MERGER REMEDIES GUIDE

FOURTH EDITION

Editors
Ronan P Harty, Nathan Kiratzis and Anna M Kozlowski

Merger Remedies Guide

Fourth Edition

Editors

Ronan P Harty

Nathan Kiratzis

Anna M Kozlowski

Reproduced with permission from Law Business Research Ltd
This article was first published in October 2021
For further information please contact insight@globalcompetitionreview.com

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.latinlawyer.com

ISBN 978-1-83862-585-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

American Antitrust Institute

Analysis Group, Inc

Anderson Mōri & Tomotsune

Axinn

Cleary Gottlieb Steen & Hamilton LLP

Cravath, Swaine & Moore LLP

Crowell & Moring LLP

Davis Polk & Wardwell LLP

Daniel P Ducore

Fangda Partners

Gilbert + Tobin

Linklaters LLP

Paul, Weiss, Rifkind, Wharton & Garrison LLP

Shardul Amarchand Mangaldas & Co

Thompson Hine LLP

Wachtell, Lipton, Rosen & Katz

Wilmer Cutler Pickering Hale and Dorr LLP

Contents

PART VI: MERGER REMEDY INSIGHTS FROM AROUND THE GLOBE

APPENDICES

Part III

Process and Implementation

CHAPTER 7

Remedies in the Context of Multi-Jurisdictional Mergers

John Harkrider and Michael O'Mara[1]

As the number of jurisdictions with active merger control regimes continues to increase,[2] parties to international deals must navigate an increasingly complex web of notification requirements, timelines and review processes, and substantive review frameworks. These challenges are heightened for mergers that may raise significant antitrust concerns and potentially require remedies in some or all reviewing jurisdictions. Timely, predictable and efficient clearance requires significant upfront analysis and preparation to define an effective clearance strategy; selecting and tightly cooperating with a team of local specialist antitrust counsel; and effectively engaging with and facilitating cooperation among global regulators on merits and remedies issues.

Assessing risk and developing an effective clearance strategy

Developing an effective clearance strategy for multi-jurisdictional mergers begins with an antitrust risk analysis and strategic plan, taking into account the total global regulatory landscape required for clearance. This analysis should begin

1 John Harkrider is a founding partner and Michael O'Mara is an associate at Axinn.

2 See, e.g., Organisation for Economic Co-operation and Development [OECD], Competition Trends 2020, at 3 (2020), at https://www.oecd.org/daf/competition/OECD-Competition-Trends-2020.pdf ('In 1970, only 12 jurisdictions had a competition law, with only seven of them having a functioning competition authority. Today, more than 125 jurisdictions have a competition law regime, and the large majority has an active competition enforcement authority.'); as of 2015, more than 120 countries had active merger control regimes. Marc Waha and Ian Giles, 'Trends In Merger Control 2015', *International Financial Law Review*, available at https://www.iflr.com/article/b1lsqhcnmv0wk6/trends-in-merger-control-2015.

as soon as practicable in the merger process in order to inject transparency and visibility into the post-signing and pre-closing process. Although confidentiality concerns can sometimes prevent access to certain resources, it is advantageous to have this analysis done early, preferably prior to signing, to help inform negotiation about required clearances for closing, outside date and remedies required to meet the parties' obligations under the contract.

In multi-jurisdictional deals, the parties' analysis and strategic plan should at least include consideration of the following factors:

- *Determination of the jurisdictions where filing is necessary or advisable to file notifications*. There is wide variation across global merger control regimes of what triggers a mandatory notification obligation. Some jurisdictions do not require notification to investigate foreign-to-foreign transactions and, conversely, notifying in some jurisdictions may be advisable for some mergers despite being voluntary notification jurisdictions. For example, the United Kingdom is nominally a voluntary notification jurisdiction, but post-Brexit, the Competition and Markets Authority (CMA) has increased its market monitoring scheme such that it has become a *de facto* mandatory filing for significant mergers (even for foreign-to-foreign mergers without an obvious UK component).
- *Evaluation of geographical and product market areas of risk*. The parties should determine which products are likely to raise significant concerns and where (among those jurisdictions in which the parties will notify) there may be local (or global) market issues that might increase risk of substantive regulatory concerns and potentially require remedies in that jurisdiction.
- *Analysis and development of merits case*. The parties should develop and evaluate the merits case for closing to be presented to global regulators, taking into account the differing competitive conditions and differing regulatory frameworks (e.g., public interest or consumer welfare standards) across the filing jurisdictions and the interplay between them. For example, if shares in one potential national product market suggest that local regulators may have concerns about competition for a certain product, but neighbouring countries do not show the same concern, the parties may develop arguments that the geographical market is broader, or entry is likely into the first country.
- *Consideration of potential remedies packages*. The parties should evaluate whether there is a significant chance that one or more reviewing jurisdictions may require a remedy for clearance and, if so, analyse what a suitable remedy might look like. This analysis should take into account the differences in the factual and legal frameworks that multi-jurisdictional authorities face. For example, some jurisdictions are more willing to accept behavioural remedies

than others; some are more amenable to taking into account or mirroring other jurisdictions' remedies; and some typically require a buyer for a proposed divestiture to be identified up front instead of a hold separate pending sale.

If remedies are reasonably likely, it is important to start the remedy planning process early, even if the primary plan for merger clearance is to advocate on the merits. Engaging early in planning a remedy package (even as a 'plan B') can save time, minimise business disruptions, market-test the suitability and sale value of potential remedy packages (allowing the parties to determine the scope of palatable divestiture options), and even line up suitable divestiture buyers. The time post-signing can also be used to advance the remedy planning process, in tandem with engaging global regulators on the merits. The parties can use that time for counsel and the entity to review the business and regulatory considerations around a suitable business or package of assets, hire a banker and shop the business, and start identifying and evaluating potential buyers.

Assembling an A-team: coordination from assessment to clearance

From the preliminary risk analysis to remedy approval and clearance, developing and executing an effective strategy for clearing a multi-jurisdictional merger will benefit greatly from tight global coordination among outside counsel, in-house counsel and the business team. Effective coordination between the global coordinating counsel and the web of local counsel can help to ensure that all jurisdictions are on the same page, offering consistent facts and arguments on merits and remedies in front of global regulators (who are themselves likely to be communicating among themselves), and minimising and streamlining the burden of review on the parties' legal teams and business personnel.

Typically, an effective multi-jurisdictional clearance strategy will select one global coordinating counsel to be responsible for overseeing global strategy and execution across all reviewing jurisdictions. Responsibilities of the global coordinating counsel include negotiating the antitrust risk provisions and closing conditions in the agreement, disseminating updates and information to local counsel, and coordinating and reviewing global filings across all filing jurisdictions.

The development and execution of a global clearance strategy for multi-jurisdictional mergers should also rely on the knowledge and experience of local counsel selected because they are tapped into the processes, substantive viewpoints and significant enforcement trends of their local regulators. In addition to representing the parties in front of the local authority, local counsel advise on jurisdiction-specific risks and idiosyncrasies, draft and submit filings, and interface with local business people. Importantly, close coordination with local counsel can avoid hiccups in remedy design and advocacy (e.g., whether a local authority may be more likely to pursue a novel theory of harm or might identify an issue with a potential divestiture buyer in its jurisdiction if no issue exists elsewhere).

Since the development and success of the global clearance strategy relies heavily on the quality of the insights of local counsel and their ability to execute that strategy in close coordination with other counsel around the world, parties should give due consideration to the selection of local counsel in each jurisdiction. One option is to hire an international law firm with offices or attorneys qualified in most or all of the filing jurisdictions, which may have benefits for coordination; however, in most cases even large international firms may not have a strong local presence in each filing jurisdiction. Another option is to employ a 'best of breed' strategy, retaining a top firm from each filing jurisdiction to work together as a global patchwork of local counsel. This strategy ensures that each jurisdiction's local counsel has the required experience and exposure in their jurisdiction to inform the strategy and effectively interface with local authorities. As an example, in the past 10 years, Axinn has coordinated closely on multi-jurisdictional mergers with more than 40 firms from 24 jurisdictions as global coordinating counsel for multi-jurisdictional mergers.

Facilitating regulatory coordination to encourage consistent outcomes

Just as it is important that the parties' international outside counsel are tightly coordinated, parties to a multi-jurisdictional merger will often benefit from facilitating communication and coordination among reviewing jurisdictions as they review the merger. Multi-jurisdictional coordination can help the parties adhere to tighter time frames, avoid surprises and reduce the burden on the business by facilitating coordinated submissions or even joint witness interviews. Coordination can also help smaller jurisdictions get comfortable with merits arguments or remedy packages, such as viewing competitive concerns more broadly than their national borders (e.g., accepting the potential for entrants from other countries or broader geographical markets) or the appropriateness of a larger remedy package. As a result, coordination can result in more uniform remedy packages.

Granting confidentiality waivers to facilitate multi-jurisdictional review has become the norm: regulators prefer them[3] and parties commonly grant them because, in general, it is in the parties' best interest to facilitate this information

3 See International Competition Network [ICN], Merger Working Group, Practical Guide to International Enforcement Cooperation in Mergers, p. 6, para. 19 (2015) ('Merger reviews that are aligned at key decision-making stages may allow for more efficient investigations,

sharing. In reviewing a proposed remedy package in particular, it may be necessary for the reviewing jurisdictions to exchange confidential information about the parties' businesses in other jurisdictions. However, even with confidentiality waivers, there is no guarantee that agencies will coordinate to a degree that is helpful to the parties, and it is sometimes difficult for parties to discern at what level the reviewing jurisdictions are coordinating in the background, let alone aligning on substantive issues.

In transactions where divestitures of global businesses are expected, it is critical to facilitate close coordination where a single remedy package might be feasible, to ensure greater consistency. This is important because it can allow the parties to maximise value by running concurrent processes to find buyers for all the divested assets. In particular, the relatively predictable process that results from working with multiple agencies all at once can even result in a single buyer for all divested assets, which helps to avoid a situation where there are no realistic buyers for smaller assets. A good example of close coordination of review among agencies being successful in aligning review and facilitating a global remedy was in Thermo Fisher Scientific's US$13.2 billion acquisition of Life Technologies.[4] That transaction, announced in April 2013, was reviewed by agencies in nine jurisdictions – United States, the European Union, China, Canada, Japan, South Korea, Russia, Australia and New Zealand. The parties signed cooperation waivers with multiple jurisdictions, which allowed the agencies to coordinate their efforts in reviewing the acquisition and, as the US Federal Trade Commission (FTC) pointed out in its press release approving the consent decree, 'led to compatible approaches on a global scale'.[5] It also allowed for global convergence on a single

more meaningful discussions between agencies and ultimately more consistent outcomes.'), available at www.internationalcompetitionnetwork.org/uploads/library/doc1031.pdf.

4 See id., at 4 (2018)('cooperation generally involved keeping each other informed on process (particularly, on expected timelines and state of play of the respective investigations) as well as comparative discussions of agency considerations and findings on substantive aspects (including theories of harm, product and geographic market definition and market dynamics), the Commission's cooperation with some of the agencies went beyond this (and involved, for example, exchange of documents which included confidential information and coordination in relation to remedy design and implementation on the basis of waivers)'), available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf.

5 Press Release, US Federal Trade Commission [FTC], 'FTC Puts Conditions on Thermo Fisher Scientific Inc's Proposed Acquisition of Life Technologies Corporation' (31 January 2014), available at www.ftc.gov/news-events/press-releases/2014/01/ftc-puts-conditions-thermo-fisher-scientific-incs-proposed.

remedies package of three business lines sold to General Electric for US$1 billion (the European Commission (EC) and FTC approved the divestiture buyer on the same day).

However, it is not always necessary that all filing jurisdictions be aligned and coordinated; in some cases, there may be a strategic advantage to engage one or more key jurisdictions to lead with a favourable outcome (or delay a less favourable outcome) in a key jurisdiction. This can sometimes take the form of first addressing the jurisdictions that are expected to have significant issues with the merits of the merger, and then building on successes in those jurisdictions where the issues are relatively more manageable. A successful clearance with or without remedies can send a signal to other jurisdictions both in analysis and result, and build momentum. For example, if the parties believe that a jurisdiction is more likely to clear the transaction without remedies and do so in a manner that made economic sense (i.e., was persuasive to other jurisdictions), it may make sense to pick that jurisdiction as the lead jurisdiction, so that other jurisdictions could follow suit.

Historically, the most common strategy for using lead jurisdictions to build momentum was to have the United States or European Union – the two most established merger control regimes – lead the way. In part this is because of the belief that less established or more resource constrained jurisdictions will follow the decisions of those two, but it also reflects the fact that those two jurisdictions have been the most prolific for reviewing significant international deals and also for seeking and securing remedies from merging parties. According to the Organisation for Economic Co-operation and Development, two jurisdictions (probably these two) together accounted for 26 per cent of merger decisions requiring remedies reviews from 2018 to 2019.[6]

For example, if the parties believe that the United States will ultimately clear the transaction without remedies and potentially without issuing a second request, and that other jurisdictions would be more likely to clear the deal in response, one viable strategy is engaging the United States first and extending the US agencies' initial review for several months to do so. If the parties believed that the FTC or US Department of Justice (DOJ) could clear the transaction in 60 days, it might make sense to 'pull and refile' the Hart-Scott-Rodino Act filing (HSR) (30-day HSR period plus an additional 30 days after pulling and refiling). If the

6 OECD, Competition Trends 2021, at 23 (2021), available at https://www.oecd.org/daf/competition/oecd-competition-trends-2021-vol2.pdf.

parties believed that the FTC or DOJ could take more than 60 days to clear the transaction, the parties might want to simply delay filing the HSR and engage in pre-HSR filing advocacy.

One such case was Dell Technologies' US$67 billion acquisition of EMC Corporation, in which the parties engaged in more than three months of pre-filing engagement with the FTC in the United States to prevent the issuing of a second request, which would have sent a negative signal to the other 17 reviewing jurisdictions. The FTC was the first mandatory jurisdiction to clear the transaction, allowing the initial waiting to expire on 24 February 2016, and, during the next three weeks, nine more agencies cleared the transaction.

As the number of reviewing jurisdictions increases and those jurisdictions become increasingly assertive in policing potential anticompetitive effects affecting their borders, more consideration should be given to which regulators the parties want in the driving seat, given the international regulatory landscape facing the deal, including the jurisdiction through which the most difficult path to clearance may run. Sometimes this still suggests that the United States and European Union may be the lead jurisdictions, but increasingly it will include countries where the competitive concerns are expected to be of most concern to regulators, or jurisdictions whose idiosyncrasies in process, substance or timing may cause issues.

One example of the latter might include the UK's CMA, which has already had an outsized influence on multi-jurisdictional merger review in the run-up to and since it exited the European Union at the end of 2020. Although the United Kingdom is formally a voluntary filing jurisdiction, the CMA can also open investigations on its own volition and request filings from the parties, sometimes well into the timing of reviews by other jurisdictions. This is because the CMA's revenue-based thresholds are supplemented by an alternative test by which the CMA can review any transaction involving an increment up to a 25 per cent or greater share of supply of any UK product or service (even if the products or services would not be considered economic markets). Moreover, the CMA's authority includes the ability to investigate the question of its own jurisdiction, sometimes through a time-consuming and burdensome investigation, so a conclusion on the part of the parties that the CMA does not appear to have jurisdiction is not necessarily the end of the matter. This mid-stream intervention can result in major disruptions to the review of a transaction and cause significant delays. Accordingly, if there is a reasonable possibility that the CMA might exercise jurisdiction over the transaction, a proactive approach can be important to avoid a late entry by the CMA and significant delays.

A proactive CMA strategy can also help to limit the risk of unexpected substantive results resulting from the CMA's increasingly aggressive posture and exacting and sceptical approach towards merger remedies, particularly in vertical transactions, which have led to a sharp increase in the number of extended (Phase II) investigations and blocked or abandoned mergers during the past year.[7]

Special case: Preserving a litigation option in the United States

In certain situations, it can be advantageous to delay filing or review in a jurisdiction, in particular in the United States, to preserve the option to litigate to avoid or reduce required remedies. The United States is one of the few jurisdictions that provides for meaningful and timely judicial review of agency determinations. Situations in which one might want to preserve a US option to litigate include deals where there are unique, challenging issues in the United States, where US agencies are expected to be the most aggressive, or when a remedy in a foreign jurisdiction would not affect the US businesses, since it would not be productive litigating in the United States to avoid certain remedies only to have the same remedies imposed elsewhere. Although these scenarios are relatively limited, global deals can benefit from having every tool at their disposal.

In the United States, judicial review is effectively under a *de novo* standard (without deference to the agency's findings) and if the parties carefully manage the process, litigation can be concluded within the timetable of most international deals. This litigation typically happens when the agency files a motion for a preliminary injunction in federal court with its complaint (the DOJ in federal court, the FTC in its administrative court). The preliminary injunction action, which proceeds on an expedited timetable, becomes a proxy for litigation of the deal – it is often effectively won or abandoned at this stage – and so provides a timely litigation option. The ability to litigate (and thus credibly threaten to litigate) within the deal time improves the parties' negotiating posture with the agencies regarding remedies and ultimate clearance.

7 Totsis Kotsonis, 'Main Developments in Competition Law and Policy 2020: United Kingdom', Kluwer Competition Law Blog (2 March 2021) ('In the first 9 months of the CMA's FY2020-2021, between 1 April and 31 December 2020, over 45% of transactions were either referred to Phase 2 or cleared subject to conditions. Perhaps most worryingly, of the 9 mergers referred for in-depth Phase 2 review during this period, just two were cleared (one unconditionally, one subject to remedies), while three were prohibited and four were abandoned.'), available at http://competitionlawblog.kluwercompetitionlaw.com/2021/03/02/main-developments-in-competition-law-and-policy-2020-united-kingdom/.

One example in which this 'US last' strategy had a positive outcome was the multi-jurisdictional review of Ball Corporation's 2016 acquisition of Rexam PLC, which when first announced was called 'daunting'.[8] Announced in February 2015, the acquisition cleared with remedies in Brazil in December 2015 and in the European Union in January 2016, leaving the parties with a viable option to litigate in the United States prior to the outside date in August 2016. This litigation option gave the parties more leverage in negotiating with the DOJ, resulting in a more favourable remedies package than might otherwise have been required by the DOJ for clearance.

Timely judicial review is only possible, however, if the United States is the last jurisdiction to clear the deal because, if the transaction cannot close because of review in other jurisdictions, the US agencies have no incentive (and potentially no ability) to seek an injunction, even if they file a complaint to block the deal. Without the preliminary injunction action, the deal litigation follows a normal (and longer) litigation path. This is especially a problem at the FTC, which may bring merger cases through its administrative courts (known as Part III), without an accompanying preliminary injunction action in federal court where the parties could not otherwise close the deal. Part III review is considerably longer than a suit in federal district court, and is subject to automatic *de novo* review by the FTC, which can simply reverse the decision of the administrative law judge if it does not like the result.

This was the predicament facing Illumina, Inc in the FTC's investigation of its US$7.1 billion acquisition of Grail, Inc. The deal, announced in September 2020, was notified in the United States. After seven months of review, the FTC sued to block the merger, filing for a preliminary injunction in federal court, alleging that the combination of Illumina's next generation sequencing (NGS) platform and Grail's in-development multi-cancer early detection (MCED) tests would harm innovation for MCED tests.[9] In April 2021, four days before the preliminary injunction trial was set to begin, the EC announced that it was opening an investigation into the competitive effects of the deal (which did not meet the notification thresholds in any EU jurisdiction), at the request of a few EU Member

8 Robert Cole, 'High Antitrust Hurdle for Merger of Can Makers', *NY Times* (19 February 2015), available at www.nytimes.com/2015/02/20/business/dealbook/high-antitrust-hurdle-for-merger-of-can-makers.html.

9 Press Release, FTC, 'FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail' (30 March 2021), available at https://www.ftc.gov/news-events/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection.

States.[10] Ordinarily, the effect of an EC investigation is to suspend the ability of the parties to close the deal during the investigation, regardless of the outcome in the United States, taking any pressure off the FTC to seek a preliminary injunction. The FTC promptly withdrew the federal court complaint and motion for preliminary injunction, and the case will now proceed through a Part III litigation that began in August 2021.[11] With the parties facing a protracted EU review and longer Part III litigation, the deal is likely to hinge on the EC decision, rather than the parties' litigation in the United States, and, in any case, extend well past the outside date in December 2021. Without the ability to timely litigate in the United States alone, the parties instead decided to take the risk of closing the deal anyway, while holding Grail separate, pending resolution of the EC investigation and Part III litigation. The parties now face a separate investigation by the EC into whether their decision to close violated the EC's 'stand still' rule for mergers under investigation, and are relying on arguments that they are not bound by the rule because the EC did not have jurisdiction to review the deal.[12]

Considerations for designing multi-jurisdictional remedies

The overarching principles for designing and negotiating multi-jurisdictional remedies are the same as for remedies to address concerns in single jurisdictional review: a suitable remedies package should be tailored to address the competition. However, when designing multi-jurisdictional remedies, the parties must take into account the viewpoints of multiple – and sometimes varying – views about the anticompetitive issues, the sufficiency of a remedy, and the ability to enforce or monitor remedies across jurisdictions.

10 European Commission, Daily News, 'Mergers: Commission to assess proposed acquisition of GRAIL by Illumina' (20 April 2021), available at https://ec.europa.eu/commission/presscorner/detail/en/MEX_21_1846.

11 Press Release, FTC, 'Statement of FTC Acting Bureau of Competition Director Maribeth Petrizzi on Bureau's Motion to Dismiss Request for Preliminary Relief in Illumina/GRAIL Case' (20 May 2021), available at https://www.ftc.gov/news-events/press-releases/2021/05/statement-ftc-acting-bureau-competition-director-maribeth.

12 Press Release, European Commission, 'Brussels Mergers: Commission starts investigation for possible breach of the standstill obligation in Illumina/GRAIL transaction' (20 August 2021), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4322.

Thus, even if there is a high level of inter-jurisdictional cooperation, the parties may face divergent views from reviewing jurisdictions on the competitive effects of the merger and the effectiveness of any proposed remedies package.[13] Reviewing jurisdictions following best practices for remedies will attempt to tailor the remedies to the harm, but what is sufficient to replace or preserve lost competition in the views of one reviewing jurisdiction can differ significantly from another. In those cases, it is important that the parties acknowledge differences in the factual and positional differences across jurisdictions when considering whether an offered remedies package addresses competition concerns.

Often, differing competitive conditions across the globe will result in different remedy demands from reviewing jurisdictions. For example, in Bayer AG's 2018 acquisition of Monsanto, the deal was reviewed by 29 jurisdictions, including notably the DOJ, the EC, the Competition Bureau of Canada (CBC) and Brazil's Administrative Council of Economic Defence, which coordinated to examine competitive effects resulting from overlaps in the two parties' research, development and marketing of seeds, crop protection chemicals and related agricultural products.[14] The EC entered into a consent decree on 21 March 2018 with the parties under which the latter would divest certain businesses addressing overlaps in the parties' seed and herbicide business, as well as address certain vertical and innovation concerns. The same day, the DOJ released a statement distancing its review from the EC's, noting that 'the effects of the transaction in Europe . . . may differ from its effects in the United States' and pointing to the existence of certain markets, such as those for genetically modified seeds that do not exist in

13 ICN Merger Working Group, Merger Remedies Guide, at 3 (2016), available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf.

14 Brazil's Administrative Council of Economic Defence and the Competition Bureau of Canada [CBC] announced consent decrees with the parties on 9 February 2018 and 30 May 2018, respectively.

the European Union.[15] Two months later, the DOJ announced a consent decree requiring the parties to divest a broader set of businesses and assets to BASF[16] (worth US$9 billion; about US$2 billion more than required by the EC).[17]

Likewise, even if reviewing jurisdictions generally agree on the nature of the competitive concerns, differences in the competitive set across borders may require separate divestitures to account for different pools of suitable divestiture buyers For example, in Zimmer Holdings Inc's 2015 acquisition of Biomet Inc, the FTC, the EC and the Japan Fair Trade Commission examined the competitive effects of the combination of the parties' orthopaedic implants businesses. The FTC and EC coordinated closely on the investigation and ultimately identified similar overlaps in knee and elbow implants requiring divestitures, but determined that there were different geographical markets owing to different regulatory and licensing regimes. Moreover, coordination during the remedies stage revealed that the pool of suitable divestiture buyers varied significantly between the United States and European Union, and in some cases, a suitable buyer in the United States would pose concerns in the European Union and vice versa. As a result, the parties were unable to find a single global purchaser and entered into separate consent agreements for the divestiture of US-based and EU-based orthopaedic implant businesses.

Once the parties and regulators agree on the scope of an appropriate remedy, the parties will need to navigate multi-jurisdictional concerns regarding implementation and monitoring. Multi-jurisdictional remedies can be difficult for authorities to enforce where, for instance, assets are in another country. Likewise, behavioural remedies pose difficulties in monitoring behaviour that occurs outside the national borders. Close coordination between regulators can help alleviate these concerns by aligning on the scope and enforcement provisions of the remedies, including reciprocal consent decrees.

15 Press Statement, US Department of Justice [DOJ], 'Statement of the Department of Justice's Antitrust Division on the European Commission's Announcement Regarding Bayer's Proposed Acquisition of Monsanto' (21 March 2018), available at https://www.justice.gov/atr/press-statement-1.

16 As a condition to clearing the divestitures to BASF, the European Commission required BASF to divest two product lines in research and development.

17 Press Release, DOJ, 'Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto' (29 May 2018), available at https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened.

One example of where reciprocal consent decrees allowed the parties to address cross-border competitive effects is the 2015 merger of Holcim Ltd and Lafarge SA. The FTC and the CBC coordinated to review the competitive effects of combining the parties' North American portland cement businesses, and announced their consent decrees on the same day. Under those consent decrees, the CBC required the divestiture of the entire Holcim cement business in Canada and – pointing to regional markets for cement that crossed the US–Canada border – also required the divestiture of a Holcim US facility in Montana.[18] The FTC required a broader set of divestiture packages covering US regional cement markets, and also included a required divestiture of US and Canadian assets that closely mirrored the consent decree with the CBC.[19] Notably, the FTC required an upfront buyer for four US regional packages of assets sold separately to four purchasers, but followed the CBC's lead in allowing Holcim and LaFarge to close while the assets required to be divested by the CBC were merely held separate.

On the other hand, sometimes a reviewing jurisdiction may be comfortable relying on the commitments made to another jurisdiction and that jurisdiction's ability to monitor and enforce compliance with those commitments. For example, in Cisco's 2010 acquisition of video communications solutions provider Tanberg ASA, the DOJ and the EC coordinated in their review of the merger, which concentrated on potential competitive concerns about high-end videoconferencing solutions. The EC accepted Phase I remedies that required Cisco to ensure continued ease of entry into videoconferencing solutions through open access and interoperability with Cisco's 'telepresence interoperability protocol', including divesting that protocol to an independent body.[20] Soon after, the DOJ cleared the deal without conditions. In its statement describing its decision to close the investigation without commitments of its own, the DOJ pointed to the

18 CBC, Competition Tribunal, Holcim Ltd – Registered Consent Agreement (4 May 2015), available at https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463130/index.do?q=holcim.

19 FTC, Analysis of Agreement Consent Orders to Aid Public Comment: In re Holcim Ltd and Lafarge S.A., File No. 141-0129 (4 May 2015), available at https://www.ftc.gov/system/files/documents/cases/150504holcimanalysis.pdf.

20 European Commission, 'Mergers: Commission clears Cisco's proposed acquisition of Tandberg subject to conditions' (29 March 2010), available at https://ec.europa.eu/competition/mergers/cases/decisions/m5669_2153_2.pdf

commitments the parties made to the EC as 'designed to foster the development of open operating standards' and a 'positive development that likely will enhance competition among producers of telepresence systems'.[21]

Conclusion

As the number of merger control regimes continues to increase, merging parties will continue to face an increasingly complex process for multi-jurisdictional review of international deals. With upfront planning and close coordination with an international team of experienced and effective counsel, parties can navigate the review process in a timely, predictable and efficient manner.

21 Press Release, DOJ, 'Justice Department Will Note Challenge Cisco's Acquisition of Tanberg' (29 March 2010), https://www.justice.gov/opa/pr/justice-department-will-not-challenge-cisco-s-acquisition-tandberg.

APPENDIX 1

About the Authors

John Harkrider
Axinn

John Harkrider is a founding partner of Axinn and is ranked at Tier 1 in *Chambers*. He was global lead counsel on Thermo Fisher's proposed acquisition of Qiagen as well as its successful acquisition of Life Technologies, Dell's acquisition of EMC and Ball Corporation's acquisition of Rexam PLC. He was also counsel to Google in its acquisition of Motorola Mobility. He has litigated three different merger challenges.

John was named *Global Competition Review*'s Lawyer of the Year and has been shortlisted for Dealmaker of the Year. He was also named Litigator of the Week by *The American Lawyer* in connection with the FTC's investigation of Google. He currently represents Google in a highly publicised litigation and in various investigations throughout the world.

Michael O'Mara
Axinn

Michael O'Mara is an associate in Axinn's Washington, DC, office, whose practice is focused on merger review, antitrust counselling and antitrust litigation. He has also worked on merger filings and investigations in the United States before both the Federal Trade Commission and the Department of Justice, as well as in the European Union, Australia, Austria, Brazil, Canada, China, Germany, India, Israel, Japan, Mexico, Russia, South Africa, South Korea, Switzerland, Taiwan, Turkey and others. He was the lead associate in Axinn's representation of Dell Technologies' acquisition of EMC Corporation and currently represents Tyson Foods in a treble-damage class action and direct purchaser litigations and regulatory investigations alleging industry-wide conspiracies to raise the prices of broiler chickens.

Michael received his undergraduate degree in public policy and American institutions from Brown University and JD from Duke University School of Law. Prior to attending law school, Michael worked as a research assistant for the New England Public Policy Center at the Federal Reserve Bank of Boston.

Axinn

114 West 47th Street
New York, NY 10036
United States
Tel: +1 212 728 2210
Fax: +1 212 728 2201
jharkrider@axinn.com

1901 L Street NW
Washington, DC 20036
United States
Tel: +1 202 721 5409
Fax: +1 202 912 4701
momara@axinn.com

www.axinn.com

Successfully remedying the potential anticompetitive effects of a merger can be more of an art than a science. Not only is every deal specific but, as noted in the introduction, every remedy contains an element of 'crystal ball-gazing'; enforcers must look to the future and successfully predict outcomes.

As such, practical guidance for both practitioners and regulators in navigating this challenging environment is critical. This fourth edition of the *Merger Remedies Guide* provides that detailed guidance and analysis. It examines remedies throughout their life cycle: from the fundamental principles, to the remedies available, through how remedies are structured and implemented, to how enforcers ensure compliance. Insights from four jurisdictions around the world supplement the global analysis to inform the reality of multi-jurisdictional deals.

The Guide draws not only on the wisdom and expertise of 41 distinguished practitioners from 15 firms, but also the perspective of former enforcers Daniel Ducore and Diana Moss. It brings together unparalleled proficiency in the field and provides essential guidance for all competition professionals.

Visit globalcompetitionreview.com
Follow @GCR_alerts on Twitter
Find us on LinkedIn

ISBN 978-1-83862-585-6