The Merger Control Review

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Editor
Ilene Knable Gotts

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Editor
Ilene Knable Gotts

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Chapter 2

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 substantive lead provided by those authorities.

Now, with the growth 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 2020.[3]

So, while in practice the US and the EU remain 'priority' jurisdictions because of the economic importance of the territories they cover and their influence, parties should also consider the possible need for remedies in other jurisdictions, tailored to deal with other specific concerns, or the application of similar principles to local markets.

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

1 John Ratliff and Frédéric Louis are partners, and Cormac O'Daly is special counsel, at Wilmer Cutler Pickering Hale and Dorr LLP (WilmerHale). The authors thank Virginia Del Pozo, Su Şimşek and Álvaro Mateo Alonso for their assistance.

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

3 See ICN Merger Working Group 2020–2023 Work Plan, available at: www.internationalcompetitionnetwork.org/wp-content/uploads/2020/09/Workplan2020-23MWG.pdf at p. 1.

4 See, for example, the BIAC contribution to the Organisation for Economic Co-operation and Development (OECD) Roundtable on 'Cross-Border Merger Control: Challenges for Developing and Emerging Countries', February 2011 (OECD report, 2011) at pp. 316–319.

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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 whether other national economic or public interest factors could exist.

Below we highlight some prominent cases that illustrate the diverse issues raised in international merger remedies: (1) the *Seagate/Samsung* and *Western Digital/Viviti* cases; (2) *Dow/DuPont*; (3) *Glencore/Xstrata*; (4) two examples of particularly effective cooperation between agencies, namely *Cisco/Tandberg* and *UTC/Goodrich*; and (5) the recent *Danaher/GE Healthcare Life Sciences Biopharma* (see Section II).[6] We then outline some of the key context,

5 See, for example, the EU and Australian contributions to the OECD report, 2011, pp. 153 and 105, respectively.

6 Other notable transactions that required review and remedies in numerous jurisdictions include: (1) *AbbVie/Allergan*, which was reviewed by several competition authorities, including the agencies in the EU, the US, Canada, Mexico and South Africa. The cooperation between these authorities was notably recognised by the Federal Trade Commission (FTC) in its press release where it highlighted, in particular, that it had closely worked with the EC to analyse proposed remedies (see www.ftc.gov/news-events/press-releases/2020/05/ftc-imposes-conditions-abbvie-incs-acquisition-allergan-plc). Ultimately, the EC and the FTC approved AstraZeneca as the suitable buyer for the divested assets: https://ec.europa.eu/competition/mergers/cases/decisions/m9461_1181_4.pdf, and www.ftc.gov/news-events/press-releases/2020/09/ftc-approves-final-order-imposing-conditions-abbvie-incs; (2) the *EssilorLuxottica/GrandVision* merger required approval in eight jurisdictions, including the US, Russia, Brazil, Chile and the EU; (3) in *Google/Fitbit*, not all the competition authorities followed the same approach. While the Japan Fair Trade Commission cooperated with several competition agencies, including the EC, during its review of the transaction, and approved the transaction with the same remedies (see www.jftc.go.jp/en/pressreleases/yearly-2021/January/210114.html), the Australian Competition Authority (ACCC) was still reviewing the deal six months after the EC and other jurisdictions conditionally cleared it. This is outlined in Section III; (4) *GE/Alstom*, which the EU and US authorities cleared conditionally on the same day (even though they had different concerns, the EC and the US Department of Justice (DOJ) adopted aligned remedies – see Commissioner Vestager's speech 'Merger review: Building a global community of practice', 24 September 2015, https://wayback.archive-it.org/12090/20191129201618/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/merger-review-building-global-community-practice_en); the case was notified to 23 other regulators (Sharis Pozen, then GE's vice president of global competition and antitrust and a former acting assistant attorney general at the DOJ, is reported as stating that GE granted all the relevant authorities waivers to communicate with each other – see 'Ex-DOJ Atty Urges Coordination In Defending Global Mergers', *Law 360*, 13 April 2016); (5) *Merck/AZ Electronic*, in which China imposed behavioural remedies after Germany, Japan, Taiwan and the US had unconditionally cleared the transaction; (6) the *Holcim/Lafarge* merger, which involved multiple divestments (including in the US and Canada, the EU, Brazil, India and South Africa); see, e.g., the FTC and Canadian Competition Bureau 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: www.ftc.gov/news-events/press-releases/2015/05/ftc-requires-cement-manufacturers-holcim-lafarge-divest-assets and 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; (7) in *Bayer/Monsanto*, the DOJ press release noted that the DOJ had secured the largest-ever divestiture (see www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened) and the EC also required extensive structural remedies and a behavioural remedy. The ACCC noted that it would not oppose this transaction 'on the basis of global divestments' (see www.accc.gov.au/media-release/accc-wont-oppose-bayers-proposed-acquisition-of-monsanto). The Competition Commission of India took account of the remedies elsewhere while also requiring behavioural remedies to address issues that were specific to India (see www.cci.gov.in/sites/default/files/whats_newdocument/Press%20Release%20dated%2020.06.2018.pdf); (8) in *Tronox/*

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drawing on Organisation for Economic Co-operation and Development (OECD) studies[7] (see Section III). We also refer to the ICN's Merger Guides. Finally, we offer some practical conclusions for companies and their advisers (see Section IV).

II PROMINENT CASES

i Seagate/Samsung and Western Digital/Viviti

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

As a result of the two transactions, five hard disk drive (HDD) manufacturers became three and, in some market segments, the level of concentration was greater.[8] Ultimately, most jurisdictions decided to clear the transactions in the sector for HDDs for storage of digital data on the condition that Western Digital (WD) sold some production assets to Toshiba. However, while China's Ministry of Commerce (MOFCOM)[9] allowed the transactions to go through, it imposed materially different remedies with worldwide impact. The main points of interest are as follows.

First, the EU, the US and China each had different approaches to the essentially simultaneous transactions. The European Commission (EC) treated them under a 'first come, first served' rule, so that *Seagate/Samsung*, which was notified to the EC one day before *WD/Viviti*, was assessed against the market situation before the *WD/Viviti* transaction, while *WD/Viviti* was assessed against the backdrop of *Seagate/Samsung*.[10] The US Federal Trade Commission (FTC) treated both cases as occurring simultaneously. MOFCOM assessed each deal separately, as if the other had not happened.

Cristal, the EC would have required a divestment to an upfront buyer (see http://europa.eu/rapid/press-release_IP-18-4361_en.htm) but the FTC obtained an injunction to prevent the deal from closing, which was upheld in court (see www.ftc.gov/system/files/documents/cases/docket_9377_tronox_et_al_initial_decision_redacted_public_version_0.pdf). The EC has also published a 'Competition Policy Brief' on the main principles and its recent experience in international enforcement cooperation in mergers: see http://ec.europa.eu/competition/publications/cpb/2016/2016_002_en.pdf.

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.

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

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

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Second, both the US and EU authorities[11] cleared the *Seagate/Samsung* transaction without any remedy, whereas MOFCOM required the two businesses to be held separate until potential subsequent approval.

Third, the EU, US, Japanese and Korean authorities diverged from China on what remedies were required in *WD/Viviti*. The EU required *WD/Viviti* to divest certain production assets, including a production plant, to an approved third party before closing the deal.[12] The US did the same, requiring a named upfront buyer, Toshiba.[13] The Japanese and Korean authorities also required similar divestitures.[14] However, in addition to this divestiture, MOFCOM required that WD and Viviti be held as separate businesses until approved.[15]

Fourth, MOFCOM imposed other behavioural obligations.[16] For example, Seagate was required to invest significant sums during each of the next three years to bring forward more innovative products.

Fifth, there was widespread cooperation between competition authorities. For example, the FTC states that its staff cooperated with authorities in Australia, Canada, China, the EU, Japan, Korea, Mexico, New Zealand, Singapore and Turkey, including working closely on potential remedies.[17] 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 US and the 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 raised several points.

First, many of the customers, the computer companies buying the HDDs, manufacture in China and some of the merging parties' production facilities were also in China. So one could argue that China had a particularly strong interest in these cases.

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.[18] MOFCOM was also evidently concerned by the prospect of

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

12 EC Press Release, IP/11/1395, 23 November 2011.

13 Federal Register Vol. 77, No. 48, 12 March 2012, pp. 14,523–14,525; *In the matter of Western Digital Corporation*, FTC Decision and Order, available at: www.ftc.gov/os/caselist/1110122/120305westerndigitaldo.pdf.

14 See, for example, www.jftc.go.jp/en/pressreleases/yearly-2011/dec/individual-000460_files/2011_Dec_28.pdf.

15 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.

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

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

18 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.

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reduced competition; it 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.[19]

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.

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.

In October 2015, MOFCOM partially lifted the hold-separate obligation on *WD/Viviti* and, in November 2015, MOFCOM removed the hold-separate obligation on the *Seagate/Samsung* transaction, allowing full integration (while still maintaining certain other behavioural commitments).[20] 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 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.[21]

ii Dow/DuPont

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

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

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 expired after 24 months, which was 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.

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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]

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 research and development (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 US Department of Justice (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,

24 See decision, Paragraph 4044.

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 www.justice.gov/opa/pr/justice-department-requires-divestiture-certain-herbicides-insecticides-and-plastics.

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

31 See SACC Annual Report for 2012/13, www.compcom.co.za/wp-content/uploads/2019/10/annual-report-2012-2013.pdf, p. 17.

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limiting them to 80 employees initially, with a further loss of 100 lower-level employees a year later and a financial contribution towards their retraining. Similar conditions have been imposed in many other cases.[32]

In April 2013, MOFCOM cleared the acquisition, subject to different remedies compared to those previously agreed with the EU.[33] MOFCOM raised concerns 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 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.[36] The DOJ's press release, announcing that it would not challenge Cisco's acquisition, expressly noted the commitment entered into with

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

33 See WilmerHale Alert, Lester Ross and Kenneth Zhou, 'China Clears Glencore's Acquisition of Xstrata Subject to Remedies', 26 April 2013: www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=10737421260. 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 *The Merger Control Review*, at p. 492). MOFCOM is clearly not the only authority to require divestitures outside its jurisdiction. For example, in *Anheuser-Busch Inbev/Grupo Modelo*, the DOJ required the sale of a Mexican brewery, which was located only five miles from the US border and had good transport links to the US, and which was therefore a key part of a US remedy. See www.justice.gov/opa/pr/justice-department-reaches-settlement-anheuser-busch-inbev-and-grupo-modelo-beer-case. 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.

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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.'[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.

v Danaher/GE Healthcare Life Sciences Biopharma

Danaher's acquisition of GE Healthcare Life Sciences' Biopharma business (GE Biopharma) is an interesting example of a merger involving cooperation between multiple agencies, in this case in Brazil, China, the EU, Israel, Korea and the US, both in analysing the transaction and remedies.[41]

Given the complexity of the markets,[42] the cooperation appears to have been useful in aligning remedies.

Both parties were suppliers of products and services used in the bioprocessing industries and the merger involved overlaps in several markets.[43] The Brazilian and Japanese authorities

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

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

43 For example, the EC concluded that the merger would lead to concerns regarding certain products in microcarriers, bioprocess filtration, chromatography and molecular characterisation markets, but did not find any competition issues in other markets that are part of the single-use technology, bioprocess filtration, chromatography and other life sciences areas; see EC Press Release of 18 December 2019, 'Mergers:

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approved the transaction without any remedy,[44] whereas the parties offered to divest several businesses to alleviate competitive concerns raised by the agencies in China, the EU, Korea and the US.

The remedies, mainly focusing on concerns around actual competition, consisted of the divestment of several of Danaher's businesses. China's State Administration for Market Regulation (SAMR) also had concerns regarding potential competition, requiring Danaher to also provide the purchaser of the divested business package with an unfinished project and to continue R&D for two years after the closing of the deal, in addition to divestment of several businesses.[45]

As for the timing of the regulatory process, following the announcement of the deal in February 2019,[46] the merger control review procedures took different paths in the EU, the US and China. The parties notified the merger to the EC in November 2019, and obtained conditional approval in December 2019 after a Phase I review of the transaction. The EC granted purchaser approval in a separate decision in March 2020.[47] This is another example of the time constraints in a Phase I review not allowing the EC to review and approve the purchaser at the same time as it analysed the main transaction[48] (even though the proposed purchaser was already known).[49]

In China, the parties first notified in April 2019, and then withdrew the notification to refile in December 2019. SAMR conditionally approved the merger in February 2020. Similar to the EC procedure, SAMR approved the same proposed purchaser of the divestment businesses in a separate decision. Danaher completed the sale of the divestiture to Sartorius on 30 April 2020.[50]

Commission approves Danaher's acquisition of GE Healthcare Life Sciences' Biopharma Business, subject to conditions', available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6809. The Korean authority found that the merger would not lead to competitive concerns in 24 of 32 product markets: PaRR Reporting on 'GE/Danaher conditionally approved by Korean antitrust regulator'.

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

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

46 See Danaher Press Release of 25 February 2019, 'Danaher to Acquire the Biopharma Business of General Electric Life Sciences for $21.4 Billion', available at: https://investors.danaher.com/2019-02-25-Danaher-to-Acquire-the-Biopharma-Business-of-General-Electric-Life-Sciences-for-21-4-Billion.

47 According to the EC's public case register, the EC approved the purchaser on 18 March 2020; https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9331.

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

49 See Danaher Press Release of 21 October 2019, 'Danaher Reaches Agreement to Sell Certain Businesses to Sartorius AG as Part of the GE Biopharma Acquisition Regulatory Process', available at: http://investors.danaher.com/2019-10-21-Danaher-Reaches-Agreement-To-Sell-Certain-Businesses-To-Sartorius-AG-As-Part-Of-The-GE-Biopharma-Acquisition-Regulatory-Process.

50 See Danaher Press Release of 30 April 2020, 'Danaher Completes Sale of Certain Businesses To Sartorius AG To Satisfy Regulatory Requirement For Cytiva Acquisition', available at: http://investors.danaher.com/2020-04-30-Danaher-Completes-Sale-Of-Certain-Businesses-To-Sartorius-AG-To-Satisfy-Regulatory-Requirement-For-Cytiva-Acquisition.

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In contrast to the two-step procedure in China and the EU, the last regulatory authority to approve the *Danaher/GE Biopharma* transaction conditionally, the FTC, announced its approval of the main transaction and the proposed purchaser at the same time.[51]

Interestingly, it appears that the same monitoring trustee was appointed, at least in the US and the EU, offering efficiencies in the implementation and oversight of the divestment plan.[52]

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 specific laws and from their different regional or national perspectives, and often with different approaches[53] and inputs (e.g., in terms of market testing results).[54]

Second, as noted above, there is increasing international cooperation on remedies.[55]

51 See FTC Press Release of 19 March 2020, 'FTC Imposes Conditions on Danaher Corporation's Acquisition of GE Biopharma', available at: www.ftc.gov/news-events/press-releases/2020/03/ftc-imposes-conditions-danaher-corporations-acquisition-ge.

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

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

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

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

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There are, for example, frequent contacts between authorities through the OECD[56] and the ICN.[57] The work of these organisations is in parallel and is not case-specific,[58] 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. 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'. Among other things, the Secretariat pointed to cooperation and coordination as effective tools to prevent parties from playing authorities against each other, such as using commitments accepted by one authority as leverage against others.[59] 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.[60] The Roundtable report also highlighted the advantages of appointing common enforcement and monitoring trustees to enforce cross-border remedies.[61]

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.[62] 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 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.[63] This is an extensive

56 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.

57 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.

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

59 See OECD 2013 Roundtable at p. 10.

60 id. at, inter alia, pp. 5 and 6.

61 id. at, inter alia, p. 6.

62 www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf.

63 www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf.

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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[64] and examples of cooperation on remedies.[65]

There are also other layers of cooperation based on bilateral agreements. Clearly EC and US cooperation is close and important.[66] EC and DOJ cooperation has developed from their first cooperation agreement in 1991,[67] with, more recently, the 2011 Best Practices on Cooperation in Merger Investigations.[68] There are also specific agreements between the EU and Switzerland,[69] and between Australia and New Zealand.[70] Such cooperation can be case-specific, where supported by appropriate waivers of confidentiality.[71] In 2019, the DOJ cooperated with 11 international counterparts on 20 different merger matters.[72] The DOJ and the FTC have concluded a general 'best practice' agreement with the CCB;[73] the Australian Competition and Consumer Commission (ACCC) signed a memorandum of understanding with MOFCOM to enhance communication on merger review cases;[74] and in October 2015, the EC signed a best practices framework agreement with MOFCOM for cooperation on reviewing mergers.[75] Since then, the EC has cooperated with (what is now) SAMR in at least five merger review cases.[76]

64 See Annex 1, p. 29.

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

66 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).

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

68 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.

69 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.

70 See the OECD report, 2011, p. 102. 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.

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

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

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

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

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

76 See the Report from the Commission on Competition Policy 2018, https://ec.europa.eu/competition/publications/annual_report/2018/part1_en.pdf, p. 25.

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The specific cooperation in the EU–UK Brexit Withdrawal Agreement (the Withdrawal Agreement),[77] which became applicable on 31 December 2020, should also be mentioned. Under the Withdrawal Agreement, some specific rules are set out. The main points for remedies are these:

a it was agreed that, for cases arising before the end of the transition period (the period up to 31 December 2020), the EC would continue to monitor and enforce merger remedies imposed in relation to the UK, including where the decision was taken after the end of the transition period in a procedure started before the end of that period; and

b the agreement also provides for the possibility that the EC and the relevant UK competition authority could agree to transfer that monitoring and enforcing role to the UK authorities in the future.[78]

A UK Competition and Markets Authority (CMA) publication (the CMA Guidance)[79] explains that, where possible and appropriate, the CMA will 'endeavour to coordinate merger reviews relating to the same or related cases' with the EC.[80] In May 2021, the EC adopted a Recommendation for a Council Decision that would authorise it to open negotiations for an EU–UK Competition Cooperation Agreement.[81] In its Recommendation, the EC noted that the envisaged competition cooperation agreement may include, in particular, conditions for the exchange and use of confidential information in the context of merger investigations.[82]

The CMA Guidance also states: 'Merging parties (and third parties) are encouraged to facilitate cooperation with the European Commission and other competition authorities wherever possible.'[83] In practice, one may expect this to be achieved by granting standard confidentiality waivers allowing the EC and the CMA (or other relevant UK authority) to coordinate. This is further clarified in a CMA guidance on its functions after 31 December 2020: 'Where national legislation prevents the exchange of confidential information, the CMA and other competition authorities may seek permission from the parties to exchange confidential information.'[84]

It will be interesting to see whether in the future, when the UK also investigates a case in parallel to the EU, the UK will require separate remedies, an issue likely to be assessed on a case-by-case basis (and linked to whether the UK would want a notification in the first place, with filing being, in principle, voluntary). In some cases, the CMA might consider that

77 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT(02)&from=EN (the Withdrawal Agreement).

78 See Article 95(2) of the Withdrawal Agreement.

79 CMA, 'UK exit from the EU: Guidance on the functions of the CMA under the Withdrawal Agreement', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864371/EU_Exit_guidance_CMA_web_version_final_---2.pdf (CMA Guidance).

80 See CMA Guidance, Paragraph 3.31. Also see CMA, Guidance on the functions of the CMA after the end of the Transition Period, 1 December 2020, Paragraph 3.44, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940943/Guidance_Document_for_End_of_Transition_Period_--.pdf.

81 See Article 2.4, Paragraph 4 of the EU–UK Trade and Cooperation Agreement, Title XI.

82 See EC Press Release, MEX/21/2441, 11 May 2021.

83 See CMA Guidance, Paragraph 3.31.

84 See CMA, Guidance on the functions of the CMA after the end of the Transition Period, 1 December 2020, Paragraph 3.44, (see footnote 80).

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an EU remedy might suffice for all of Europe, including the UK. In others, the CMA may want its own remedy, for a specific UK issue, or simply to have its own decision and order in jurisdiction for enforceability.

Beyond this, many competition authorities emphasise that they cooperate even without such formal structures.[85] 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.[86] Cooperation has often led to coordination of remedies.[87]

Agencies may cooperate even without waivers on the basis of public information or 'agency non-public information' such as an agency's procedures regarding timing and views on the competitive assessment.[88] The *Nestlé/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 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.[89]

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.[90]

85 See the US, EU and UK contributions to the OECD report, 2011, at pp. 296, 153 and 288–289, respectively.

86 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.

87 In its assessment of the *Praxair/Linde* merger, the FTC cooperated with agencies in Argentina, Brazil, Canada, Chile, China, Colombia, the EU, India, Korea and Mexico. The FTC required Praxair and Linde to divest assets in certain industrial gas markets, including source contracts equal to all of Praxair's helium source contract volume less the volumes that the EC and SAMR ordered to be divested; see FTC Press Release of 22 October 2018, 'FTC Requires International Industrial Gas Suppliers Praxair, Inc. and Linde AG to Divest Assets in Nine Industrial Gas Markets as a Condition of Merger', available at: www.ftc.gov/news-events/press-releases/2018/10/ftc-requires-international-industrial-gas-suppliers-praxair-inc; also see EC Press Release of 20 August 2018, 'Mergers: Commission clears merger between Praxair and Linde, subject to conditions', available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5083.

88 See ICN, 'Merger Cooperation and Information Exchange Types of Information', www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/MWG-Types-of-information.pdf.

89 See www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf at p. 9.

90 See id. at pp. 3–4.

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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.[91] 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.*[92]

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 EU 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.[93] 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.[94] 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:

> *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.*[95]

The recent *Google/Fitbit* transaction is a good example of this, with the issue in Australia. While the authorities in the EU, Japan and South Africa approved the transaction conditionally,

91 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.

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

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

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

95 See the Korean contribution to the OECD report, 2011, p. 170.

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the ACCC is still reviewing it (as at May 2021). The ACCC has already indicated doubts regarding the competitiveness of the merger and the adequacy of the remedies approved in other jurisdictions in light of Google's accumulation of data.[96]

Fifth, a competition authority may consider that it cannot just rely on another jurisdiction's remedy to ensure enforcement.[97] 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.[98] 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.[99]

Sixth, a competition authority may decide that it cannot order a structural remedy involving assets outside its jurisdiction because it lacks the means to enforce it, and therefore accepts a behavioural remedy instead. This was, for example, the position of the UK in *Drager/Airshields*.[100] It also appears often to be the position of newer competition authorities, or those in smaller countries.[101]

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 that 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

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

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

98 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, 43 and 44.

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

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

101 See BIAC contribution to the OECD report, 2011, pp. 316–319. See also Allen & Overy's 'Global trends in merger control enforcement', www.allenovery.com/global/-/media/allenovery/2_documents/news_and_insights/campaigns/global_trends_in_merger_control_enforcement/merger_control_2018.pdf at p. 16, which notes increased use of behavioural remedies globally but not in the EU, the US or the UK. In a joint statement of 20 April 2021, the competition authorities in the UK, Australia and Germany noted the need to favour structural over behavioural remedies, since behavioural remedies may, among other things, distort the natural development of the market, while placing a burden on competition agencies and businesses due to the extensive post-merger monitoring that can be required; available at: www.gov.uk/government/publications/joint-statement-by-the-competition-and-markets-authority-bundeskartellamt-and-australian-competition-and-consumer-commission-on-merger-control/joint-statement-on-merger-control-enforcement.

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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.'[102]

Usefully, they emphasise the need to plan the remedies phase, especially if an upfront buyer may be required,[103] taking into account the differences in authorities' 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.

Interestingly, in the *Springer/Funke* cases (concerning TV programme magazines), the German and Austrian competition authorities cooperated in the implementation of remedies that addressed different competition concerns in each country. According to the ICN Practical Guide, 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.[104]

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 US and the EU 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

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

103 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. 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.

104 See www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf at p. 14.

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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.

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.[105]

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 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.[106] This 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 to 'address competition concerns arising in other jurisdictions'.[107]

As illustrated in some of the case studies in Section II, the Chinese process often takes longer than others. As such, early contact with SAMR is advisable.[108]

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, creativity, hard work and patience.

105 id., at p. 22.

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

107 See MLex report of 11 April 2018.

108 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. SAMR has recently committed to speeding up merger reviews in the sectors hardest hit by the covid-19 outbreak to resume economic activity; see MLex report of 6 April 2020, 'China's SAMR ramps up efforts to assist Covid-19 battle, assist economic recovery'.

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ABOUT THE AUTHORS

JOHN RATLIFF

Wilmer Cutler Pickering Hale and Dorr LLP

John Ratliff is a partner in WilmerHale's Brussels office. He has been practising EU competition law for more than 30 years, dealing with all aspects. In the mergers field, he has been involved in some 40 cases, several with major remedies, including Phase II and complex Phase I EU procedures such as *Boeing/McDonnell Douglas*, *Unilever/Bestfoods*, *Statoil/Hydro*, *StatoilHydro/ConocoPhillips (JET)*, *Halliburton/Baker Hughes*, *GE/Baker Hughes* and *Danaher/GE Healthcare Life Sciences Biopharma*. He has handled numerous worldwide filings with local counsel. In April 2015, he chaired the panel at the American Bar Association Spring Meeting on international merger remedies: 'Cross-Border Remedies – Still safe in Antarctica?'. Mr Ratliff has also represented companies before the European courts in competition law cases and works in other EU law areas.

FRÉDÉRIC LOUIS

Wilmer Cutler Pickering Hale and Dorr LLP

Frédéric Louis is a partner in WilmerHale's Brussels office. He has been practising EU competition law for 20 years, including behavioural investigations, litigation in national and EU courts, merger notifications and state aid. He has been involved in some 30 merger filings, including Phase II and complex Phase I EU procedures such as *Alcatel/Lucent*, *LSG Sky Chefs/Gate Gourmet*, *StatoilHydro/ConocoPhillips (JET)*, *Lufthansa/Brussels Airlines* and *Danaher/GE Healthcare Life Sciences Biopharma*. In 1998, he was voted one of *Global Competition Review*'s '40 under 40'. Mr Louis has represented clients before the European Commission, and the Belgian, Dutch and French competition authorities, and has appeared before domestic courts in Belgium, France and the Netherlands.

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CORMAC O'DALY

Wilmer Cutler Pickering Hale and Dorr LLP

Cormac O'Daly is a special counsel based in WilmerHale's London and Brussels offices. He has practised for 15 years and advises on a wide range of EU and UK competition law issues. These include merger control, cartels and related litigation, licensing and other vertical and horizontal agreements, other potentially restrictive practices and alleged abuses of market power. He regularly advises on areas at the convergence of competition and intellectual property laws. Mr O'Daly has been involved in over 20 merger proceedings, some with remedies, including *Oracle/PeopleSoft*, *Statoil/Hydro*, *Cisco/Tandberg*, *Halliburton/Baker Hughes* and *GE/Baker Hughes*.

WILMER CUTLER PICKERING HALE AND DORR LLP

Bastion Tower
Place du Champ de Mars 5
1050 Brussels
Belgium
Tel: +32 2 285 49 00
john.ratliff@wilmerhale.com
frederic.louis@wilmerhale.com

49 Park Lane
London W1K 1PS
United Kingdom
Tel: +44 207 872 1000
cormac.odaly@wilmerhale.com

www.wilmerhale.com

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