MERGER REMEDIES GUIDE

SECOND EDITION

Editors
Ronan P Harty and Nathan Kiratzis

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PART III
PROCESS AND IMPLEMENTATION

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08

Managing Timing of Multi-Jurisdictional Review

John Harkrider and Michael O'Mara[1]

Antitrust reviews of international deals are increasingly prolonged, resulting in increased costs for the combining parties, as long waits between deal signing and closing may introduce the risk of changes to the parties' business or financial conditions, increase the difficulty of obtaining financing commitments, and distract management from day-to-day operations. As a result, the merging parties must understand how long it takes for jurisdictions to review a transaction so they can factor it into their transaction and financing agreements.

Moreover, in international deals with multi-jurisdictional antitrust review, understanding the strategic implications of the complicated patchwork of review timelines across multiple jurisdictions can help close the deal earlier and minimise the effect of potential remedies on deal value. Depending on the risk and filing profile of a transaction, strategic timing of international notifications can create important advantages for the parties by harmonising global review to minimise remedies, collecting key early wins to build momentum, or preserving the ability to litigate in the United States.

Setting an appropriate outside date

It is important that the parties are on the same page in terms of the expected time and effort it will take to achieve clearance across the required jurisdictions. In particular, it is important that the agreement between the parties provides for an appropriate outside date that takes into account the expected time to clearance given the risk and filing profile of the deal. Getting the outside date right has serious implications for preserving the value of the deal and ultimately allowing the deal to close.

Setting an appropriate outside date should start with an empirical basis that takes into account the average time to clearance in the applicable jurisdictions and for deals with similar risk profiles. The parties should also take into consideration whether their preferred advocacy

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

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strategy may call for a longer or shorter outside date. A relatively short outside date (especially paired with a reverse break-up fee or ticking fees) can give the parties more incentive to work diligently to obtain clearances and close, minimising financing risk and disruption to the businesses. However, a shorter outside date also can give the reviewing agencies more leverage over the parties and can result in the time-pressured parties agreeing to more expansive remedies than they otherwise might have in order to avoid prolonging the investigations, or having to renegotiate the outside date where the economics of the deal may have changed since signing. On the other hand, a longer outside date gives the agencies less leverage (and the parties more time for effective advocacy), but comes along with a greater cost to the parties waiting for the deal to close. Additional flexibility can be added to an outside date, for example by providing for automatic extensions for certain antitrust triggers like the start of a Request for Additional Information (Second Request) or Phase II investigation, or the issuance of a complaint.

For example, if the parties are considering preserving a litigation option in the United States, it is important for the outside date to include sufficient time to litigate a preliminary injunction after all other clearances are expected to be obtained, or else the parties will not be able to litigate (or credibly threaten to litigate) without renegotiating the outside date. Of six Hart–Scott–Rodino Act (HSR) reportable deals since 2010 that litigated through a preliminary injunction, the average time from filing the complaint to a decision by the court was approximately five months. This means that the outside date for deals with a realistic litigation option should probably be no less than five months longer than expected clearance in other jurisdictions.

Clear expectations on review timing

While all jurisdictions have statutory rules that govern the timing of merger review and clearance, in practice the actual review time periods are much longer. The agencies have a number of mechanisms to delay resolution. For example, in the United States, even though the HSR allows the parties to close 30 days after they substantially comply with a Second Request, the Federal Trade Commission (FTC) and Department of Justice (DOJ) routinely request timing agreements under which the parties are prevented from substantially complying before a certain date and then are prevented from closing for between 60 and 75 days.[2] In Europe, the clock does not even start until the Form CO is accepted by the European Commission (EC), which can sometimes take many months of extensive prenotification engagement with the staff. After the Form CO is accepted, the standard Phase I and Phase II review periods are frequently stopped while the parties respond to Requests for Information. In many other jurisdictions, including China and Brazil, the timeline does not start until the filing is accepted by the regulators.

Transactions with any UK customers, sales, or other relationship must also consider the timing of potential UK filings, which have become increasingly important as the UK's Competition and Markets Authority (CMA) has grown more aggressive in asserting jurisdiction over international transactions, and the scope of its jurisdiction is poised to expand in the post-Brexit era over transactions that to date have been consolidated into a one-stop EC review. While the UK 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. Moreover, the CMA's authority includes the ability to investigate the question of

2 See, e.g., US Dep't of Justice, Model PTA Letter (25 June 2015), available at www.justice.gov/atr/merger-review-process-initiative-model-pta-letter.

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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.

Like the EC, the CMA requires a significant prenotification process prior to the running of its formal timeline, but unlike the EC, the scope of CMA jurisdiction can be difficult to predict. 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 to a 25 per cent or greater share of supply of any UK product or service (even if such products or services would not be considered economic markets). Accordingly, where there is a reasonable possibility that the CMA might exercise jurisdiction over the transaction, a proactive approach can be important in order to avoid a late-in-the-game entry by the CMA and significant delays. A sound CMA strategy can also help limit the risk of unexpected substantive results resulting from the CMA's exacting and sceptical approach toward merger remedies, particularly in vertical transactions.

In addition to agency-driven complications to statutory timelines, the parties themselves may also have strategic reasons not to file immediately or otherwise delay running the statutory clocks. For example, in the US the parties may either delay HSR filing or delay substantial compliance with a Second Request to make sure that the US review is finished at the same time as review in other jurisdictions.

Thus, it is more useful to look empirically at how long transactions actually take to review rather than to look simply at the statutory periods.

According to the Dechert Antitrust Merger Investigation Timing Tracker (DAMITT) database, in 2018 it took on average 10.5 months for the US agencies to clear significant mergers (i.e., mergers that received a Second Request).

It also shows that in 2018 the average EC review period from deal announcement to the end of Phase I remedy cases took 8.4 months, while the average review period from announcement to end of Phase II remedy cases was 12.5 months.[3]

Unsurprisingly, navigating multi-jurisdictional reviews takes longer than reviews by one jurisdiction. Although not reported in DAMITT, review of purely US-to-US deals takes on average considerably less than 11 months. Second Requests handled by Axinn on purely US-to-US deals took on average nine months, while international deals took 10.6 months to complete. This suggests that post-Brexit the average time for review of transactions that have a significant European component is likely to expand, because the number of these transactions that will be reviewed solely by the EC will decline, as many will also attract review by the CMA. This will require extra time to coordinate review of the merits and consideration of any proposed remedies.

3 Bryan Koenig, Law360, US Merger Probes Still Drawn Out, Dechert Study Shows (28 January 2019), available at www.law360.com/articles/1122690/us-merger-probes-still-drawn-out-dechert-study-shows.

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Choosing when to file where

Choosing when to file in each jurisdiction is an important decision, with real strategic implications. Most jurisdictions do not have deadlines for notification, providing only that clearance must be obtained before closing, which allows for flexibility to strategically time each filing. Importantly, it is not always advisable to file as quickly as possible in all jurisdictions. To the contrary, there are multiple considerations for strategically timing certain filings.

First, harmonising the timing of key decision points across jurisdictions can streamline the overall review process by allowing cooperation among the agencies on common issues such as global product markets (and global remedies), leading to more consistent outcomes across jurisdictions.

Second, staggering the timing of certain filings may create a strategic advantage by positioning a given jurisdiction to be the first or last to clear. For example, if the parties believe that the United States will clear the transaction with relatively few obstacles, it may be important for the US filing to be made first so that HSR clearance becomes a signal for other jurisdictions to do the same. Alternatively, if the parties want to preserve a litigation option in the United States, it is critical that the United States be the last suspensory jurisdiction to clear the deal and there may be an advantage in delaying the US filing.

Aligning timing

Harmonising the timing of multiple jurisdictions' reviews, particularly where the merger raises global or regional issues, can be more efficient and lead to more consistent results because it allows for the agencies to share information and coordinate on their findings. Agencies also prefer this higher level of inter-agency coordination for largely the same reasons.[4] This coordination is only really feasible if time frames are aligned to allow for agencies to make key decisions at about the same time. Since these jurisdictions often have different statutory timetables, aligning key decision points may mean that not all jurisdictions file at the same time.

In transactions where divestitures of global businesses are expected, it is critical to align timing so that there may be a single package of consistent remedies. This is important because it can allow the parties to maximise value by running concurrent processes to find buyers for all of 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 where timing was successfully aligned for a global remedy was in Thermo Fisher Scientific's US$13.2 billion acquisition of Life Technologies. That transaction, announced in April 2013, was reviewed by agencies in nine different jurisdictions, including the 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 FTC pointed out in

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

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

Picking a lead jurisdiction

While in some cases it is preferable to harmonise merger reviews, in others, there is a strategic advantage to staggering the filings to lead with a favourable outcome (or delay a less favourable outcome) in a key jurisdiction. This can send a signal to other jurisdictions both in analysis and result, and build momentum. For example, if one believed that a jurisdiction was 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.

Correctly timing the staggered filings first requires an understanding of the average review times of jurisdictions (in addition to the statutory time frames). To illustrate using the DAMITT average review times, if one expects the merger to result in Phase I remedies in Europe (seven months) and a Second Request in the United States (11 months), European clearance is likely to occur first without staggered filings. If one expects the EC's review to result in Phase II remedies, US clearance is likely to occur first without staggering.

But the review times reflected in the averages can be shortened with strategic timing of one or more jurisdictions. 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, it may be worth extending the US agencies' review for several months to do so. If the parties believed that the FTC or DOJ could clear the transaction in 60 days, it might make sense to 'pull and refile' the 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 longer than 60 days to clear the transaction, the parties might want to simply delay filing the HSR.

One such case was Dell Technologies' US$67 billion acquisition of EMC Corporation, where the parties engaged in over 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 period to expire on 24 February 2016, and over the next three weeks, nine more agencies cleared the transaction. Allowing for such a long investigation in the United States without a Second Request is only possible by delaying the filing or pulling and refiling the HSR Form.

5 Fed Trade Comm'n, 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.

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Preserving a litigation option

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. The United States is one of the few jurisdictions that provides for meaningful and timely judicial review of agency determinations. Situations where 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. While 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 along 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 over remedies and ultimate clearance.

One recent example where 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'.[6] 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 no other jurisdictions obstruct the parties' ability to close because, if the transaction cannot close pending 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 has a practice of bringing 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 Commission, which can simply reverse the decision of the administrative law judge if it does not like the result. This situation usually only occurs when the United States is the last jurisdiction to clear the deal, but in the case of reviews combining US and UK investigations, it is noteworthy that suspensory effects under UK law do not kick in until the start of a Phase II review, so that in cases where UK

6 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.

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clearance is not a contractual condition to closing, scenarios are possible where the parties are legally free to close – and thus the US agencies may feel compelled to seek an injunction – while a parallel UK investigation has yet to reach Phase II review.

Consider the recent predicament faced by the parties in *Tronox/Cristal*, the proposed combination of two leading producers of titanium dioxide. The merger was announced in February 2017 and was cleared over the next several months by regulators in Saudi Arabia, Australia, China, New Zealand, Turkey, South Korea, and Colombia, leaving only the FTC and EC reviewing the deal by December. The FTC filed a Part III complaint on 5 December, at about the same time as the EC opened a Phase II investigation, leaving no threat that the parties would close without injunctive relief.[7]

Despite having permission from the Commission to file for injunctive relief in federal court, FTC staff instead only filed an administrative complaint, either because there was no incentive to litigate earlier or because it was unlikely to meet the standard for an injunction (which requires the FTC to show a likelihood of irreparable harm) while the merger was suspended during the EC's review.

While a preliminary injunction action may have been expected to be resolved on average about five months after the complaint – before the deal's original 21 May outside date – the Part III review would not have allowed for resolution before then. The trial was scheduled for 18 May, and was expected to last several weeks, followed by a lengthy time for a decision and automatic review by the full Commission. According to the parties, the FTC stated that it would wait for the EC to finish its Phase II review and, if the EC cleared the deal, only then would it have filed a preliminary injunction.[8] Since the EC was not expected to finish its Phase II review until early May, resolution of a follow-on preliminary injunction action was also highly unlikely before 21 May.

This led Tronox's CEO to call the FTC's complaint a 'pocket veto type action', since the FTC could effectively run out the clock without engaging the merits of the deal in court.[9] And, seeing the writing on the wall, the parties filed a suit in federal district court for a declaratory judgment in late January to attempt to force the FTC either to seek a preliminary injunction or, if they would not, to enjoin them from seeking one if and when the EC closed its investigation.

Faced with a ticking clock and armed only with this novel (and somewhat dubious) declaratory judgment lawsuit, the parties were forced to renegotiate an extension of the outside date. On 1 March 2018, the parties signed an extension that provided for automatic three-month extensions through 31 March 2019 (subsequently dropping the declaratory judgment suit). In exchange for this extension Tronox was required to commit to a reverse break-up fee of US$60 million if it had terminated the deal after 1 January 2019 for regulatory reasons, or if either party had terminated after the renegotiated ultimate 31 March 2019 outside date.

The extension, while increasing the risk to buyer Tonox, allowed the parties to have their day in court – twice, in front of an administrative judge at the FTC and again before a federal court – and ultimately allowed the deal to cross the finish line. After the June 2018 trial before an FTC

7 Matthew Perlman, Law360, EC To Investigate $2.2B Tronox-Cristal Titanium Dioxide Deal (20 December 2017), available at www.law360.com/articles/996853/ec-to-investigate-2-2b-tronox-cristal-titanium-dioxide-deal.

8 Plaintiff's Memorandum In Support Of Renewed Motion For Expedited Hearing And Scheduling Order, *Tronox Ltd. v. FTC*, ECF No. 14, at 2–3, 1:18-cv-00010-SA-RP (N.D. Miss 28 January 2018).

9 *Tronox Ltd*, Current Report (Form 8-K), Attach 99.1 (24 January 2018)(call transcript), available at www.sec.gov/Archives/edgar/data/1530804/000114036118002989/ex99_1.htm.

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administrative judge (but prior to a decision) the EC cleared the deal with remedies, requiring the FTC finally to seek injunctive relief in US Federal court to prevent the parties from closing. The FTC successfully sought a preliminary injunction in November 2018, which was followed by the administrative judge's decision to block the deal in December 2018. Despite these two losses, the renegotiated outside date allowed the parties to negotiate a remedies package during an automatic review by the full Commission, submitting a successful proposal to divest two US plants just prior to the outside date, and closing the deal two weeks after, on 15 April 2019.[10] This result underscores that parties should be aware that timely judicial review of mergers in the United States is only feasible where there are no regulatory obstacles against closing elsewhere, typically once all other jurisdictions have cleared, and should take into account the likely timing of non-US reviews and additional time to litigate in the United States (at least five months) when negotiating appropriate timing provisions into the transaction agreement.

Conclusion

As the average time for multi-jurisdictional review of international deals continues to increase, it is important that parties have a clear-eyed view of their realistic time to clearance and provide for an appropriate outside date accordingly. With advance planning and clear view of the time to clearance, parties can approach their multi-jurisdictional filings strategically, to protect the deal value and speed the time to clearance.

10 Fed Trade Comm'n, FTC Requires Divestitures by Tronox and Cristal, Suppliers of Widely Used White Pigment, Settling Litigation over Proposed Merger (10 April 2019), available at https://www.ftc.gov/news-events/press-releases/2019/04/ftc-requires-divestitures-tronox-cristal-suppliers-widely-used.

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Appendix 1

About the Authors

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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 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, most notably Tyson Foods' sale of assets to Georges, SunGard's acquisition of Comdisco, and Omnicare's proposed acquisition of Pharmerica. He was GCR's Lawyer of the Year and has been shortlisted for Dealmaker of the Year. He was also named as American Lawyer Litigator of the Week for his representation of Google before the FTC.

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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 into the future and successfully predict outcomes.

As such, practical guidance for both practitioners and regulators in navigating this challenging environment is critical. This second edition of the *Merger Remedies Guide* – published by Global Competition Review – provides such 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 around the world, ranging from Brazil to China, supplement the global analysis to inform the reality of multi-jurisdictional deals.

The Guide draws not only on the wisdom and expertise of 46 distinguished practitioners from 18 firms, but also the perspective of current and former enforcers Pablo Trevisán, Daniel Ducore and Diana Moss. It brings together unparalleled proficiency in the field and provides essential guidance for all competition professionals.

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