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MERGER REMEDIES GUIDE

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CHAPTER 6

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 counsel 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[3] 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

3 Recently, the European Commission has shown a greater willingness to accept behavioural remedies than regulators in the United Kingdom or United States. For example, in the vertical acquisition by Xbox-maker Microsoft of popular video game publisher Activision, the European Commission accepted proposed behavioural remedies while the CMA initially prohibited the combination and the Federal Trade Commission sought unsuccessfully to enjoin the transaction in US Federal Court. See discussion of remedies, further on.

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[4] and parties commonly grant them because, in general, it is in the parties' best interest to facilitate this information 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.[5] That transaction, announced in April 2013, was reviewed by agencies in nine jurisdictions – the United States, the European Union, China, Canada, Japan, South Korea,

4 See International Competition Network [ICN], Merger Working Group, Practical Guide to International Enforcement Cooperation in Mergers, p. 6, para. 19 (2018) ('Merger reviews that are aligned at key decision-making stages may allow for more efficient investigations, more meaningful discussions between agencies and ultimately more consistent outcomes.'), available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf.

5 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.

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'.[6] It also allowed for global convergence on a single 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.[7]

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6 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.

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

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 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 had an outsized influence on multi-jurisdictional merger review 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 compared to pre-Brexit.[8]

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

8 Totsis Kotsonis, 'Main Developments in Competition Law and Policy 2022: United Kingdom', Kluwer Competition Law Blog (5 April 2023) (in 2021 and 2022, a significant proportion (30–40 per cent) of the CMA's investigations required Phase I remedies or went to Phase II, and between two-thirds and three-quarters of those deals that went to Phase II investigations were blocked, abandoned or required remedies; moreover the CMA did not agree to any behavioural remedies in 2022), available at https://competitionlawblog.kluwercompetitionlaw.com/2023/04/05/main-developments-in-competition-law-and-policy-2022-united-kingdom/.

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.

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'.[9] 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

9 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.

(MCED) tests would harm innovation for MCED tests.[10] 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 States.[11] 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 brought the case through its internal – and much longer – litigation process.[12] With the parties facing a protracted EU review and 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. While this strategy allowed Illumina to close the transaction in August 2021, both the EC and FTC have since prohibited the acquisition and ordered Illumina to divest GRAIL (both stayed pending appeals).[13] Moreover, the EC levied the statutory maximum fine of €432 million on Illumina for 'knowingly and intentionally' breaching its obligation not to close the acquisition before the EC completed its review.[14]

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10 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.

11 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.

12 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.

13 Press Release, *Illumina*, 'Illumina Intends to Appeal European Commission's Decision in GRAIL Deal' (6 September 2022); available at https://www.illumina.com/company/news-center/press-releases/press-release-details.html?newsid=1ef95365-0ca9-4726-a683-37124b1116b5; Press Release, *Illumina*, 'Illumina Will Appeal FTC Decision in Federal Court, Will Seek US Resolution by Late 2023 or Early 2024' (3 April 2023), available at https://www.illumina.com/company/news-center/press-releases/press-release-details.html?newsid=2f28aecf-7d01-492f-9385-726c7fba88b1.

14 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; Press Release, European Commission, 'Mergers: Commission fines Illumina

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 potential loss in 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.

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.[15] 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.[16] 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

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and GRAIL for implementing their acquisition without prior merger control approval' (12 July 2023), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3773.

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

16 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.

certain markets, such as those for genetically modified seeds that do not exist in the European Union.[17] Two months later, the DOJ announced a consent decree requiring the parties to divest a broader set of businesses and assets to BASF[18] (worth US$9 billion; about US$2 billion more than required by the EC).[19]

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.

Increasingly, reviewing jurisdictions may disagree on the sufficiency of the remedies offered by merging parties to address their competitive concerns, reflecting underlying differences in the views of global regulators as to the efficacy of certain types of remedies or even the efficacy of remedies altogether. For instance, the CMA notes that concerns about the efficacy and practicality of behavioural remedies drove it to set a high bar for the acceptance of behavioural remedies – the CMA did not accept any behavioural remedies in 2022.[20] In the

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17 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.

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

19 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.

20 Sarah Cardell, 'UK merger control in 2023' (27 Feb 2023), available at https://www.gov.uk/government/speeches/uk-merger-control-in-2023; Totsis Kotsonis, 'Main Developments in

United States, the US agencies in the Biden Administration share the CMA's scepticism of behavioural remedies and have also expressed a preference for simply prohibiting a merger rather than accepting remedies at all – for instance, Assistant Attorney General Jonathan Kanter remarked that 'when the [DOJ] concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction. It is the surest way to preserve competition.'[21]

These cross-jurisdictional differences were on display during the global review of Xbox-maker Microsoft's US$68.7 billion acquisition of video game publisher Activision. The acquisition, announced in January 2022, was reviewed in more than a dozen global jurisdictions. But the merger faced its closest scrutiny in Europe, the United States, and the United Kingdom. Each jurisdiction initially raised similar competitive issues regarding the post-merger ability of Microsoft to use Activision's blockbuster titles to disadvantage Microsoft's rival platforms in PC and console gaming, and in subscription or cloud gaming services.

Anticipating these concerns, Microsoft made offers to console rival Sony to extend its access to Activision's Call of Duty series and to Nintendo, Nvidia and others to expand Call of Duty to their respective console and cloud gaming platforms. And, after the conclusion of in-depth reviews in the UK and by the CMA, the parties offered remedies consisting of licences that would enable purchasers of Activision's games to also play those games on any cloud platform.

The EC, FTC, and CMA each approached these commitments differently, underscoring their diverging approaches to remedies, and this impacted the parties' ability to close the transaction before the original termination date in July 2023, requiring the parties to extend the merger agreement through October 2023. The EC ultimately concluded that the transaction posed no competitive concerns based on a theory of console foreclosure, and accepted Microsoft's commitments and cleared the acquisition in May 2023. In clearing the transaction, the EC

Competition Law and Policy 2022: United Kingdom', Kluwer Competition Law Blog (5 April 2023), available at https://competitionlawblog.kluwercompetitionlaw.com/2023/04/05/main-developments-in-competition-law-and-policy-2022-united-kingdom.

21 Jonathan Kanter, Remarks to the New York State Bar Association Antitrust Section (24 January 2022), available at https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

noted that the remedies not only addressed the EC's concerns regarding cloud gaming, but were a 'significant improvement for cloud game streaming compared to the current situation'.[22]

The FTC, which brought an administrative complaint in December 2020 and sought a preliminary injunction in US Federal Court, did not accept either set of commitments, and argued to the court that the commitments made to Sony, Nintendo, Nvidia and others were insufficient to address the potential competitive effects of the merger.[23] Moreover, there's no indication that the FTC was open to considering whether the type of licensing commitments accepted by the EC might lessen its competitive concerns in cloud gaming. In August 2023, the federal court ruled against the FTC, finding that the FTC had not shown that Microsoft would have the incentive or ability to foreclose its video game console or cloud gaming rivals and thus substantially lessen competition. In making that finding, the court pointed to those long-term agreements that Microsoft had proactively entered into post-signing.[24] The FTC has appealed the court's decision denying the FTC's bid to block the parties from closing, and has restarted administrative proceedings.

The CMA ultimately concluded that there were no competitive concerns about console foreclosure (despite not crediting Microsoft's offers to Sony), but retained its concerns about the cloud gaming market and rejected the licensing commitments accepted by the EC, raising issues about the scope and administrability of the remedy.[25] The parties initially appealed the CMA's prohibition to the Competition Appeals Tribunal, but during the pendency of that appeal, resubmitted the transaction in August 2023 including an alternative remedy. Aligning the proposed remedy to the CMA's preference for structural rather than behavioural remedies, the parties restructured the deal to sell off the cloud gaming rights to Activision's current and future portfolio to video game publisher Ubisoft. As at

22 Press Release, European Commission, 'Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions' (15 May 2023), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705.

23 Preliminary Injunction Opinion, *Fed. Tr. Comm'n. v. Microsoft Corp.*, No. 23-cv-02880 at *39 (N.D. Cal. Jul. 10, 2023).

24 id.

25 Press Release, Competition and Markets Authority, 'Microsoft/Activision deal prevented to protect innovation and choice in cloud gaming' (26 April 2023), available at https://www.gov.uk/government/news/microsoft-activision-deal-prevented-to-protect-innovation-and-choice-in-cloud-gaming.

the time of writing, the CMA has announced that it had provisionally concluded that those changes should address its remaining issues in cloud gaming,[26] and the transaction is expected to close.

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.

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.[27] 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.[28] 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

26 Press Release, Competition and Markets Authority, 'New Microsoft/Activision deal addresses previous CMA concerns in cloud gaming' (22 September 2023), available at https://www.gov.uk/government/news/new-microsoft-activision-deal-addresses-previous-cma-concerns-in-cloud-gaming.

27 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.

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

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.[29] 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 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'.[30]

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.

29 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.

30 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.