MERGER REMEDIES GUIDE

THIRD 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]

As the number of jurisdictions with active merger control regimes grows, international deals face a growing and increasingly complex checklist of required clearances, each jurisdiction with its own filing thresholds, timelines and approaches to analysing transactions. As a result, antitrust reviews of international deals – and those with significant antitrust risk in particular – 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. At the outset, 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 agreement between the parties provides for an appropriate outside date that takes into account the expected time to achieve clearance given the risk and filing profile of the deal. Getting the outside date right has serious implications for preserving the value of

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

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the deal and ultimately allowing the deal to close. While outside dates can be extended, that may require additional consideration, and once the date changes, it may be difficult to claim to regulators that they must complete review of the deal by the new outside date.

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 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 can also 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 such as 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, otherwise 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 start until the Form CO is accepted by the European Commission (EC), which typically takes many months of extensive pre-notification 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.

2 See, e.g., US DOJ, Model PTA Letter (25 June 2015), available at www.justice.gov/atr/merger-review-process-initiative-model-pta-letter.

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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 2019 it took on average 11.9 months for the US agencies to clear significant mergers (i.e., mergers that received a Second Request).

It also shows that in 2019 the average EC review period from deal announcement to the end of Phase I remedy cases took 7.7 months, while the average review period from announcement to end of Phase II remedy cases was 15.6 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 11.9 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.

With these averages in mind, it is also important to size up any local issues that may prolong the review. Early engagement with local counsel attuned to trends at each jurisdiction can help the parties determine whether review of their transaction is likely to deviate from average review times because of local review idiosyncrasies and plan accordingly.

One jurisdiction, the United Kingdom, bears special consideration, as it is likely to have an outsized impact on merger review timing post-Brexit. Transactions with any UK customers, sales or other relationship must 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. With the 31 December 2020 end of the EC's ability to pre-empt the CMA's review of transactions with a significant European component, the scope of the CMA's jurisdiction is poised to expand significantly. At the least, this suggests that post-Brexit, such transactions will likely see a longer average time for review simply because many of them will be reviewed by both the EC and the CMA, requiring extra time to coordinate review of the merits and consideration of any proposed remedies.

In addition, parties should carefully consider their filing obligations in the UK, as choosing not to file may result in disruptions if the CMA decides to intervene mid-stream. 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. 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).

3 Dechert, 'DAMITT: How Long Does it Take to Conduct Significant Antitrust Merger Investigations?', available at www.dechert.com/knowledge/hot-topic/damitt--how-long-does-it-take-to-conduct-significant-u-s--antitr.html.

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This mid-stream intervention can cause major disruptions to the review of a transaction and cause significant delays. Accordingly, where there is a reasonable possibility that the CMA might exercise jurisdiction over the transaction, a proactive approach can be important in avoiding a late entry by the CMA and significant delays. A sound CMA strategy can also help limit the risk of unexpected substantive results arising from the CMA's exacting and sceptical approach towards merger remedies, particularly in vertical transactions.

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

4 See International Competition Network Merger Working Group, 'Practical Guide to International Enforcement Cooperation in Mergers', p. 6, Paragraph 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/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf.

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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 (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 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 (7.7 months) and a Second Request in the United States (11.9 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 participated 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

5 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.

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clear the transaction, allowing the initial waiting period to expire on 24 February 2016, and over the following 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.

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 remedies only to have the deal blocked or 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

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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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 in cases where UK 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. However, pursuing litigation in the US in that situation comes with significant risk that the deal will still be blocked by the CMA even if the parties prevail in the US, as happened during Sabre Systems, Inc's unsuccessful attempt to acquire Farelogix, Inc. In that deal, the parties announced their intention to close at the end of the Second Request review period in the US on 21 August 2020[7] – while the CMA was still in Phase I – and without a suspensory effect in the UK, the DOJ was forced to sue to enjoin the deal. The parties successfully defeated the injunction, effectively clearing the deal in the US.[8] However, the time to litigate in the US allowed the CMA to progress in its investigation, putting it in a position to block the deal two days after US clearance,[9] in a decision that is effectively unappealable under the UK's judicial review standards.[10] As a result, this strategy is likely only available where the parties consider the risk in the UK to be significantly lower than in the US. Outside that narrow set of circumstances, the most viable US litigation option is when the US is the last jurisdiction to clear the deal.

Consider the predicament faced by the parties in Tronox Holdings plc's acquisition of The National Titanium Dioxide Company Ltd (Cristal), the 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 2017, at about the same time as the EC opened a Phase II investigation, leaving no threat that the parties would close without injunctive relief.[11]

7 Sabre Press Release, 'Sabre Announces Intent to Close Farelogix Acquisition' (14 August 2019), available at www.sabre.com/insights/releases/sabre-announces-intent-to-close-farelogix-acquisition/.

8 *United States v. Sabre Corp.*, No. CV 19-1548-LPS, 2020 WL 1855433 (D. Del. 7 April 2020), *vacated as moot United States v. Sabre Corp.*, No. 20-1767 (3d Cir. 20 July 2020) (expressing 'no opinion on the merits of the parties' dispute before the District Court').

9 Competition and Markets Authority, 'CMA blocks airline booking merger' (9 April 2020), available at www.gov.uk/government/news/cma-blocks-airline-booking-merger.

10 There is no de novo review of a CMA decision to prohibit a merger. The appellate body, the Competition Appeals Tribunal (CAT), is limited to review decisions only for illegality (including review of jurisdiction), irrationality and improper process. See *British Sky Broadcasting v. CC* [2010] EWCA Civ 2 (confirming that the CAT must apply the same principles as a court on an application for judicial review). In practice, this means that the CAT affords the CMA's factual determinations a high level of deference. See, e.g., *Tobii AB (publ) v. Competition and Markets Authority* [2020] CAT 159 ('[I]t is the CMA's task to assess the relative weight of evidence or factors arising from the evidence. . . . [A]s long as there was some evidence on which to base its decisions, it was for the CMA to weigh up the totality of the evidence.').

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

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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 2018 outside date – the Part III review would not have allowed for resolution before then. The trial was scheduled for 18 May 2018, 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.[12] 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 2018.

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.[13] And, seeing the writing on the wall, the parties filed a suit in federal district court for a declaratory judgment in late January 2018 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 to 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 the buyer, Tronox, 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 administrative judge (but prior to a decision), the EC cleared the deal with remedies, requiring the FTC to finally 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.[14] 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

12 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).

13 *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.

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

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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.

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Appendix 1

About the Authors

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John Harkrider is a founding partner of Axinn and is ranked as Band 1 in *Chambers*. He has been lead or co-lead counsel on nearly half a trillion dollars' worth of M&A deals, including cross-border deals such as *Thermo/Life Technologies*, *Ball/Rexam*, *Google/Motorola* and *Dell/EMC*. 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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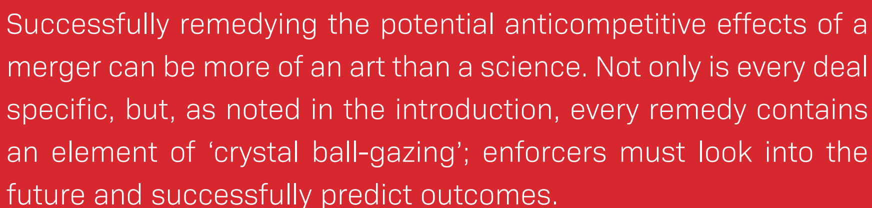

Successfully remedying the potential anticompetitive effects of a merger can be more of an art than a science. Not only is every deal specific, but, as noted in the introduction, every remedy contains an element of 'crystal ball-gazing'; enforcers must look into the future and successfully predict outcomes.

As such, practical guidance for both practitioners and regulators in navigating this challenging environment is critical. This third 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 China to Russia, 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 former enforcers 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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