THE MERGER CONTROL REVIEW

NINTH EDITION

Editor
Ilene Knable Gotts

THE LAWREVIEWS

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Chapter 4

INTERNATIONAL MERGER REMEDIES

John Ratliff, 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 lead provided by the US and EU authorities.

Now, with the increase in national merger control systems and other regulators' increased activity, other countries' regulators may also significantly impact a deal. Similarly, the extent of international cooperation on mergers is steadily growing.[2] For example, the International Competition Network (ICN) mergers working group included 21 countries in 2006, but that had risen to over 60 in 2016.[3]

So, while in practice the United States and the European Union 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.

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

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1 John Ratliff and Frédéric Louis are partners and Cormac O'Daly is special counsel at Wilmer Cutler Pickering Hale and Dorr LLP (WilmerHale). With thanks to Virginia Del Pozo for her assistance with this chapter.

2 For example, the EC relied on cooperation with multiple foreign antitrust authorities in 55 per cent of all cases it investigated in 2016 to 2017, including merger and antitrust cases. See MLex report of 4 May 2018.

3 See ICN Merger Working Group 2016-2019 Work Plan, available at: http://www.konkurrensverket.se/globalassets/om-oss/icn2016-2019_horizontal-coordinator_merger-working-group_workplan.pdf at p. 1. See also EC Commissioner Vestager's speech 'Merger review: Building a global community of practice', 24 September 2015, available at http://ec.europa.eu/commission/2014-2019/vestager/announcements/merger-review-building-global-community-practice_en.

4 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.

With all of 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] Such review should also assess where other national economic or public interest factors could exist.

Below we highlight some prominent cases that illustrate the diverse issues being raised by international merger remedies: (1) the *Seagate/Samsung* and *Western Digital/Viviti* cases, (2) *Dow/DuPont* and (3) *Glencore/Xstrata*, as well as (4) two examples of particularly effective cooperation between agencies, namely *Cisco/Tandberg* and *UTC/Goodrich* (see Section II, below).[6] We then outline some of the key context, drawing on useful OECD studies[7] (see Section III, below). We also refer to the ICN's Merger Guides. Finally, we offer some practical conclusions for companies and their advisers (see Section IV, below).

II PROMINENT CASES

i Seagate/Samsung and Western Digital/Viviti

Although not the most recent examples, these two global mergers still are particularly interesting for international merger remedies.

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

6 Other notable more recent transactions that required review and remedies in numerous jurisdictions include: *GE/Alstom*, which the EU and US authorities cleared conditionally on the same day (even though they had different concerns, the EC and Department of Justice (DoJ) adopted aligned remedies – see Commissioner Vestager's speech 'Merger review: Building a global community of practice', 24 September 2015 above) and which was notified to 23 other regulators (Sharis Pozen, 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', Law 360, 13 April 2016); *Merck/AZ Electronic*, in which China imposed behavioural remedies after Germany, Japan, Taiwan and the United States had unconditionally cleared the transaction; and the *Holcim/Lafarge* merger, which involved multiple divestments (including in the United States and Canada; the European Union, Brazil, India and South Africa), see, e.g. the Federal Trade Commission (FTC) and Canadian Competition Bureau (CCB) press releases, highlighting how these agencies cooperated in making sure that the remedies that they required fitted together, given that plants and terminals affected supply in the two countries, https://www.ftc.gov/news-events/press-releases/2015/05/ftc-requires-cement-manufacturers-holcim-lafarge-divest-assets and http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03919.html. The case is also notable because the parties appear to have come to the regulators with advanced remedies proposals from the outset. In the *AB InBev/SABMiller* case, interestingly the DoJ required that it be allowed to review future ABI Craft Beer acquisitions even if these would not be compulsorily notifiable to the DoJ. See https://www.justice.gov/opa/pr/justice-department-requires-anheuser-busch-inbev-divest-stake-millercoors-and-alter-beer. In *Archer Daniels Midland/GrainCorp*, which involved Archer Daniels Midland's planned acquisition of GrainCorp, the Australian Treasury also prevented the deal from closing notwithstanding that the Australian Competition and Consumer Commission (ACCC) had cleared the acquisition: see http://resources.news.com.au/files/2013/11/29/1226771/015541-131129-joe-hockey.pdf. The EC has 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.

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

As a result of the two transactions, five HDD manufacturers became three and, in some market segments, the level of concentration was greater.[8] In general, the competition authorities around the world agreed on the central issues. Ultimately, most jurisdictions decided to clear the transactions in the sector for hard disk drives for storage of digital data (HDDs) on condition that Western Digital (WD) sold some production assets to Toshiba. However, while China's MOFCOM allowed the transactions to go through, it imposed materially different remedies with worldwide impact.

First, the EC, the United States 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*.[9] 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[10] 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 European Union required *WD/Viviti* to divest certain production assets, including a production plant to an approved third party before closing the deal.[11] The United States did the same, requiring a named upfront buyer, Toshiba.[12] The Japanese and Korean authorities also required similar divestitures.[13] However, in addition to this divestiture, MOFCOM required that WD and Viviti be held as separate businesses until approved, allowing WD to apply for such approval in two years.[14]

Fourth, MOFCOM imposed other behavioural obligations.[15] For example, Seagate was required to invest significant sums during each of the next three years to bring forward

8 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; and Case COMP/M.6203, *Western Digital Ireland/Viviti Technologies*: http://ec.europa.eu/competition/mergers/cases/decisions/m6203_20111123_20600_3212692_EN.pdf.

9 Similarly, when assessing the three recent deals in the agricultural chemicals sector, the EC assessed the transactions on a priority/'first-come, first-served' basis. *Dow/DuPont*, which was the first transaction notified to the EC and which is discussed in greater detail below, 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.

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

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

12 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.

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

14 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.

15 MOFCOM has continued to impose additional behavioural remedies in international transactions. For example, in 2017, it imposed behavioural remedies in the *Dow/DuPont* case discussed below. In *Broadcom/*

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, 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.[16] 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 European Union 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 raised several 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 were 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.[17] 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.[18] MOFCOM thus saw real competitive implications of reduced or more concentrated supply in China.

Third, 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 if things might change in the future and 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 European Union and the United States.

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: while 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.

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; remedies relating to interoperability and confidentiality were also imposed in both the European Union and the United States.

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

17 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.

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

In October 2015, MOFCOM partially lifted the hold-separate obligation on *WD/Viviti*, allowing the integration of their manufacturing and R&D activities, but it still required that WD maintain two separate sales divisions and brands (and certain other behavioural commitments).[19] Then, in November 2015, MOFCOM removed the hold-separate obligation on the *Seagate/Samsung* transaction, allowing full integration (again while still maintaining certain other behavioural commitments).[20] MOFCOM noted that the competitiveness of solid-state drivers (SSD) has been 'markedly enhanced' compared with HDDs, but otherwise the competitive landscape had changed little since 2012. MOFCOM also noted that these revisions would allow the parties to offer full product ranges and reduce costs. In both cases, the remaining conditions were valid until October 2017 and they lapsed then some five or six years after the transactions closed.

Hold-separate remedies of this kind are not usual in the United States and the European Union, 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.[21]

ii Dow/DuPont

The recent merger between Dow and DuPont is a good example of a transaction requiring clearance in multiple jurisdictions and of regulators requiring differing remedies.[22] Both parties were leading agrochemical companies and they had overlapping activities in many markets including crop protection and pesticide markets (herbicides, insecticides and fungicides) and petrochemical markets.

In March 2017, the EC cleared the transaction subject to extensive structural remedies.[23] 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 upfront buyer requirement, so the parties could not close their transaction until the EC approved the buyer.[24]

19 See http://english.mofcom.gov.cn/article/policyrelease/buwei/201510/20151001148014.shtml; and the MLex report of 23 October 2015.

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

21 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. 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 expires after 24 months, which is much clearer for the parties than the ongoing review imposed on Seagate and WD.

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

23 Case M.7932, *Dow/DuPont*: http://ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.pdf.

24 See decision, Paragraph 4044.

In addition, the EC was concerned that the transaction would reduce innovation.[25] 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 R&D organisation.[26]

In May 2017, MOFCOM also cleared the transaction but subject to both structural and behavioural remedies.[27] MOFCOM's structural remedies largely mirror those entered into in the EC. In addition, however, MOFCOM required behavioural commitments apparently to address issues that were specific to China. These included obligations to supply 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 on an exclusive basis during the same period.[28]

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.[29] Unlike the EC, the DoJ did not, however, 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 that '[l]ike 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 United States did not provide a basis for a similar conclusion at this time'.[30] 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.[31] 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 other cases.[32]

25 See decision, Section V.8, Paragraphs 2000-2020 and Section V.8.4.1, which outline the EC's theory of harm.

26 See decision, Paragraphs 4032-4035.

27 See http://english.mofcom.gov.cn/article/policyrelease/announcement/201705/20170502577349.shtml.

28 Id. at, Section VI at Obligations III, IV and V.

29 See https://www.justice.gov/opa/pr/justice-department-requires-divestiture-certain-herbici des-insecticides-and-plastics.

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

31 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.

32 See, for example, the South Africa Competition Commission's decision in *AB InBev/SABMiller*, https://www.comptrib.co.za/assets/Uploads/INBEV/2016-05-31-SACC-Conditions-Final-Non-Confidential.pdf.

In April 2013, MOFCOM cleared the acquisition, subject to different remedies compared to those previously agreed with the European Union.[33] 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. These concerns were raised, despite market share levels on a worldwide or Chinese basis that generally would not raise concern in other jurisdictions.

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;[34]

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.[35]

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 US DoJ and, in *UTC/Goodrich*, additionally with Canada's CCB.

In *Cisco/Tandberg*, Cisco proposed remedies to the EC to increase interoperability between its products and those of its competitors.[36] 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

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

34 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 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 United States, 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.

35 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).

36 See the EC's decision in Case No. COMP/M.5669, *Cisco/Tandberg*, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m5669_2153_2.pdf.

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.'[37]

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.[38] The CCB noted that these remedies 'appear to sufficiently mitigate the potential anti-competitive effects in Canada' and, in particular since no Canadian assets were involved, it decided not to impose any remedies.[39] 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.[40] 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 close.[41] EC and DoJ cooperation has developed from their first cooperation agreement in 1991,[42]with, most recently, the 2011 Best Practices on Cooperation in Merger Investigations.[43] However it is also apparent that other agencies cooperate frequently (as explained further below in Section III).

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 situation: local remedies and international remedies common to many jurisdictions. Unsurprisingly, when addressing international remedies, there is potential for conflict both in substantive assessments and remedies, since the competition authorities work with their particular laws

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

38 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.

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

40 See OECD 2013 Roundtable 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 at p. 20.

41 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).

42 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.

43 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.

and from their different regional or national perspectives, and often with different approaches and inputs (e.g., in terms of market testing results). For example, as noted above, MOFCOM occasionally uses a hold-separate remedy, which neither the European Union nor the United States would typically favour.[44]

Second, as noted above, there is increasing international cooperation on remedies. There are, for example, frequent contacts between authorities through the OECD[45] and the ICN.[46] The work of these organisations is in parallel and is not case-specific,[47] 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, such coordination should not be underestimated and many of the examples discussed and quoted in these reports are very revealing.

For example, in October 2013, the OECD Competition Committee held a 'Roundtable on Remedies in Cross-Border Merger cases'. Amongst 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.[48] 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.[49] The Roundtable report also highlighted the advantages of appointing common enforcement and monitoring trustees to enforce cross-border remedies.[50]

There is also 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 the ICN 2015 Annual Conference in Sydney.[51] The purpose of this Guide, which is quite short (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 such 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

44 Barry Nigro, Deputy Assistant Attorney General, Antitrust Division in the DoJ, has also recently commented that proposals to divest carved-out assets, as opposed to standalone 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.

45 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.

46 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.

47 See the ICN Merger Working Group Interim Report on the Status of the International Merger Enforcement Cooperation Project, available at http://www.konkurrensverket.se/globalassets/om-oss/icn2016-2019_horizontal-coordinator_merger-working-group_workplan.pdf.

48 See, OECD 2013 Roundtable at p. 10.

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

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

51 http://www.internationalcompetitionnetwork.org/uploads/library/doc1031.pdf.

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.[52] This is an extensive work (some 54 pages). It again 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[53] and examples of cooperation on remedies.[54]

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 European Union and Switzerland,[55] and between Australia and New Zealand,[56] which can be case-specific, where supported by appropriate waivers of confidentiality.[57] Quite recently, the US DoJ and FTC also concluded a general 'best practice' agreement with the CCB,[58] the ACCC signed a memorandum of understanding with MOFCOM to enhance communication on merger review cases[59] and in October 2015, the EC signed a best practices framework agreement with MOFCOM for cooperation on reviewing mergers.[60]

Beyond this, many competition authorities emphasise that they cooperate even without such formal structures.[61] For example, the ICN has published two presentations on cooperation between competition authorities.[62] 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.[63] Cooperation often led to coordination of remedies.

The *Nestle/Pfizer Nutrition* case is an example of successful 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 of 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

52 http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf.

53 See, Annex 1, p. 29.

54 See, Annex 6, where, for example, cooperation on remedies in *Nestle/Pfizer*, *Holcim/Lafarge* and *Pfizer/Wyeth* is outlined.

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

56 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.

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

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

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

60 See http://europa.eu/rapid/press-release_IP-15-5843_en.htm.

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

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

63 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 at p. 6, which gives examples of 'joint investigative tools' including joint calls, meetings, interviews and requests for information.

provide these two agencies with waivers. As a result, discussions between the two agencies 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.[64]

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.[65]

Third, while 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.[66] 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.*[67]

Interestingly, in the *Unilever/Sara Lee* case, the SACC 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 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.[68] The SACC therefore appears to have shown sensitivity for the impact of other jurisdictions' remedies internationally, while also showing that such remedies still do not outweigh 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, 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.[69] Even if contacted by and cooperating with other competition authorities, the US and EU competition authorities are not ruling on the effects elsewhere, in, for instance, Brazil, Korea or Singapore. As Korea notes in the OECD report, 2011:

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64 See http://internationalcompetitionnetwork.org/uploads/library/doc1031.pdf at p. 9.

65 See http://internationalcompetitionnetwork.org/uploads/library/doc1031.pdf at pp. 3-4.

66 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.

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

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

69 See, for example, the United States contribution to the OECD report, 2011, p. 296. Similarly, post-Brexit, the EC and the UK's CMA will frequently be considering markets that are EEA-wide, but each authority will be considering the effects in its own territory.

> *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.*[70]

Fifth, a competition authority may consider that it cannot just rely on another jurisdiction's remedy to ensure enforcement.[71] 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.[72] 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.[73]

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*.[74] It also appears often to be the position of newer competition authorities, or those in smaller countries.[75]

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 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 which may take longer to rule). They also try 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, 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 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'.[76]

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

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

72 See Undertaking to the ACCC, 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.

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

74 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.

75 See BIAC contribution to the OECD report, 2011, pp. 316–19. See also Allen & Overy's 'Global trends in merger control enforcement', http://www.allenovery.com/SiteCollectionDocuments/Global%20trends%20in%20merger%20control.pdf#report, at page 16, which notes increased use of behavioural remedies globally but not in the European Union, United States or United Kingdom.

76 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 upfront buyer may be required,[77] taking into account the differences in authorities' practices, such as the way that the FTC selects a purchaser itself, while 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, etc.

Interestingly in the *Springer/Funke* cases (concerning TV programme magazines), the German and Austrian competition authorities cooperated in the implementation of remedies which addressed different competition concerns in each country. According to the ICN Practical Guide, due 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.[78]

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 upfront 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 analysis 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 like 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 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 that case, remedies like this can take a long time to work through.

77 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* 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. Apart from the cooperation between the ACCC and the CCP noted above, the Chilean, Colombian and Mexican authorities also cooperated closely during their investigations; see OECD 2013 Roundtable at p. 68.

78 See http://internationalcompetitionnetwork.org/uploads/library/doc1031.pdf at p. 14.

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., upfront buyer or not) and the practicalities of different timings for the approval of such remedies.[79]

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 (admittedly 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.[80]

As illustrated in some of the case studies in Section II, above, MOFCOM often takes longer than other agencies to review complicated transactions. As such, early contact with MOFCOM is advisable.[81]

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.[82] Generally, such solutions are manageable with willingness, creativity and patience.

79 Id, p. 22.

80 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.

81 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.

82 The need for flexibility was recently illustrated by 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 in order to 'address competition concerns arising in other jurisdictions.' See MLex report of 11 April 2018.

Appendix 1

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