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Chapter 46

INTERNATIONAL MERGER REMEDIES

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I INTRODUCTION

When planning merger control clearance of a deal involving companies operating on a global scale, the days when the merging parties could focus their strategy on obtaining approvals in North America and Europe are over.

Previously, merging parties were aware of the need to notify in other countries. However, often these jurisdictions were treated as lower priority for two main reasons: partly due to the belief that they would follow the lead provided by the US and EU authorities; and partly because, if a problem arose in a smaller jurisdiction, the parties would argue that this could be addressed by a local 'hold-separate', while the merger could proceed elsewhere. The pressure from dealmakers and their lawyers to prioritise in this manner was often intense.

That model is now out of date. As the world economy has realigned and the economic importance of BRIC and other countries has grown, more competition authorities are asserting their views on worldwide cases and any related remedies. As such, now not only may the US and EU require broad remedies with a transnational impact, but so also may at least Australia, Brazil, China, Japan, Korea and South Africa.

In practice, therefore, the group of countries that should be in the 'primary focus group' for merger review has grown. Beyond the countries already mentioned, there are also signs that other authorities may not be expected just to piggyback on the more established authorities' positions. Where they see specific local concerns, they may also impose remedies.

Some local interventions remain pragmatic rather than strict, because a small jurisdiction may consider that it cannot enforce its will on a big deal occurring abroad

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when there are no local assets in that jurisdiction, or that if the authority presses a company too far, the company may just withdraw from the local market.[2] However, such a situation may still lead to behavioural remedies. Further, the trend is for parties to face fines when they close transactions early, leaving a local 'hold-separate' in a small jurisdiction.

With this in mind, merger planning should cover coordination of filings and remedy design worldwide, dealing with any jurisdiction where substantial lessening of competition or dominance issues could arise,[3] and also assessing where other national economic or public interest factors could apply.

To give an example of the sort of consideration that occurs in the international merger remedies context now, the South African Commission indicated in the OECD Cross-border Merger Control Report, 2011 that, in relation to the *Unilever/Sara Lee* case, it looked at whether it was correct to require divestiture of the 'Status' brand, when the EU had already required divestiture of the 'Sanex' brand. The Commission 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.

Interestingly, the Commission 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.[4] The Commission therefore appears to have shown sensitivity for the impact of other jurisdictions' remedies internationally, while also showing that such remedies still do not 'trump' a local concern.

Below we outline some recent cases that illustrate the issues being raised by international merger remedies today: the *Seagate/Samsung* and *Western Digital/Viviti*, *Panasonic/Sanyo*, *Cisco/Tandberg*, *Glencore/Xstrata*, *Marubeni/Gavilon* and *Microsoft/Nokia* cases (see Section II, *infra*).[5] We then outline some of the key background to international merger remedies, drawing on the OECD report 2011, which, although focused on developing and emerging countries, highlights well what is generally happening now, often with useful examples (see Section III, *infra*). Finally, we offer some practical conclusions for companies and their advisers (see Section IV, *infra*).

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2 See, for example, the BIAC contribution to the OECD Roundtable on 'Cross-Border Merger Control: Challenges for Developing and Emerging Countries', February 2011 (OECD report, 2011) at pp. 316–19.

3 See, for example, the European Union and Australian contributions to the OECD report, 2011, p. 153 and p. 105 respectively.

4 South African contribution to the OECD report, 2011, p. 260.

5 Other notable recent mergers that required review and remedies in numerous jurisdictions include *Thermo Fisher Scientific Inc/Life Technologies*, in which Australia, the EU, New Zealand and the US required divestitures, and in which China imposed additional divestiture and behavioural remedies; and *Merck/AZ Electronic*, in which China imposed behavioural remedies after Germany, Japan, Taiwan and the US had unconditionally cleared the transaction. ADM's planned acquisition of GrainCorp was prevented by the Australian Treasury, notwithstanding that the Australian Competition and Consumer Commission (ACCC) and other competition authorities had cleared the acquisition; see http://resources.news.com.au/files/2013/11/29/1226771/015541-131129-joe-hockey.pdf.

II YEAR IN REVIEW

i Seagate/Samsung and Western Digital/Viviti

These two global mergers are particularly interesting in terms of international merger remedies.

Ultimately, most jurisdictions decided to clear the transactions on condition that Western Digital (WD) sell some production assets to Toshiba. However, while MOFCOM in China allowed the transactions to go through, MOFCOM required:

a Seagate to hold the Samsung business separate and to run the two businesses separately, with the ability to apply for review in one year; and

b WD to hold separate the Viviti business remaining after the divestiture to Toshiba and run the two businesses separately, with the ability to apply for review in two years.

In short, MOFCOM required materially different remedies with worldwide impact to those required by other competition authorities.

WD is a US manufacturer of hard disk drives for storage of digital data (HDDs). Viviti, formerly Hitachi Storage, is the HDD business of Hitachi in Japan. In March 2011, WD contacted the European Commission and filed on 20 April 2011. In parallel, also in March 2011, Seagate, another US manufacturer of HDDs, contacted the EC regarding its proposed acquisition of the HDD business of Samsung in Korea. Seagate filed with the EC on 19 April 2011 (i.e., just before *WD/Viviti*).

Each proposed transaction was viewed as raising issues, since they both increased the level of concentration in the overall worldwide market for HDDs, and in particular in certain market segments, such as 3.5 inch desktop HDDs. However, Seagate/Samsung appears to have been considered less of a competitive problem, because the two companies were not closest competitors. Samsung was also viewed as a smaller player and not being as strong as Viviti.[6]

The key issue was that, with both transactions, five HDD manufacturers became three and, in some market segments, the level of concentration was greater. Thus, in 3.5 inch desktop HDDs, there would be only two competitors left: Seagate/Samsung and WD/Viviti; while in 2.5 inch mobile HDDs, there would be only three: WD/Viviti, Seagate/Samsung and Toshiba.

In general, the competition authorities around the world agreed on the central issues. However, their conclusions and approaches differed.

First, the EC, US and China each had different approaches to the essentially simultaneous transactions. The Commission treated them under a 'first come, first served' rule, so that *Seagate/Samsung* was assessed against the market situation before the *WD/Viviti* transaction, while *WD/Viviti* was assessed against the backcloth of *Seagate/Samsung*. As such, in some market segments *Seagate/Samsung* presented only five-to-four

6 See the EC's decisions in Case COMP/M.6214, *Seagate/HDD Business of Samsung*: http://ec.europa.eu/competition/mergers/cases/decisions/m6214_20111019_20682_2390485_EN.pdf; and Case COMP/M.6203, *Western Digital Irland/Viviti Technologies*: http://ec.europa.eu/competition/mergers/cases/decisions/m6203_20111123_20600_3212692_EN.pdf.

and four-to-three concentrations, whereas *WD/Viviti* presented four-to-three and three-to-two concentrations.[7] The US Federal Trade Commission (FTC) treated both cases as occurring simultaneously. MOFCOM assessed each deal separately, as if the other had not happened.

Second, there was divergence among these three competition authorities as regards *Seagate/Samsung*. Both the US and EU authorities[8] cleared the transaction without remedy, whereas MOFCOM required the two businesses to be held separate until potential subsequent approval, allowing Seagate to apply for approval a year after the decision.

Third, the EU, US, Japanese and Korean authorities diverged from China on what remedies were required in *WD/Viviti*. The EU required *WD/Viviti* to divest certain production assets, including a production plant, to an approved third party before closing the deal (a 'fix-it-first' remedy).[9] The US did the same, requiring a named upfront buyer, Toshiba.[10] The Japanese and Korean authorities also required similar divestitures.[11]

However, in addition to this divestiture, MOFCOM required WD and Viviti to be held as separate businesses until approved, allowing WD to apply for such approval in two years.

In effect, MOFCOM therefore cleared the *Seagate/Samsung* and *WD/Viviti* transactions only in the sense that the equity transfers could occur, but denied approval to the business mergers, meaning that the targeted synergies could not occur.

Fourth, MOFCOM imposed other behavioural obligations, for example on Seagate to invest significant sums during each of the next three years to bring forward more innovative products. MOFCOM also required that the companies would not require TDK (China) to supply HDD heads exclusively to Seagate or its affiliates, or restrict TDK supplying other producers.

Fifth, it appears that there was widespread cooperation between 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.[12] Since none of these authorities have bilateral or multilateral cooperation agreements, one can only imagine that this was a varied and informal process.

Finally, at a very practical level, the same trustees were appointed in the US and EU for the *WD/Viviti* divestiture remedy, while others were appointed in China covering the rather different behavioural remedy of monitoring firewalls between the two companies.

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7 EC *Seagate/Samsung* decision, paragraphs 13–18. This is clearly controversial.

8 EC press release, IP/11/213, 19 October 2011; Federal Register, Vol. 77, No. 48, 12 March 2012, p. 14,525.

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

10 Federal Register Vol. 77, No. 48, 12 March 2012, pp. 14,523–5; *In the matter of Western Digital Corporation*, FTC Decision and Order, available at: www.ftc.gov/os/caselist/1110122/120305westerndigitaldo.pdf.

11 See, for example, www.jftc.go.jp/en/pressreleases/archives/individual-000460.html.

12 Federal Register, op. cit. 9, p. 14,525, column 3.

Comment

MOFCOM's approach raises a number of points.

First, many of the customers, the computer companies buying the HDDs, manufacture in China, so one could argue that China had a particularly strong interest in the outcome of the cases. Some of the merging parties' production facilities are also in China.

Second, 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.[13] MOFCOM also noted that when WD lost HDD production capacity because of floods in Thailand in 2011 and raised selling prices of HDDs, other HDD manufacturers followed, with some product prices rising over 100 per cent.[14] MOFCOM thus saw real competitive implications of reduced or more concentrated supply, or both, in China.

Third, arguably what MOFCOM did was to be 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 appeared to give opportunities to see if things might change in the future and, in particular, to see whether Toshiba, with its new assets, could develop to become a third force in HDD. In short, MOFCOM's approach appeared to give scope for phased and proportionate review over time, albeit that it reflected a more cautious approach than that taken in the EU and the US.

However, the problem for the parties is clearly that it leaves them unable to achieve the desired synergies from their investments, and they face considerable uncertainty as to what the future holds. In short: when, if at all, will they be able to fully integrate, or will they later face an order to divest?

Fourth, such remedies are not usual in the US and the EU, mainly because authorities favour clear-cut structural remedies. In addition, usually they do not leave matters in suspense, with some scepticism as to whether, with common ownership, two businesses will compete. The use of such remedies is therefore a topic of some controversy.

ii Panasonic/Sanyo

Panasonic's acquisition of Sanyo in 2009 is another example of multiple competition authorities requiring different remedies.

Although the two Japanese companies' activities overlapped in many areas, the main focus of the authorities' reviews was the markets for a number of different kinds of batteries.

The Japanese Federal Trade Commission's (JFTC) investigation, which concluded in September 2009, considered that the acquisition would have an anti-competitive effect on the market for cylindrical manganese dioxide lithium batteries.[15] The parties

13 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.

14 MOFCOM *Seagate/Samsung* and *WD/Viviti* decisions, paragraph 2.6.

15 The proposed acquisition would have led to an almost 100 per cent combined market share.

proposed a divestiture of Sanyo's manufacturing facilities in Japan to a third-party battery manufacturer. The JFTC concluded that this divestiture would alleviate its concerns.

The EC's decision of 29 September 2009 concluded that remedies were necessary for three battery types.[16] The parties committed to divest a plant that produced both primary cylindrical lithium and rechargeable coin-shaped lithium ion batteries and one of their portable rechargeable NiMH battery businesses. The assets concerned were in China and Japan. The EC's press release announcing the clearance of the acquisition notes its close cooperation with the JFTC and the FTC.[17]

Meanwhile, the FTC, which announced its proposed consent decree on 24 November 2009, was primarily concerned with what it concluded was the worldwide market for portable rechargeable NiMH batteries.[18] The final consent order required that the parties divest Sanyo's portable rechargeable NiMH battery business to a named upfront buyer, FDK Corporation, a subsidiary of Fujitsu. The principal asset concerned was a facility in Japan. The order also required that Sanyo supply FDK with NiMH batteries of a size that were not produced at that plant, that Sanyo provide FDK access to certain key employees and that Sanyo transfer all necessary intellectual property to FDK.[19]

The FTC's press release announcing the proposed consent decree notes its close cooperation with the Canadian Competition Bureau, the EC and the JFTC.

Finally, in China, MOFCOM required that Sanyo divest its rechargeable coin-shaped lithium battery business to an independent third party; that either Panasonic or Sanyo divest their NiMH batteries for daily use business; and that Panasonic sell its NiMH batteries for use in vehicles business to a third party, reduce its equity in a joint venture with Toyota and waive certain rights that it otherwise had in this joint venture.

Comment

Four aspects of this review process stand out.

First, the FTC required an upfront buyer for Sanyo's portable rechargeable NiMH business, while the EC and MOFCOM both merely required that either Panasonic or Sanyo sell one of their relevant businesses. While we are not aware that the FTC's requirement delayed closing of this transaction, we are aware of other instances in which an upfront buyer requirement led to material delays.

Second, MOFCOM's remedies were, as far as we are aware, the first instance of MOFCOM requiring divestiture of assets situated outside China. It is true, however, that other authorities also required divestitures outside their countries or jurisdictions.

16 EC press release, IP/09/1383, 29 September 2009; Case No. COMP/M.5421 *Panasonic/Sanyo*, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m5421_20090929_20212_en.pdf.

17 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1383.

18 www.ftc.gov/opa/2009/11/sanyo.shtm.

19 See the decision and order available at: www.ftc.gov/os/caselist/0910050/100108panasantodo.pdf.

Third, each authority appears to have taken its own view, with China again apparently more cautious and requiring a further remedy. This independence of approach needs to be factored into planning international merger control review.

Finally, the authorities' decisions were issued fairly close to each other, showing that this can be achieved in some cases, despite differences in rules and procedures.

iii Cisco/Tandberg

Cisco's acquisition of Tandberg, which led to overlaps in videoconference solutions, is a good example of effective cooperation between the EC and the US Department of Justice (DoJ).

Cisco proposed remedies to the EC aimed at increasing interoperability between its products and those of its competitors.[20] The EC accepted that the remedies would address the concerns that it had identified during its investigation and cleared the acquisition without opening a Phase II inquiry. The DoJ's press release, announcing that it would not challenge Cisco's acquisition, expressly noted the commitment entered into with the Commission.

Comment

The *Cisco/Tandberg* remedy was unusual as it involved divesting an intangible asset at the end of a Phase I EC investigation, and the DoJ's acceptance of this.

Such remedy would not have been possible, in particular given the tight timetable involved in Commission merger investigations, without close and timely cooperation between the agencies. Indeed, in the DoJ's press release, which was issued within an hour of the Commission announcing that it had cleared the acquisition, Assistant Attorney General Christine Varney noted: 'This investigation was a model of international cooperation between the United States 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.'[21]

Such extensive cooperation is only possible when authorities have an established relationship and have built mutual trust. The EC and the DoJ developed this during a series of investigations since their first cooperation agreement that they entered into in 1991;[22] and their formal cooperation agreements have been amended since, most recently by the 2011 Best Practices on Cooperation in Merger Investigations.[23]

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20 See the EC's decision in Case No. COMP/M.5669, *Cisco/Tandberg*, available at: http://ec.europa.eu/competition/mergers/cases/decisions/M5669_20100329_20212_253140_EN.pdf.

21 www.justice.gov/atr/public/press_releases/2010/257173.htm.

22 Agreement between the European Communities and the Government of the United States of America 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, available at http://ec.europa.eu/competition/international/legislation/usa01.pdf.

23 US–EU Merger Working Group, Best Practices on Cooperation in Merger Investigations, available at http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf.

Nonetheless, a few months before *Cisco/Tandberg*, on 9 November 2009, having communicated in August 2009 that it would not challenge Oracle's proposed acquisition of Sun Microsystems, the DoJ issued a press release noting that the Commission had opened a Phase II investigation into *Oracle/Sun* and therefore evidently held 'a different view' of that acquisition to that of the DoJ.[24] While the differences between the DoJ and the EC in *Oracle/Sun* were not over remedies, the Commission only cleared the acquisition in January 2010.[25] The varying speeds of the authorities' review of this transaction therefore illustrate the complexities of international merger review, even where authorities are in the habit of cooperating closely.

iv Glencore/Xstrata

The Glencore trading and production group's acquisition of Xstrata's mining business also raised diverse merger remedies issues.

In October 2012, the South African Competition Commission (SACC) recommended clearance, with remedies, after close scrutiny of the acquisition's implications for coal supply in South Africa.[26] The SACC found that there was no substantial lessening of competition. However, on the public interest side, conditions were imposed regarding proposed job losses, limiting such to 80 employees initially, with a further 100 lower level employees only a year later and with a financial contribution to retraining.

In November 2012, the EC cleared the acquisition at the end of a Phase 1 review, with remedies, the focus in Europe being on zinc supply.[27] Glencore agreed to divest a minority shareholding and to behavioural remedies.

In April 2013, MOFCOM cleared the acquisition, subject to different remedies.[28] The review took over a year, going into Phase 2, being withdrawn and re-notified, and then again going into Phase 2.

MOFCOM's review focused on possible negative effects in the copper, zinc and lead markets. In particular, MOFCOM considered the potential impact on trading patterns (spot contracts versus long-term agreed quantity and price contracts, especially for copper concentrate), vertical integration (from mine to trading house) and market entry barriers in a heavily resource-focused and capital-intensive industry.

Interestingly, part of the Chinese concern was the way Glencore would be able to transform Xstrata's annually negotiated mine contracts into trading or spot contracts. This type of concern, about the migration from annual negotiated prices (between

24 http://www.justice.gov/atr/public/press_releases/2009/251782.htm.

25 Case No. COMP/M.5529, *Oracle/Sun Microsystems*: http://ec.europa.eu/competition/mergers/cases/decisions/m5529_20100121_20682_en.pdf.

26 See press release, 22 October 2012 at www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Commission-approves-Glencore-Xstrata-merger-subject-to-conditions.pdf.

27 See EC press release, IP/12/1252, 22 November 2012.

28 See WilmerHale Alert. Lester Ross, Kenneth Zhou, 'China Clears Glencore's Acquisition of Xstrata Subject to Remedies', 26 April 2013: www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=10737421260. The Chinese text is available at http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400091222.shtml.

Chinese producers and the three big producers) to spot prices, was also a factor in China's opposition in the seaborne iron ore market.

These concerns were raised, despite market share levels on a worldwide or Chinese basis that generally would not raise concern in other jurisdictions. Even in copper, for which China was 68.5 per cent dependent on imports in 2011, Glencore's worldwide market shares post-merger would be only 7 per cent in production, 9.3 per cent in supply and 9.5 per cent in trading. Looking at China alone, the post-merger entity's market share in supply would only rise from 13.3 per cent to 17.8 per cent.

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

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

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

c to 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 for these metals.

v Marubeni/Gavilon

Similar issues appear to have arisen when MOFCOM cleared the acquisition by Marubeni, the Japanese trading house, of the agricultural trader Gavilon. The review took some 10 months, again with the parties withdrawing and re-notifying to gain more time to negotiate remedies.[29]

It appears that Chinese concerns focused on Marubeni's strong position in China's soybean import market, being combined with Gavilon's perceived advantages in sourcing in North America's soybean market, China's dependency on soybean imports and the weak bargaining position of Chinese buyers.

Marubeni is the largest soybean supplier to China, accounting for nearly 20 per cent of supply in 2012. It was also found to have a strong Chinese distribution network and customer base.

MOFCOM found that there were high barriers to entry, with no new entrants in the global soybean trade market or the Chinese soybean import market in the past five years. MOFCOM also noted that China is highly dependent on imports, and that the level of concentration of Chinese soybean crushers and buyers is low. MOFCOM considered that the acquisition may further weaken those crushers and buyers' bargaining power.

To gain clearance, Marubeni undertook to maintain independent operations for the export and sale of soybeans to China, including separate subsidiaries and operating teams, with firewalls between the two and an independent supervising trustee. Marubeni may apply to request release from these obligations after two years.

29 See http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400100376.shtml (Chinese text).

The case is interesting, partly for the type of remedy, insofar as hold-separates were required again; and partly insofar as China appears to have been particularly sensitive to supply issues affecting Chinese imports.[30]

vi Microsoft/Nokia

Microsoft's acquisition of Nokia's devices and services business was completed in April 2014, again raising remedy issues in China.[31]

Among the 16 authorities that reviewed the transaction, the EC unconditionally cleared it and the FTC announced early termination of its investigation. MOFCOM engaged in a longer review resulting in a conditional clearance, while the acquisition was also delayed by the Indian Supreme Court freezing Nokia's assets there as part of a tax dispute.[32]

Competitors and licensees had expressed concern regarding the parties' post-transaction conduct, since Nokia would retain ownership of its patents, some of which were standards essential patents (SEPs). It was argued that the transaction would strengthen Nokia's dominant position in patent licensing and would eliminate existing restraints on Nokia; for example, with Nokia no longer being a device manufacturer, it would not fear retaliation from other patent owners.[33] Concerns were also raised that Nokia would discriminate in favour of Microsoft.[34]

The EC decided that assessing such post-transaction behaviour of Nokia was outside the scope of the EU Merger Regulation,[35] but also that, in any event, the transaction would not give rise to any serious competition issues.[36] The EC subsequently stated that it would closely monitor possible breaches of Article 102 TFEU, which prohibits abuse of a dominant position.[37] The EC's approach mirrors its approach when Google purchased Motorola Mobility.[38]

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30 See, e.g. *The Financial Times*, 23 April 2013, 'China clears Marubeni-Gavilon deal' and MLex, 'Chinese merger decisions illuminate process for approval of commodity deals', 6 May 2013.

31 See Microsoft press release 'Microsoft looks to remake the mobile market with acquisition of Nokia Devices and Services business' of 25 April 2014, available at http://blogs.technet.com/b/microsoft_blog/archive/2014/04/25/microsoft-looks-to-remake-the-mobile-market-with-acquisition-of-nokia-devices-and-services-business.aspx.

32 See Reuters, 'India court rejects Nokia appeal over asset transfer to Microsoft', available at www.reuters.com/article/2014/03/14/us-nokia-india-court-idUSBREA2D0TI20140314; and *The Times of India*, 'Supreme Court Rejects Nokia Appeal Over Asset Transfer To Microsoft', http://timesofindia.indiatimes.com/topic/Supreme-Court-Rejects-Nokia-Appeal-Over-Asset-Transfer-To-Microsoft.

33 EC Decision in Case No. COMP/M.7047, *Microsoft/Nokia*, paragraphs 195–198.

34 *Microsoft/Nokia*, paragraphs 200 and 205.

35 *Microsoft/Nokia*, paragraph 224.

36 *Microsoft/Nokia*, paragraph 238.

37 EC press release, IP/13/1210 on 4 December 2013 available at http://europa.eu/rapid/press-release_IP-13-1210_en.htm.

38 EC Decision in Case No. COMP/M.6381 *Google/Motorola Mobility*.

MOFCOM, after a seven-month review, completed in an extended Phase II, accepted commitments from both Microsoft and Nokia:[39]

a inter alia, Microsoft committed not to seek injunctions against smartphone manufacturers in China on the basis of its SEPs, and also made commitments regarding its non-SEPs;

b Nokia likewise committed, inter alia, that it would continue to license its SEPs under FRAND terms in accordance with its commitments to relevant standards organisations, and that it would not seek to obtain injunctions based on its SEPs unless a licensee was not acting in good faith; and

c all the commitments are effective for eight years, but the conditions relating to SEPs are effective indefinitely unless MOFCOM agrees to modify or terminate them.[40]

MOFCOM's conditional clearance is in stark contrast to the reviews by the FTC, EC and other competition authorities. It appears that MOFCOM wanted to pre-empt the risk of Nokia using its patents against Chinese smartphone manufacturers. In the EU, the EC has recently brought behavioural enforcement action against Motorola for having abused its SEPs, while not having objected to Google's acquisition of Motorola in early 2012.[41]

III KEY BACKGROUND

There are a number of facets of competition authority practice that should be borne in mind when considering international merger remedies.

First, international mergers tend to present two types of remedy situation: local remedies and international remedies common to many jurisdictions. Unsurprisingly when addressing international remedies, since the competition authorities work with their particular laws and from their different regional or national perspectives, and often with different approaches and inputs (e.g., in terms of market testing), there is the potential for conflict both in substantive assessments and remedies.

Second, there is international cooperation on remedies, albeit often fairly limited and informal. There are, for example, frequent contacts between authorities through the OECD[42] and the International Competition Network (ICN).[43] The work of these

39 See http://english.mofcom.gov.cn/article/newsrelease/press/201404/20140400554324.shtml.

40 Microsoft's commitments to MOFCOM differ from the decision of the Taiwanese Fair Trade Commission, which required Microsoft not to engage in unfair pricing and discrimination.

41 See above at footnote 38 and http://europa.eu/rapid/press-release_IP-14-489_en.htm.

42 See for example, the 2003 OECD Roundtable on Merger Remedies, the 2011 OECD Global Forum on Competition and the OECD report, 2011, all available on the OECD website, www.oecd.org.

43 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.

organisations is not case-specific, but rather 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.

In October 2013, the OECD Competition Committee held a roundtable on remedies in cross-border merger cases.[44] The Secretariat noted that lack of cooperation and communication between enforcers reviewing the same transaction might lead to a 'chilling effect', where businesses restrict their merger activity to transactions acceptable in all jurisdictions in which they are notifiable.[45] The Secretariat also 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.[46]

There is also an ICN initiative to improve cooperation between competition authorities on mergers. Within that framework, the JFTC has proposed establishing a non-binding ICN Framework for Merger Review Cooperation.[47] According to the proposal, the purpose is to facilitate effective and efficient cooperation between agencies through identifying agency liaisons and possible approaches for information exchange.

There are also other layers of cooperation based on specific bilateral agreements, such as those between the EU and US authorities noted above, between the EU and Switzerland,[48] and between Australia and New Zealand,[49] which can be case-specific, where supported by appropriate waivers of confidentiality.

Recently, the US DoJ and FTC also concluded a general 'best practice' agreement with the Canadian Competition Bureau,[50] and the ACCC signed a memorandum of understanding with MOFCOM to enhance communication on merger review cases.[51]

Beyond this, various competition authorities emphasise that they cooperate even without such formal structures.[52] For example, the ICN recently published two presentations on cooperation between competition authorities.[53] Several authorities gave examples of cooperation in cross-border merger cases. Some agencies held joint discussions with the parties to the merger and many exchanged documents after the necessary waivers had been granted. Cooperation often led to coordination of remedies.

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44 www.oecd.org/daf/competition/competition-remedies-in-cross-border-merger-cases.htm. The roundtable discussion itself has not yet been published.

45 See http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/WP3(2013)6&docLanguage=En at paragraph 4.

46 Id.

47 www.internationalcompetitionnetwork.org/uploads/library/doc803.pdf.

48 http://europa.eu/rapid/press-release_IP-13-444_en.htm. This 2013 agreement envisages an 'an advanced form of cooperation' in the form of information sharing.

49 See the OECD report, 2011, pp. 102, 404.

50 www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03704.html.

51 See www.accc.gov.au/media-release/australia-and-china-to-increase-cooperation-on-mergers-regulation.

52 See the US, EU and UK contributions to the OECD report, 2011, at p. 296, p. 153 and pp. 288–9 respectively.

53 See presentations at www.internationalcompetitionnetwork.org/uploads/library/doc940.pdf and www.internationalcompetitionnetwork.org/uploads/library/doc943.pdf.

Third, while in many cases a competition authority may decide to defer to review by established jurisdictions, many also consider that reliance on a foreign authority might not deal adequately with local concerns.[54] This was well illustrated in Singapore's contribution to the OECD report, 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.*[55]

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, while both the US and EU authorities may find worldwide markets and recognise worldwide dynamics, the US decision concerns the perceived effect on US commerce and the EU decision is based on the perceived compatibility of the transaction with the (EU) common market.[56]

Even if contacted by and cooperating with other competition authorities, the US and EU competition authorities are not ruling on the effects in, for instance, Brazil, Korea or Singapore. As Korea notes in the OECD report, 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 anti-competitive effect on their own domestic markets, adverse impact [on] developing countries might suffer [if] not adequately controlled.*[57]

Fifth, a competition authority may consider that it cannot just rely on another jurisdiction's remedy to ensure enforcement.[58] An authority may need its own order, albeit modelled generally on a remedy commonly accepted by other jurisdictions. For example, in *Agilent Technologies/Varian*, the ACCC required Agilent to comply with its commitments to the EC to divest itself of a number of businesses and accepted the two proposed purchasers.[59] In so doing the ACCC noted, however, that the purchasers

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54 See the Singapore contribution in the OECD report, 2011, pp. 249–250, discussing the proposed *Prudential/AIA* transaction and its specific impact on insurance in the national market of Singapore, and the related Global Forum slides.

55 See the Singapore contribution, the OECD report, 2011, p. 249.

56 See, for example, the United States contribution, the OECD report, 2011, p. 296.

57 See the Korea contribution, the OECD report, 2011, p. 170.

58 See the OECD report, 2011, p. 30.

59 See Undertaking to the Australian Competition and Consumer Commission, 30 March 2010, available on the ACCC website, http://transition.accc.gov.au/content/index.phtml/itemId/921363, paragraphs 2.16–2.18 and paragraphs 43 and 44.

had 'established and effective Australian distribution arrangements'. In other words, the ACCC checked that the EC remedy also worked for Australia.

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, for example, the position of the UK in *Drager/Airshields*.[60] It also appears often to be the position of newer competition authorities, or those operating in smaller countries.[61]

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 other jurisdictions to follow suit. They also do not like being a 'non-priority' jurisdiction that is only contacted late in the day. Unsurprisingly, therefore, they are increasingly advocating simultaneous contacts to facilitate simultaneous reviews of the same transaction.

Two FTC officials have made the point well in the context of remedies, writing of a case where time was lost dealing with the unique concern of an agency brought into the process late on. It appears that an upfront buyer had been agreed on 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'.[62]

Usefully, they emphasise the need to plan the remedies phase, especially if an upfront buyer may be required, taking into account the differences in authorities' practices (e.g., the way that the FTC selects a purchaser itself, while in the EU 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, etc.).

V CONCLUSIONS FOR COMPANIES AND THEIR ADVISERS

In view of recent events, companies and their legal advisers should think on a global scale and plan any remedies, especially if some jurisdictions want an upfront buyer.

Parties should not assume that the more established competition authorities in the US and the EU are the only ones that matter. Even apparently worldwide markets are often more limited in scope, which may well mean that varied effects must be catered for. Nor should they assume that the newer authorities or those in smaller countries, which have tended to defer to the larger, longer-established authorities in the past, will do so in their cases. Whether because of concerns about local effects or through a desire to have a locally enforceable remedy, other authorities may intervene.

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60 See the United Kingdom contribution to the OECD report, 2011 pp. 289 and 290–291 and the ICN Merger Working Group, Merger Remedies Review Project report, Bonn 2005, Appendix L, pp.53–56.

61 See BIAC contribution, the OECD report, 2011, pp. 316–19.

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

In light of MOFCOM's remedies in *Seagate/Samsung* and *WD/Viviti*, parties must consider carefully the purchaser's 'walk-away' rights, any related vendor's break-up fees and valuation rules in the purchase agreement. Given that the 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.

Parties should also consider how to involve all relevant competition authorities, and have those authorities conduct their investigations in parallel and in close consultation with each other, taking into account each other's possible demands (e.g., upfront buyer or not) and the practicalities of different timings for the approval of such remedies.[63] That may mean 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. It may also mean 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. It may also mean talking to less-involved 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 *Shell/Montecatini* case, the EU required divestiture of one holding in a joint venture to protect one technology, while the US required divestiture of the other linked to a rival technology. Fortunately, the parties were able to go back to the EU for review and revise their EU undertaking in light of the US one.[64]

As illustrated in a number of the case studies in Section II, *supra*, MOFCOM often takes longer than other agencies to review complicated transactions. As such, early contact with MOFCOM is often advisable.[65]

Finally, as is so often the case in international situations, the parties and the authorities concerned need to be flexible to work out practical solutions. Generally, such solutions are manageable with willingness, ingenuity and patience.

63 Id, p. 22.

64 Case IV/M.269, EC decisions of 8 June 1994 and 24 April 1996; FTC File 941 0043, press release, 1 June 1995.

65 MOFCOM's delay in clearing the planned merger between Omnicom and Publicis 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.

Appendix 1

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