Chapter 4

INTERNATIONAL MERGER REMEDIES

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I INTRODUCTION

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

Previously, parties were aware of the need to notify in other countries. However, often these jurisdictions were treated as lower priority for two main reasons: due to the belief that they would follow the lead provided by the US and EU authorities; and 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.

That model is now out of date. As the economic importance of BRIC and other countries has grown, more competition authorities are asserting their views on worldwide cases and remedies. Now, not only may the US and EU require broad remedies with a transnational impact, but remedies may also be required in at least Australia, Brazil, China, Japan, Korea and South Africa. Similarly, the extent of international cooperation on mergers is steadily growing. For example, the International Competition Network (ICN) mergers working group included 21 countries in 2006, but that rose to 65 in 2014.[2]

In practice, therefore, the group of countries that should be in the 'primary focus group' for merger review has grown. Other authorities may not be expected just to defer to the more established authorities' positions. Where they see specific local concerns, they may also impose remedies.

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2 See www.icnmarrakech2014.ma/pdf/ICN_MWG_Interim_Report.pdf at p. 1.

Some local interventions remain pragmatic rather than strict, because a competition authority in a small 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 authority may be concerned that if it presses a company too far, the company may just withdraw from the local market.[3] However, even then, such a situation may still lead to behavioural remedies in that country.

Further, the trend is for parties to face fines when they close transactions early, leaving a local 'hold-separate' in a smaller country, where the authorities seek to emphasise that their concerns also must be met.

With this in mind, merger planning should cover coordinating filings and remedy assessment and design worldwide, dealing with any jurisdiction where substantial lessening of competition or dominance issues could arise.[4] Such review should also assess where other national economic or public interest factors could apply.

Below we highlight some prominent cases that illustrate well the diverse issues being raised by international merger remedies today: the *Seagate/Samsung* and *Western Digital/Viviti* cases, *Glencore/Xstrata*, and *Microsoft/Nokia*, as well as two examples of effective cooperation between agencies, namely *Cisco/Tandberg* and *UTC/Goodrich* (see Section II, *infra*).[5] We then outline some of the key background to international merger remedies, frequently drawing on very useful OECD studies on the topic[6] (see Section III, *infra*). Finally, we offer some practical conclusions for companies and their advisers (see Section IV, *infra*).

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3 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.

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

5 Other notable recent transactions 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; *Merck/AZ Electronic*, in which China imposed behavioural remedies after Germany, Japan, Taiwan and the US had unconditionally cleared the transaction; the *Holcim/Lafarge* merger, which involves divestments in multiple countries; and the series of *GSK/Novartis* deals. It may also be of interest to note that *Archer Daniels Midland/GrainCorp*, which involved Archer Daniels Midland's planned acquisition of GrainCorp, was prevented by the Australian Treasury, notwithstanding the fact 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.

6 OECD Report 2011 and Policy Roundtables on Remedies in Cross-Border Merger Cases 2013 (OECD 2013 Roundtable): see www.oecd.org/daf/competition/Remedies_Merger_Cases_2013.pdf.

II PROMINENT CASES

i Seagate/Samsung and Western Digital/Viviti

These two global mergers continue to be particularly interesting in terms of international merger remedies. Ultimately, most jurisdictions decided to clear these transactions in the sector for hard disk drives for storage of digital data (HDDs) on condition that Western Digital (WD) sell some production assets to Toshiba. However, while China's MOFCOM allowed the transactions to go through, importantly, it imposed materially different remedies (which had worldwide impact) compared with those required by other competition authorities. 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.

The key issue was that, with both transactions, five HDD manufacturers became three and, in some market segments, the level of concentration was greater.[7] In general, the competition authorities around the world agreed on the central issues. However, their conclusions and approaches differed. The main points were as follows:

First, the EC, the US and China each had different approaches to the essentially simultaneous transactions. The 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, while *WD/Viviti* was assessed against the backdrop of *Seagate/Samsung*. 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, both the US and EU authorities[8] cleared the *Seagate/Samsung* transaction without any 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

7 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 Ireland/Viviti Technologies*: http://ec.europa.eu/competition/mergers/cases/decisions/m6203_20111123_20600_3212692_EN.pdf.

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

closing the deal.[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 (a 'fix-it-first' remedy).[12] 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.

Fourth, MOFCOM imposed other behavioural obligations. For example, Seagate was required 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.[13] Since many of these authorities do 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 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.

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.[14] MOFCOM also noted that when WD lost HDD production capacity because of floods in Thailand in 2011 and raised selling prices

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 In December 2014, 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.

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

14 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.

of HDDs, other HDD manufacturers followed, with some product prices rising over 100 per cent.[15] 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 was clearly that it left them unable to achieve the desired synergies from their investments, and that they faced (and, at the time of writing, still face) considerable uncertainty as to what the future holds. In short: when, if at all, would they be able to fully integrate, or would they later face an order to divest? That said, recently it has been reported that MOFCOM is expected to conclude a review of the hold separate remedies in these two cases in 2015.[16] It will be interesting to see what happens.

Fourth, such hold separate remedies are not usual in the US and the EU, mainly because authorities favour clear-cut structural remedies. 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.

As such, these cases remain important in illustrating the differences in assessment approach that can occur in a worldwide deal.

ii Glencore/Xstrata

The Glencore trading and production group's acquisition of Xstrata's mining business is also a useful case that 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.[17] The SACC found that there was no substantial lessening of competition. However, in the public interest, conditions were imposed regarding proposed job losses, limiting such to 80 employees initially, with a further loss of 100 lower-level employees only a year later with a financial contribution towards their 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.[18] Glencore agreed to divest a minority shareholding and to behavioural remedies.

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

16 See Parr's 2015 Global Trends Monitor, p. 6.

17 See press release, 22 October 2012 at: www.compcom.co.za/wp-content/uploads/2014/09/Commission-approves-Glencore-Xstrata-merger-subject-to-conditions.pdf.

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

In April 2013, MOFCOM cleared the acquisition, subject to different remedies.[19] The review took over a year, going into Phase 2, the notification 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 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;[20]

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.

19 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.

20 As far as we are aware, the first instance of MOFCOM requiring divestiture of assets outside China was *Panasonic/Sanyo*, where Panasonic acquired Sanyo in 2009 (for further discussion on this, see the 2014 edition of this book 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 Department of Justice (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. The purchaser was also required to expand the brewery's capacity and meet defined expansion milestones.

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.[21]

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

iii Microsoft/Nokia

Microsoft's acquisition of Nokia's devices and services business was completed in April 2014.[22] 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.[23]

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). The EC decided that assessing post-transaction behaviour was outside the scope of the EU Merger Regulation,[24] but

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21 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). For further discussion on this case, see the 2014 edition of this book at p. 496.

22 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. It is reported that the original deal was restructured to make it non-reportable in Korea, but the Korean Fair Trade Commission (KFTC) nonetheless continued to review it. In May 2015, the KFTC announced the terms of a proposed consent order. If approved, this would be the KFTC's first merger consent order; see *Global Competition Review*, 19 May 2015.

23 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.

24 *Microsoft/Nokia*, paragraph 224. A related issue is the threshold question of what constitutes a transaction reviewable under merger control rules. A recent example of diverging approaches to this was the proposed *P3 Shipping Alliance*, which MOFCOM reviewed and blocked, using merger control, whereas in the EC the proposed cooperation was not reviewable under merger control, but instead was reviewed under behavioural competition laws. See www.maersk.com/en/the-maersk-group/press-room/press-release-archive/2014/6/the-p3-network-will-not-be-implemented-following-decision-by-the-ministry-of-commerce--in-china.

also that, in any event, the transaction would not give rise to any serious competition issues.[25]

MOFCOM, after a seven-month review, completed in an extended Phase 2, required extensive behavioural commitments from both Microsoft and Nokia in relation to SEPs and non-SEPs.[26] The commitments were effective for eight years (with the conditions relating to SEPs indefinite unless MOFCOM agrees to modify or terminate them).[27] It appears that MOFCOM wanted to pre-empt the risk of Nokia using its patents against Chinese smartphone manufacturers.[28]

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 good examples of effective cooperation between the EC and the US 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.[29] The EC accepted that the remedies would address the concerns that it had identified during its investigation and cleared the acquisition in Phase 1. 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 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.'[30]

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.[31] The CCB noted that these remedies 'appear to sufficiently mitigate the potential anti-competitive effects in Canada'

25 *Microsoft/Nokia*, paragraph 238.

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

27 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.

28 In the EU, the EC brought a behavioural enforcement action against Motorola for having abused its SEPs, while not having objected to Google's acquisition of Motorola in early 2012. See http://europa.eu/rapid/press-release_IP-14-489_en.htm.

29 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.

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

31 See the EC's Press Release at http://europa.eu/rapid/press-release_IP-12-858_en.htm and DoJ's at www.justice.gov/opa/pr/justice-department-requires-divestitures-order-united-technologies-corporation-proceed-its.

and, in particular since no Canadian assets were involved, decided not to impose any remedies.[32] It appears that the three authorities were in frequent contact throughout this investigation. The EC and the DoJ worked closely on the remedies' implementation, jointly approving the hold separate manager and monitoring trustee.[33] 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.

Clearly, EC and US cooperation is highly developed.[34] The EC and DoJ cooperation has developed from their first cooperation agreement in 1991.[35] Their formal cooperation agreements have been amended since, most recently by the 2011 Best Practices on Cooperation in Merger Investigations.[36]

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.

32 See www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03483.html and OECD 2013 Roundtable at p. 36.

33 See OECD 2013 Roundtable at pp. 92 and 93 and www.icnmarrakech2014.ma/pdf/ICN_MWG_Interim_Report.pdf at p. 20.

34 The US contribution to the OECD 2013 Roundtable 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 setup of two different EU and US divestment packages to two purchasers; the cooperation between two trustees, where one sub-contracted 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).

35 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.

36 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.

Second, as noted above, there is increasing international cooperation on remedies. There are, for example, frequent contacts between authorities through the OECD[37] and the ICN.[38] The work of these organisations, which at times has been conducted in parallel,[39] is not case-specific, 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. Nevertheless, many of the examples discussed and quoted in these reports are very revealing as to the nature of cooperation on merger remedies (and, in some cases, the limits of that cooperation).

In October 2013, the OECD Competition Committee held a Roundtable on Remedies in Cross-Border Merger cases. 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.[40] 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.[41] The Roundtable report emphasises 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.[42] The Roundtable report also highlights the advantages of appointing common enforcement and monitoring trustees to enforce cross-border remedies.[43]

There is also an ICN initiative to improve cooperation between competition authorities on mergers. After the Japanese Fair Trade Commission proposed establishing a non-binding ICN Framework for Merger Review Cooperation,[44] the ICN Merger Working Group presented a Practical Guide to International Enforcement Cooperation at the ICN 2015 Annual Conference in Sydney. The purpose of this Guide is to facilitate effective and efficient cooperation between agencies through identifying agency liaisons and possible approaches for information exchange. The guidelines create a voluntary and flexible framework for inter-agency cooperation in merger investigations and provide practical guidance for agencies willing to engage in international cooperation, as well as

37 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.

38 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.

39 See the ICN Merger Working Group Interim Report on the Status of the International Merger Enforcement Cooperation Project, available at www.icnmarrakech2014.ma/pdf/ICN_MWG_Interim_Report.pdf.

40 See OECD 2013 Roundtable at p. 10.

41 Id.

42 Id. at, *inter alia*, pp. 5 and 6.

43 Id. at, *inter alia*, p. 6.

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

for parties and third parties seeking to facilitate such cooperation. In September 2015, the Merger Working Group will discuss the implementation and dissemination of the Practical Guide at a workshop hosted by the EC.[45]

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,[46] and between Australia and New Zealand,[47] which can be case-specific, where supported by appropriate waivers of confidentiality.[48] Recently, the US DoJ and FTC also concluded a general 'best practice' agreement with the CCB[49] and the ACCC signed a Memorandum of Understanding with MOFCOM to enhance communication on merger review cases.[50]

Beyond this, many competition authorities emphasise that they cooperate even without such formal structures.[51] For example, the ICN recently published two presentations on cooperation between competition authorities.[52] 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.[53] Cooperation often led to coordination of remedies. Essentially, the theme is that the authorities will communicate with each other if they have common problems to solve.

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

45 See the Summary of ICN Work Product 2014-2015, Presented at the 14th Annual Conference of the ICN in Sydney (Australia) (29 April – 1 May 2015), at p. 9, available at www.internationalcompetitionnetwork.org/uploads/library/doc1029.pdf.

46 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.

47 See the OECD report, 2011, pp. 102, 404. The OECD 2013 Roundtable notes how, following a change in its laws, the Brazilian authority has built informal relationships with multiple agencies to promote cooperation; see p. 28.

48 Antitrust authorities from the five BRICS countries are reportedly concluding an agreement to enable easier information exchange between them. See MLex report of 12 May 2015.

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

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

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

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

53 See www.icnmarrakech2014.ma/pdf/ICN_MWG_Interim_Report.pdf at p. 6, which gives examples of 'joint investigative tools' including joint calls, meetings, interviews and requests for information.

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]

In the *Unilever/Sara Lee* case, the South African Commission also indicated in the OECD Cross-border Merger Control Report, 2011 that 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.[56] 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.

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.[57] 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.*[58]

54 See the Singapore contribution to 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 to the OECD report, 2011, p. 249.

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

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

58 See the Korea contribution to the OECD report, 2011, p. 170.

Fifth, a competition authority may consider that it cannot just rely on another jurisdiction's remedy to ensure enforcement.[59] 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 a number of businesses and accepted the two proposed purchasers.[60] In so doing the ACCC noted, however, that the purchasers had 'established and effective Australian distribution arrangements'. In other words, the ACCC checked that the EC remedy also worked in Australia.[61]

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 accept a behavioural remedy instead. This was, for example, the position of the UK in *Drager/Airshields*.[62] It also appears often to be the position of newer competition authorities, or those operating in smaller countries.[63]

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. Unsurprisingly, therefore, they are increasingly advocating simultaneous contacts to facilitate simultaneous reviews of the same transaction. Practitioners also tend to emphasise the need to 'work from the end' and see how best to manage things so that the authorities are 'in sync' 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, 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'.[64]

Usefully, they emphasise the need to plan the remedies phase, especially if an upfront buyer may be required,[65] taking into account the differences in authorities'

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

60 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.

61 See OECD 2013 Roundtable at p. 30 for Brazil requiring similar locally enforceable remedies.

62 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.

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

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

65 See the Australian contribution to the OECD 2013 Roundtable at p. 16, which cites the ACCC and the FTC's parallel approval of the same upfront buyer in the *Pfizer/Wyeth*

practices, such as the way that the FTC selects a purchaser itself, while in the EU 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, etc.

IV CONCLUSIONS FOR COMPANIES AND THEIR ADVISERS

In light of all of the above, companies and their legal advisers should think and plan on a global scale, including as regards remedies, and 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 in the past have tended to defer to the larger, longer-established authorities, 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.

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 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.[66]

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;

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transaction. See also www.ftc.gov/news-events/press-releases/2009/10/ftc-order-prevents-anticompetitive-effects-pfizers-acquisition and www.ftc.gov/news-events/press-releases/2009/10/ftc-order-prevents-anticompetitive-effects-pfizers-acquisition. Interestingly, in *Nestlé/Pfizer Nutrition*, the ACCC consulted with the SACC over the suitability of an upfront buyer that previously had been an exclusive licensee for Pfizer products in South Africa; see OECD 2013 Roundtable at pp. 17 and 18. The *Nestlé/Pfizer Nutrition* transaction was investigated in numerous jurisdictions, including Pakistan, and the ACCC also cooperated with the Competition Commission of Pakistan during its review. The Chilean, Colombian and Mexican authorities also cooperated closely during their investigations; see OECD 2013 Roundtable at p. 68.

66 Id, p. 22.

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-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 (admittedly old) *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.[67]

As illustrated in some 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.[68]

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. Generally, such solutions are manageable with willingness, ingenuity and patience. In some cases, counsel should also be active to facilitate and assist cooperation in the interests of seeing the deal through.

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

68 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.

Appendix 1

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