's Bamford says'. The ACCC's chair, Gina Cass-Gottlieb, emphasised during an address in May 2022 that agencies make independent decisions and can reach different conclusions even if collaboration has been constructive; see MLex report of 4 May 2022, 'Company tactics slow global merger reviews, Australian competition chief says'.

highlighted that, given the positive market reaction to the companies' proposed remedies and the fact that the European courts would be able to review the EC's decision, the EC had little discretion but to clear the deal subject to the remedies.

In May 2023, in *Microsoft/Activision*, the CMA and the EC diverged on Microsoft's proposals to resolve competition concerns in the cloud gaming market. The CMA adopted a decision blocking the transaction, having identified a number of shortcomings with Microsoft's proposed behavioural remedies;[65] however, the EC conditionally cleared the deal and noted that the proposed behavioural remedies would 'unlock significant benefits for competition and consumers in the cloud gaming market'.[66] Unusually, the CMA's Twitter feed stated that the EC's remedy 'would allow Microsoft to set the terms and conditions for this market for the next 10 years' and said that the CMA was standing by its decision, which is now under appeal.[67] In December 2022, the FTC had sought to block the acquisition, noting additional concerns regarding the gaming console and multi-game subscription services markets.[68]

III CONTEXT

There are a number of key points that should be borne in mind when considering international merger remedies.

First, international mergers tend to present two types of remedy situations: local remedies and international remedies common to many jurisdictions. Not surprisingly, when addressing international remedies, there is potential for conflict both in substantive assessments and remedies, since the competition authorities work with their specific laws and from their different regional or national perspectives, and often with different approaches[69] and inputs (e.g., in terms of market testing results).[70]

65 See CMA press release of 26 April 2023 (https://www.gov.uk/government/news/microsoft-activision-deal-prevented-to-protect-innovation-and-choice-in-cloud-gaming (accessed 13 June 2023)).

66 See EC press release, IP/23/2705, 15 May 2023.

67 See CMA thread of 15 May 2023 on Twitter (@CMAgovUK) (https://twitter.com/CMAgovUK/status/1658131200181952516 (accessed 13 June 2023)).

68 See FTC press release of 8 December 2022, 'FTC Seeks to Block Microsoft Corp.'s Acquisition of Activision Blizzard, Inc.' (https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-block-microsoft-corps-acquisition-activision-blizzard-inc (accessed 13 June 2023)).

69 An interesting case in 2020, illustrating how cases may be dealt with differently in different jurisdictions, is *Novelis/Aleris*. It was cleared with remedies in the EU; see EC press release of 1 October 2019, 'Mergers: Commission clears Novelis' acquisition of Aleris, subject to conditions' (https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5949 (accessed 13 June 2023)); in the US, the DOJ agreed to refer the question of the correct market definition to arbitration. In light of a successful award, the DOJ's required remedy applied; see press release No. 20-290, 'Justice Department Wins Historic Arbitration of a Merger Dispute: Novelis Inc. Must Divest Assets to Consummate Transaction with Aleris Corporation' (www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute (accessed 13 June 2023)).

70 Barry Nigro, Deputy Assistant Attorney General, Antitrust Division in the DOJ, has also commented that proposals to divest carved-out assets, as opposed to stand-alone businesses, were 'inherently suspect for several reasons' (GCR Report, 2 February 2018). It remains to be seen if this is an indication that the DOJ is going to become more hostile to divestments of carved-out assets.

Second, as noted above, there is increasing international cooperation on remedies.[71]

There are, for example, frequent contacts between authorities through the OECD[72] and the ICN.[73] The work of these organisations is in parallel and is not case-specific,[74] but rather provides a forum for regular discussions and a network of contacts between individuals, so that authorities can notify each other and discuss broadly what they are doing about a particular case. However, such coordination should not be underestimated and many of the examples discussed and quoted in these reports are very revealing.[75]

For example, in October 2013, the OECD Competition Committee held a 'Roundtable on Remedies in Cross-Border Merger Cases'. Among other things, the Secretariat pointed to cooperation and coordination as effective tools to prevent parties from playing authorities against each other, such as using commitments accepted by one authority as leverage against others.[76] The Roundtable report emphasised that cooperation between authorities is most effective if parties grant confidentiality waivers and allow authorities to communicate early on in their investigations and if the timing of reviews is aligned insofar as is possible.[77] The Roundtable report also highlighted the advantages of appointing common enforcement and monitoring trustees to enforce cross-border remedies.[78]

There has also been an ICN initiative to improve cooperation between competition authorities on mergers. Notably, the ICN Merger Working Group presented a 'Practical Guide to International Enforcement Cooperation in Mergers' (the ICN Practical Guide) at

71 The importance of collaboration between national competition authorities was highlighted by the DOJ in its 2020 Merger Remedies Manual, at pp. 19–20 (www.justice.gov/atr/page/file/1312416/download (accessed 13 June 2023)). In particular, the DOJ noted: 'Where possible, while the Division continues its investigation of the transaction, it welcomes opportunities to cooperate with international and state antitrust authorities to enact more efficient and effective merger remedies.' In the same vein, the UK, Australian and German competition authorities released a joint statement on 20 April 2021 on their common understanding of the need for rigorous and effective merger enforcement (www.gov.uk/government/publications/joint-statement-by-the-competition-and-markets-authority-bundeskartellamt-and-australian-competition-and-consumer-commission-on-merger-control/joint-statement-on-merger-control-enforcement (accessed 13 June 2023)).

72 See, for example, the 2003 OECD Roundtable on Merger Remedies, the 2011 OECD Global Forum on Competition and the OECD Roundtable, 2011 (op. cit. note 4), all available on the OECD website (www.oecd.org).

73 See, for example, the ICN Merger Working Group, Merger Remedies Review Project report, June 2005, and the Teleseminar on Merger Remedies in February 2010, both available on the ICN website (www.internationalcompetitionnetwork.org).

74 See the ICN Merger Working Group Interim Report on the Status of the International Merger Enforcement Cooperation Project (https://centrocedec.files.wordpress.com/2015/07/icn-merger-working-group-interim-report-on-the-status-of-the-international-merger-enforcement-cooperation-project2014.pdf (accessed 13 June 2023)).

75 A more recent OECD survey has shown that a majority of OECD member countries increasingly consider other authorities' remedies almost as a standard practice; see OECD (2022), 'International Co-operation on Competition Investigations and Proceedings: Progress in implementing the 2014 OECD Recommendation', p. 51 (www.oecd.org/daf/competition/international-cooperation-on-competition-investigations-and-proceedings-progress-in-implementing-the-2014-recommendation.htm (accessed 13 June 2023)).

76 See OECD Roundtable, 2013 (op. cit. note 13), at p. 10.

77 ibid., at, inter alia, pp. 5 and 6.

78 ibid., at, inter alia, p. 6.

the ICN 2015 Annual Conference in Sydney.[79] The purpose of this relatively short Guide (14 pages) is to facilitate effective and efficient cooperation between agencies through identifying agency liaisons and possible approaches for information exchange. The Guide creates a voluntary framework for inter-agency cooperation in merger investigations and provides guidance for agencies willing to engage in international cooperation, as well as for parties and third parties seeking to facilitate cooperation. For example, the Guide explains the need for timing alignment to facilitate meaningful communication between agencies at key decision-making stages in an investigation; how cooperation between agencies may vary in a case; how information (including documents) may be exchanged through waivers; how agencies may organise joint investigations (e.g., interviews); and – last but not least for present purposes – how agencies may cooperate on remedy design and implementation.

In 2016, the ICN also published a 'Merger Remedies Guide', outlining best practices on remedy design and complementing the ICN Practical Guide.[80] This is an extensive work (some 54 pages). It also emphasises the need for timing alignment and international cooperation on remedies in multi-jurisdictional mergers and offers practical tips for competition authorities on how to do that[81] and examples of cooperation on remedies.[82]

There are also other layers of cooperation based on bilateral agreements. Clearly cooperation between Europe and the United States is close and important.[83] It has developed from the first cooperation agreement between the EC and the DOJ in 1991[84] up to the 2011 Best Practices on Cooperation in Merger Investigations.[85] There are also specific agreements between the European Union and Switzerland,[86] and between Australia and New Zealand.[87] Cooperation can be case-specific, where supported by appropriate waivers

79 www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf (accessed 13 June 2023).

80 www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf (accessed 13 June 2023).

81 See Annex 1, p. 29.

82 See Annex 6, in which, for example, cooperation on remedies in *Nestlé/Pfizer*, *Holcim/Lafarge* and *Pfizer/Wyeth* is outlined.

83 The US contribution to the OECD Roundtable, 2013 (op. cit. note 13), also highlights the cooperation between the EC and the FTC in the *General Electric/Avio* investigation at p. 85. Regarding the EU contribution, the interesting example of *Pfizer/Wyeth* is also highlighted, including the close coordination between the EU and US authorities on the set-up of two different EU and US divestment packages to two purchasers; the cooperation between two trustees, where one subcontracted to the other on an ad hoc basis on some issues; and the transitional supply of a product divested in the EU package by manufacturing in the premises divested in the US package (see p. 43).

84 'Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws', 23 September 1991, reprinted in EU OJ L95, 27 April 1995, corrected at EU OJ L131/38, 15 June 1995 (http://ec.europa.eu/competition/international/legislation/usa01.pdf (accessed 13 June 2023)).

85 US–EU Merger Working Group, 'Best Practices on Cooperation in Merger Investigations' (http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf (accessed 13 June 2023)).

86 See EC press release, 17 May 2013 (http://europa.eu/rapid/press-release_IP-13-444_en.htm (accessed 13 June 2023)). This 2013 agreement envisages 'an advanced form of cooperation' in the form of information sharing.

87 See the OECD Roundtable, 2011 (op. cit. note 4), p. 102. The OECD Roundtable, 2013 notes how, following a change in its laws, the Brazilian authority has built informal relationships with multiple agencies to promote cooperation; see p. 28.

of confidentiality.[88] In 2019, the DOJ cooperated with 11 international counterparts on 20 different merger matters.[89] The DOJ and the FTC have concluded a general 'best practice' agreement with the CCB;[90] the ACCC signed a memorandum of understanding with MOFCOM to enhance communication on merger review cases;[91] and, in October 2015, the EC signed a best practices framework agreement with MOFCOM for cooperation on reviewing mergers.[92] Since then, the EC has cooperated with (what is now) the SAMR in at least five merger review cases.[93]

Beyond this, many competition authorities emphasise that they cooperate even without such formal structures.[94] Several authorities have given examples of cooperation in cross-border merger cases. Some agencies have held joint discussions with the parties to the merger and many have exchanged documents after the necessary waivers had been granted.[95] Cooperation has often led to coordination of remedies.[96]

Agencies may cooperate even without waivers on the basis of public information or 'agency non-public information', such as an agency's procedures regarding timing and views on the competitive assessment.[97] The *Nestlé/Pfizer Nutrition* case is an example of successful

88 Antitrust authorities from the five BRICS countries (Brazil, Russia, India, China and South Africa) were reportedly concluding an agreement to enable easier information exchange between them. See mLex report of 12 May 2015.

89 See mLex report of 17 September 2019, 'DOJ's Delrahim breaks down agency's efforts to protect consumers'.

90 www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03704.html (accessed 13 June 2023).

91 See www.accc.gov.au/media-release/australia-and-china-to-increase-cooperation-on-mergers-regulation (accessed 13 June 2023).

92 See http://europa.eu/rapid/press-release_IP-15-5843_en.htm (accessed 13 June 2023).

93 See the EC's 'Report on Competition Policy 2018', p. 25 (https://ec.europa.eu/competition/publications/annual_report/2018/part1_en.pdf (accessed 13 June 2023)).

94 See the US, EU and UK contributions to the OECD Roundtable, 2011 (op. cit. note 4), at pp. 296, 153 and 288–89, respectively.

95 See https://centrocedec.files.wordpress.com/2015/07/icn-merger-working-group-interim-report-on-the-status-of-the-international-merger-enforcement-cooperation-project2014.pdf (accessed 13 June 2023) at p. 6, which gives examples of 'joint investigative tools', including joint calls, meetings, interviews and requests for information.

96 In its assessment of the *Praxair/Linde* merger, the FTC cooperated with agencies in Argentina, Brazil, Canada, Chile, China, Colombia, the EU, India, Korea and Mexico. The FTC required Praxair and Linde to divest assets in certain industrial gas markets, including source contracts equal to all of Praxair's helium source contract volume less the volumes that the EC and the SAMR ordered to be divested; see FTC press release of 22 October 2018, 'FTC Requires International Industrial Gas Suppliers Praxair, Inc. and Linde AG to Divest Assets in Nine Industrial Gas Markets as a Condition of Merger' (www.ftc.gov/news-events/press-releases/2018/10/ftc-requires-international-industrial-gas-suppliers-praxair-inc (accessed 13 June 2023); also see EC press release of 20 August 2018, 'Mergers: Commission clears merger between Praxair and Linde, subject to conditions' (https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5083 (accessed 13 June 2023)). However, it should be noted that three years after the closing of the deal, on 2 December 2021, Argentina's National Commission for Competition Defence raised concerns about the acquisition and indicated its intention to impose remedies because of concerns that it would harm competition in more than 20 national gas markets; see National Commission for Competition Defence Decision of 29 November 2021 (www.argentina.gob.ar/sites/default/files/2021/12/conc-1663-dictamen-reso.pdf (accessed 13 June 2023)).

97 See ICN, 'Merger Cooperation and Information Exchange Types of Information' (www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/MWG-Types-of-information.pdf (accessed 13 June 2023)).

cooperation between agencies even without the use of waivers. The ACCC started cooperating with the Competition Commission of Pakistan (CCP) while the two agencies' investigations into the proposed acquisition were at different stages: the ACCC was still in its preliminary investigation stage, while the CCP was already reviewing the transaction in Phase II. The parties did not provide these two agencies with waivers; as a result, discussions were limited to non-confidential information. However, it appears from the ICN Practical Guide that the cooperation was beneficial for both agencies' understanding of the relevant markets and theories of harm.[98]

In the ICN Practical Guide, when discussing the *Thermo Fisher Scientific/Life Technologies* case, it is also emphasised that the degree of cooperation between agencies may vary, even in the same transaction.[99]

Third, although a competition authority may decide to defer to review by more established authorities, many also consider that reliance on a foreign authority might not deal adequately with local concerns.[100] This was well illustrated in Singapore's contribution to the OECD Roundtable on 'Cross-Border Merger Control: Challenges for Developing and Emerging Countries' (OECD Roundtable, 2011):

> *It is important to note that although the acceptance of commitments in overseas jurisdictions may be relevant in [the Competition Commission of Singapore's, (CCS)] assessment of the competitive impact of the merger in Singapore, commitments accepted by overseas competition authorities do not necessarily imply that CCS will allow the merger to proceed in Singapore. Any overseas commitments must be viewed in light of the facts and circumstances of the case, to see if they are capable of addressing competition concerns arising within Singapore, if any.*[101]

Interestingly, in the *Unilever/Sara Lee* case, the SACC also indicated in the OECD's 'Cross-border Merger Control Report 2011' that it looked at whether it was correct to require divestiture of the Status brand, when the European Union had already required divestiture of the Sanex brand. The SACC noted that, since it does not make practical and commercial sense only to own a brand in certain parts of the world, South Africa could be faced with a double divestiture. The SACC considered whether the divestiture of Sanex would have been enough for South Africa as well, but concluded it would not, since the brand was still small there.[102] The SACC appears, therefore, to have shown sensitivity for the effects of other jurisdictions' remedies internationally, while also showing that such remedies still do not outweigh a local concern.

98 See www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf (accessed 13 June 2023), at p. 9.

99 See ibid., at pp. 3–4.

100 See the Singapore contribution to the OECD Roundtable, 2011 (op. cit. note 4), pp. 249–50, discussing the proposed *Prudential/AIA* transaction and its specific impact on insurance in the Singapore market, and the related Global Forum slides.

101 See the Singapore contribution to the OECD Roundtable, 2011 (op. cit. note 4), p. 249.

102 See the South African contribution to the OECD Roundtable, 2011 (op. cit. note 4), p. 260.

In February 2023, the Korean regulator delayed its final approval of the remedies in *Korean Air/Asiana Airlines*, noting that it would hold another meeting 'to finalise the contents of the remedies' to reflect the results of the then ongoing review in other jurisdictions.[103]

Fourth, when considering worldwide transactions, it is important to bear in mind the related point that each competition authority views things from its own jurisdictional perspective. Notably, even when the US and EU authorities find worldwide markets and recognise worldwide dynamics, the US decision concerns the effect on US commerce and the EU decision is based on the compatibility of the transaction with the (EU) internal market.[104] Even if contacted by and cooperating with other competition authorities, the US and EU competition authorities are not ruling on the effects elsewhere, for instance, in Brazil, Korea or Singapore.

As Korea notes in the OECD Roundtable, 2011:

> *As for now, only a few large jurisdictions like the US or EU have full control over large-scale international M&As. However, because such large competition authorities tend to impose remedies focused on anticompetitive effect on their own domestic markets, adverse impact [on] developing countries might suffer [if] not adequately controlled.*[105]

The *Google/Fitbit* transaction is a good example of this. Although the authorities in the European Union, Japan and South Africa approved the transaction conditionally, the ACCC's website states, at the time of writing, that 'this matter has become an enforcement investigation of a completed merger'.[106] The ACCC had already indicated doubts regarding the competitiveness of the merger and the adequacy of the remedies approved in other jurisdictions in light of Google's accumulation of data.[107]

Fifth, a competition authority may consider that it cannot just rely on another jurisdiction's remedy to ensure enforcement.[108] An authority may need its own order, albeit modelled generally on a remedy accepted in other jurisdictions. For example, in *Agilent Technologies/Varian*, the ACCC required Agilent to comply with its commitments to the EC to divest itself of several businesses and accepted the two proposed purchasers.[109] In so doing,

103 See the Korean regulator's decision of 22 February 2022 (in Korean only) in *Korean Air/Asiana Airlines*, p. 19 (https://content.mlex.com/Attachments/2022-02-21_P536NJPU4M29MXEL%2FKFTC_Korean%20Air.pdf (accessed 13 June 2023)). See also https://assets.publishing.service.gov.uk/media/6391fa038fa8f53bafa725b6/Korean_Air_Asiana_-_Decision_that_UIL_might_be_accepted_.pdf (accessed 13 June 2023) at footnote 8.

104 See, for example, the US contribution to the OECD Roundtable, 2011 (op. cit. note 4), p. 296. Similarly, post-Brexit, the EC and the UK's CMA will frequently be considering markets that are European Economic Area-wide, but each authority will be considering the effects in its own territory.

105 See the Korean contribution to the OECD Roundtable, 2011 (op. cit. note 4), p. 170.

106 https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/google-llc-proposed-acquisition-of-fitbit-inc (accessed 13 June 2023).

107 See mLex report of 26 March 2021, 'Comment: Opposition to Google's Fitbit move leaves Australia as a global M&A outlier'.

108 See the OECD Roundtable, 2011 (op. cit. note 4), p. 30.

109 See 'Undertaking to the Australian Competition and Consumer Commission', 30 March 2010, Paragraphs 2.16–2.18, 43 and 44 (http://transition.accc.gov.au/content/index.phtml/itemId/921363 (accessed 13 June 2023)).

however, the ACCC noted that the purchasers had 'established and effective Australian distribution arrangements'. In other words, the ACCC checked that the EC remedy also worked in Australia.[110]

Sixth, a competition authority may decide that it cannot order a structural remedy involving assets outside its jurisdiction because it lacks the means to enforce it and, therefore, accepts a behavioural remedy instead. This was the position, for example, of the United Kingdom in *Drager/Airshields*.[111] It also appears often to be the position of newer competition authorities, or those in smaller countries.[112]

Seventh, managing timing as far as possible is a major issue in achieving cohesive remedies. Competition authorities do not like it when a favourable review in one jurisdiction is then used to pressurise them to follow suit. They also do not like being a 'non-priority' jurisdiction that is only contacted late in the day. Not surprisingly, therefore, they advocate simultaneous contacts to facilitate simultaneous reviews of the same transaction. Practitioners also tend to emphasise the need to 'work back from the end' (i.e., where possible, filing earlier in jurisdictions that may take longer to rule). Competition authorities also try to manage things so that the authorities are of like mind at the key time when they have to make similar closing decisions on remedies.

Two FTC officials have made the point well in the context of remedies, noting a case where time was lost dealing with the unique concern of an agency brought into the process late on. It appears that an up-front buyer had been agreed by all the reviewing authorities previously 'but then a new agency was brought in at the last minute and was unable to approve the potential buyer. We had to locate and approve another buyer that satisfied all agencies, adding months to the process and delaying the deal'.[113]

110 See OECD Roundtable, 2013 (op. cit. note 13), at p. 30 for Brazil requiring similar locally enforceable remedies.

111 See the UK contribution to the OECD Roundtable, 2011 (op. cit. note 4), pp. 289–91 and the ICN Merger Working Group, Merger Remedies Review Project report, Bonn 2005, Appendix L, pp. 53–56.

112 See BIAC contribution to the OECD Roundtable, 2011 (op. cit. note 4), pp. 316–19. See also Allen & Overy's 'Global trends in merger control enforcement', at p. 16 (www.allenovery.com/global/-/media/allenovery/2_documents/news_and_insights/campaigns/global_trends_in_merger_control_enforcement/merger_control_2018.pdf (accessed 13 June 2023)), which notes increased use of behavioural remedies globally but not in the EU, the US or the UK. In a joint statement of 20 April 2021, the competition authorities in the UK, Australia and Germany noted the need to favour structural remedies over behavioural remedies, since behavioural remedies may, among other things, distort the natural development of the market, while placing a burden on competition agencies and businesses owing to the extensive post-merger monitoring that can be required (www.gov.uk/government/publications/joint-statement-by-the-competition-and-markets-authority-bundeskartellamt-and-australian-competition-and-consumer-commission-on-merger-control/joint-statement-on-merger-control-enforcement (accessed 13 June 2023)).

113 See Licker and Balbach, 'Best Practices for Remedies in Multinational Mergers', *IBA Competition Law International*, September 2010, Vol. 6-2, p. 22.

Usefully, they emphasise the need to plan the remedies phase, especially if an up-front buyer may be required,[114] taking into account the differences in authorities' practices, such as the way that the FTC selects a purchaser itself, whereas in the European Union, the parties or the divestment trustee may carry out that task, then propose the result to the EC; and the actual timing requirements of each authority's procedure requiring publication of proposals for comment, among other things.

Interestingly, in the *Springer/Funke* cases (concerning television programme magazines), the German and Austrian competition authorities cooperated in the implementation of remedies that addressed different competition concerns in each country. According to the ICN Practical Guide, owing to the structure of the transaction, the merging parties could only avoid serious risks for the implementation of the remedies if they were able to obtain the Austrian agency's approval first. The timing and sequence of the two conditional clearance decisions and their implementation were therefore critical. The German and Austrian authorities coordinated on timing to ensure the successful completion of the transaction.[115]

Coordination on timing can also be complicated by post-completion antitrust reviews. Argentina's National Commission for Competition Defence raised concerns about the *Linde/Praxair* merger and indicated an intention to impose remedies three years after the parties' notification and the closing of the deal.[116]

IV CONCLUSIONS FOR COMPANIES AND THEIR ADVISERS

In light of the above, companies and their legal advisers should plan on a global scale, including as regards remedies, especially if some jurisdictions want an up-front buyer.

Parties should not assume that the more established competition authorities in the United States and the European Union are the only ones that matter. Clearly, those authorities are critically important, because they are responsible for large markets and their procedures and analyses are highly developed, which means that their decisions are often influential in other parts of the world. However, markets that appear worldwide in scope may often be more limited in practice, which may mean that important and varied concerns of other authorities need to be addressed. Nor should parties assume that the newer authorities, or those in smaller countries, which in the past have tended to defer to the larger, longer-established authorities, will always do so. Whether because of concerns about local effects, or through a desire to have a locally enforceable remedy, those authorities may also intervene.

Particularly in light of situations such as MOFCOM's remedies in *Seagate/Samsung* and *WD/Viviti*, parties must consider carefully the purchaser's 'walk-away' rights, any related

114 See the Australian contribution to the OECD Roundtable, 2013 (op. cit. note 13), at p. 16, which cites the ACCC and the FTC's parallel approval of the same up-front buyer in the *Pfizer/Wyeth* transaction. See also FTC press release (www.ftc.gov/news-events/press-releases/2009/10/ftc-order-prevents-anticompetitive-effects-pfizers-acquisition (accessed 13 June 2023)). Interestingly, in *Nestlé/Pfizer Nutrition*, the ACCC consulted with the SACC regarding the suitability of an up-front buyer that previously had been an exclusive licensee for Pfizer products in South Africa; see OECD Roundtable, 2013 (op. cit. note 13), at pp. 17 and 18. Apart from the cooperation between the ACCC and the Competition Commission of Pakistan noted above, the Chilean, Colombian and Mexican authorities also cooperated closely during their investigations; see OECD Roundtable, 2013 (op. cit. note 13), at p. 68.

115 See www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf (accessed 13 June 2023), at p. 14.

116 See National Commission for Competition Defence Decision of 29 November 2021 (op. cit. note 96).

vendor's break-up fees and valuation rules in the purchase agreement. Given that the initial clearance in those cases was just an equity clearance, not allowing the business synergies, some purchasers may consider this to be simply too onerous and, in effect, not a clearance; nor will they be willing to deal with ongoing hold-separates and the uncertainty of subsequent review. As shown in those cases, remedies like this can take a long time to work through.

Parties should also consider how to involve all relevant competition authorities appropriately and to facilitate those authorities conducting their investigations in parallel and in consultation with each other, taking into account their likely demands (e.g., up-front buyer or not) and the practicalities of different timings for the approval of remedies.[117]

That may mean:

a talking to the authorities concerned prior to filing, and filing earlier in one jurisdiction than another, or accepting a 'stop-the-clock' solution to allow an authority to catch up;

b a willingness to offer waivers of confidentiality, such as the standard models available through the ICN or the websites of the EU and US authorities (although clearly provided that the authorities concerned give sufficient assurance on maintaining confidentiality, especially where industrial policy considerations may come into play in local review); and

c talking to less-central authorities early on to ensure that they have enough information to consider that they could reasonably defer to others.

If possible, the parties should include a review clause in any undertakings given, so that they can be adjusted to other authorities' demands. For example, in the (old) *Shell/Montecatini* case, the European Union required divestiture of one holding in a joint venture to protect one technology, while the United States required divestiture of the other linked to a rival technology. Fortunately, the parties were able to go back to the European Union for review and revise their EU undertaking in light of the US one.[118] This need for flexibility was illustrated in the *Bayer/Monsanto* case, where Bayer had to request the EC's approval of two modifications to its prior commitments, which had already been approved by the EC to 'address competition concerns arising in other jurisdictions'.[119]

As illustrated in some of the case studies in Section II, the Chinese process often takes longer than others. As such, early contact with the SAMR is advisable.[120]

Parties and their advisers also need to determine whether scepticism regarding behavioural, and even structural, remedies may affect them, all the more so if that approach

117 www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf, at Paragraph 22.

118 Case IV/M.269, EC decisions of 8 June 1994 and 24 April 1996; FTC File 941 0043, press release, 1 June 1995. Generally, the OECD Roundtable, 2013 notes the potential need to consult with other authorities if an authority revises a remedy after clearance; see p. 7.

119 See mLex report of 11 April 2018.

120 MOFCOM's delay in clearing the planned *Omnicom/Publicis* merger has been cited as one of the reasons for that merger being abandoned. In February 2014, MOFCOM published details of an expedited preliminary merger review procedure for uncontroversial transactions that do not raise competition issues in China, which is designed to address delay issues (see www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=10737423411 (accessed 13 June 2023)). The SAMR has committed to speeding up merger reviews in the sectors hardest hit by the covid-19 outbreak to resume economic activity; see mLex report of 6 April 2020, 'China's SAMR ramps up efforts to assist Covid-19 battle, assist economic recovery'.

becomes more widespread. For now, the US agencies' reluctance to accept remedies will continue to shape the landscape and be a key consideration for parties and their counsel. Although the US approach has not been replicated so far in other key jurisdictions, the CMA's *Microsoft/Activision* decision clearly indicates an aversion to behavioural remedies.

Finally, as is so often the case in international situations, the parties and the authorities concerned need to be resourceful and flexible to work out practical solutions. Often, even in complex cases, solutions are achievable, with willingness, creativity, hard work and some patience.

ANNEXE

Notable multi-jurisdictional transactions with remedies

Transaction	Comment
AbbVie/Allergan	This transaction was reviewed by several competition authorities, including the agencies in the EU, the US, Canada, Mexico and South Africa. The cooperation between these authorities was notably recognised by the FTC in its press release, in which it highlighted, in particular, that it had worked closely with the EC to analyse proposed remedies (see www.ftc.gov/news-events/news/press-releases/2020/05/ftc-imposes-conditions-abbvie-incs-acquisition-allergan-plc (accessed 12 June 2023)). Ultimately, the EC and the FTC approved AstraZeneca as the suitable buyer for the divested assets (https://ec.europa.eu/competition/mergers/cases/decisions/m9461_1187_3.pdf (accessed 12 June 2023) and www.ftc.gov/news-events/press-releases/2020/09/ftc-approves-final-order-imposing-conditions-abbvie-incs (accessed 12 June 2023))
EssilorLuxottica/GrandVision	The transaction required approval in eight jurisdictions, including the US, Russia, Brazil, Chile and the EU
Google/Fitbit	Although the Japan Fair Trade Commission cooperated with several competition agencies, including the EC, during its review of the transaction, and approved the transaction with the same remedies (see https://www.jftc.go.jp/en/pressreleases/yearly-2021/January/210114.html (accessed 12 June 2023)), the ACCC was still reviewing the deal six months after the EC and other jurisdictions had conditionally cleared it
GE/Alstom	This transaction, which the EU and US authorities cleared conditionally on the same day (even though they had different concerns, the EC and the DOJ adopted aligned remedies (see EC press release, IP/15/5606, 8 September 2015). The case was notified to 23 other regulators (Sharis Pozen, then GE's vice president of global competition and antitrust and a former acting assistant attorney general at the DOJ, is reported as stating that GE granted all the relevant authorities waivers to communicate with each other – see 'Ex-DOJ Atty Urges Coordination In Defending Global Mergers', Law360, 13 April 2016)
Merck/AZ Electronic	China imposed behavioural remedies after Germany, Japan, Taiwan and the US had unconditionally cleared the transaction
Holcim/Lafarge	The transaction involved multiple divestments (including in the US and Canada, the EU, Brazil, India and South Africa); see, e.g., the FTC and CCB press releases, highlighting how these agencies cooperated in making sure that their remedies were mutually coherent, given that plants and terminals affected supply in the two countries: www.ftc.gov/news-events/news/press-releases/2015/05/ftc-requires-cement-manufacturers-holcim-lafarge-divest-assets-condition-merger (accessed 12 June 2023) and www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03919.html (accessed 12 June 2023). The case is also notable because the parties appear to have approached the regulators with advanced remedies proposals from the outset
Bayer/Monsanto	The DOJ press release noted that the agency had secured the largest-ever divestiture (see www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened (accessed 12 June 2023)) and the EC also required extensive structural remedies and a behavioural remedy. The ACCC noted that it would not oppose this transaction 'on the basis of global divestments' (see www.accc.gov.au/media-release/accc-wont-oppose-bayers-proposed-acquisition-of-monsanto (accessed 12 June 2023)). The Competition Commission of India took account of the remedies elsewhere while also requiring behavioural remedies to address issues that were specific to India (see PaRR report of 22 May 2018, 'Monsanto/Bayer: additional divestitures for CCI approval include shareholding in Mahyco, other commitments')
Tronox/Cristal	The EC would have required a divestment to an up-front buyer (see EC press release, IP/18/4361, 4 July 2018) but the FTC obtained an injunction to prevent the deal from closing, which was upheld in court (see www.ftc.gov/system/files/documents/cases/docket_9377_tronox_et_al_initial_decision_redacted_public_version_0.pdf (accessed 12 June 2023))

Transaction	Comment
Aon/Willis Tower Watson	The deal was cleared in several jurisdictions, including the EU, subject to structural remedies (see EC press release, IP/21/3626, 9 July 2021), although the parties abandoned it following a challenge from the DOJ (https://aon.mediaroom.com/2021-07-26-Aon-and-Willis-Towers-Watson-Mutually-Agree-to-Terminate-Combination-Agreement (accessed 29 June 2023))
Danfoss/Eaton Hydraulics	The EU and US authorities had similar concerns and adopted coordinated remedy solutions (see, e.g., DOJ press release, www.justice.gov/opa/pr/justice-department-requires-divestitures-transaction-between-global-industrial-and (accessed 12 June 2023), and mLex report of 1 October 2021, '"New forms" of EU-US cooperation on competition welcome, Vestager says'
IAG/Air Europa	The deal was cleared unconditionally in the US and Brazil but terminated when the proposed remedy package was considered not to address fully the concerns raised by the EC (see EC Statement, STATEMENT/21/6942, 16 December 2021)
Meta/Kustomer	The transaction was conditionally cleared by the EC whereas the CMA found that it did not give rise to any competitive concerns (see EC press release, IP/22/652, 27 January 2022 and https://assets.publishing.service.gov.uk/media/6151a0da8fa8f5610b9c2208/Facebook.Kustomer_-_Summary_of_Phase_1_Decision_.pdf (accessed 12 June 2023))
Korean Air/Asiana Airlines	The agencies in South Korea, the UK and China indicated that they would clear the transaction subject to remedies (see, e.g., the CMA Decision that undertakings might be accepted, https://assets.publishing.service.gov.uk/media/6391fa038fa8f53bafa725b6/Korean_Air_Asiana_-_Decision_that_UIL_might_be_accepted_.pdf (accessed 12 June 2023); mLex report of 22 February 2022, 'Korean Air-Asiana Airlines merger approved with conditions in South Korea')
Sika AG/MBCC Group	The transaction was notably reviewed by the EC, the CMA and in Australia, Canada, New Zealand and the US. In its Final Report, the CMA noted that 'there may be procedural and administrative benefits of appointing a single Monitoring Trustee firm that could meet the requirements of all competition authorities' (https://assets.publishing.service.gov.uk/media/639b4445e90e07218568c078/Sika-MBCC_Final_Report__VERSION_FOR_PUBLICATION_.pdf (at 9.363) (accessed 12 June 2023)). The EC's press release noted its cooperation with the Australian, Canadian, New Zealand, UK and US authorities and that it would 'continue liaising with these counterparts during the assessment of a suitable purchaser for the divestment business' (see EC press release, IP/23/598, 8 February 2023). The EC has also published a 'Competition Policy Brief' on the main principles and its recent experience in international enforcement cooperation in mergers (see http://ec.europa.eu/competition/publications/cpb/2016/2016_002_en.pdf (accessed 12 June 2023))