



**International  
Competition  
Network**

**ICN MERGER WORKING GROUP**

# **Merger Remedies Guide**

---

**2016**

## TABLE OF CONTENTS

<b>PART 1 – INTRODUCTION</b> .....	<b>2</b>
<b>PART 2 – GUIDING PRINCIPLES AND PROCEDURAL CONSIDERATIONS</b> .....	<b>2</b>
<b>I. OVERARCHING PRINCIPLES FOR REMEDIAL ACTION</b> .....	<b>2</b>
<b>2.1. NEED FOR REMEDY</b> .....	<b>2</b>
<b>2.2 TAILORED TO HARM</b> .....	<b>3</b>
<b>2.3 EFFECTIVENESS</b> .....	<b>3</b>
<b>2.4 TRANSPARENCY AND CONSISTENCY</b> .....	<b>5</b>
<b>II. PROCEDURAL CONSIDERATIONS</b> .....	<b>6</b>
<b>2.6 TIMING</b> .....	<b>6</b>
<b>2.7 TIMING ALIGNMENT IN MULTI-JURISDICTIONAL MERGERS</b> .....	<b>6</b>
<b>PART 3 – CHOICE AND DESIGN OF REMEDIES</b> .....	<b>7</b>
<b>3.1 EFFECTIVE DESIGN</b> .....	<b>7</b>
<b>3.2 TYPES OF MERGER REMEDIES</b> .....	<b>7</b>
3.2.1 Structural and Non-structural Considerations .....	9
<b>3.3 DESIGNING STRUCTURAL REMEDIES</b> .....	<b>10</b>
3.3.1 Acceptable divestiture packages .....	10
3.3.2 Timing of Divestiture.....	13
3.3.3 Design elements for the Remedy Order .....	16
<b>3.4 DESIGNING NON-STRUCTURAL REMEDIES</b> .....	<b>17</b>
3.4.1 Design considerations for non-structural remedies.....	18
<b>3.5 ADDITIONAL CONSIDERATIONS WITH INTERNATIONAL COOPERATION</b> .....	<b>19</b>
<b>3.6 MARKET TESTING WITH THIRD PARTIES</b> .....	<b>20</b>
<b>PART 4 – IMPLEMENTATION AND MONITORING OF REMEDIES</b> .....	<b>22</b>
<b>4.1 EFFECTIVE IMPLEMENTATION</b> .....	<b>22</b>
<b>4.2 CONSIDERATIONS WHEN APPROVING DIVESTITURES</b> .....	<b>22</b>
4.2.1 Additional Considerations with International Cooperation .....	23
<b>4.3 MONITORING</b> .....	<b>24</b>
<b>4.4 USE OF THIRD PARTY TRUSTEE OVERSIGHT</b> .....	<b>24</b>
4.4.1 Types of Trustees .....	24
4.4.2 Trustee Considerations.....	25
<b>4.5 COMPLIANCE WITH REMEDY ORDER</b> .....	<b>26</b>
4.5.1 Compliance Enforcement .....	26
4.5.2 Non-Compliance .....	26
<b>4.6 POST IMPLEMENTATION MODIFICATION</b> .....	<b>27</b>
4.6.1 Revision Clauses .....	27
4.6.2 Procedures for Revisions.....	27
<b>4.7 PERIODIC REVIEWS</b> .....	<b>28</b>
<b>Annex 1: Practical Tips for Competition Authorities Cooperating on Merger Remedies</b> .....	<b>29</b>
<b>Annex 2: Examples of Non-structural Remedies</b> .....	<b>30</b>
<b>Annex 3: Risks Associated with Price Controls as a Remedy</b> .....	<b>33</b>
<b>Annex 4: List of Selected Guidelines on Merger Remedies from Various Jurisdictions</b> .....	<b>34</b>
<b>Annex 5: List of Selected Ex Post Reviews and Studies of Merger Remedies</b> .....	<b>35</b>
<b>Annex 6: Case Examples</b> .....	<b>36</b>

# ICN Merger Working Group Merger Remedies Guide (2016)

## **Part 1 – INTRODUCTION**

When an investigation reveals that a merger will likely result in substantial harm to competition, a remedy may be required so that competition in the market can be effectively maintained or restored.<sup>1</sup> Competition authorities are responsible for ensuring that remedies are necessary, clear, enforceable, effective, sufficient in scope and capable of being effectively implemented within a short period of time.

The purpose of this Merger Remedies Guide (“Guide”) is to describe the overarching principles which form the basis of sound merger remedies and to provide guidance on how these principles inform the way in which remedies may be designed and implemented. Reflecting the current experience of competition authorities and practitioners around the world, this Guide builds on the foundation established in the Merger Working Group’s 2005 Report on the Merger Remedies Review Project, and supersedes the 2005 Report by explaining relevant factors in more detail, while providing practical guidance on effective remedial action.

This Guide recognizes the significant growth in international cooperation over the past decade and complements the Merger Working Group’s 2015 Practical Guide on International Cooperation (“**International Cooperation Guide**”) by highlighting the factors that come into play in the design and implementation of remedies when more than one competition authority is reviewing the same merger (“multijurisdictional merger”). Such cooperation is particularly suited to the analysis, design and implementation of remedies, as well as the overall investigation of the merger in question.

Merger remedies are typically formalized or codified in some form to ensure enforceability by a court or administrative body. Different jurisdictions refer to the written form of remedies in different ways (Consent Order, Consent Decree, Consent Agreement, Commitments, Remedies, Undertakings, or others). For ease of reference, the term “Remedy Order” will be used in this document to underscore the importance that remedies be enforceable by a governing body or court.

## **Part 2 – GUIDING PRINCIPLES AND PROCEDURAL CONSIDERATIONS**

### **I. OVERARCHING PRINCIPLES FOR REMEDIAL ACTION**

#### **2.1. Need for Remedy**

The purpose of a remedy is to maintain or restore competition otherwise lost due to the merger, while permitting, if possible, the realization of efficiencies and other benefits. To accomplish this goal, a competition authority determines the nature and scope of competitive harm within its own jurisdiction before requiring remedies or agreeing to proposed remedies.

---

<sup>1</sup> The post-remedy standard may differ across jurisdictions according to the legal framework, policies and case law in each jurisdiction.

For multijurisdictional mergers involving international cooperation, each competition authority should exercise its independent judgment in reaching its enforcement decisions regarding the need for a remedy. In doing so, each competition authority will rely on its own legal framework, guidelines, economic analysis and case law to determine how it will address competition issues given the specifics of its investigation.

If competitive harm resulting from the merger is found and thus the need for a remedy has been determined, the type of the remedy (i.e. structural, non-structural, or a hybrid of both) is likely to depend on the nature of competitive harm. Relevant considerations for design and implementation are described in Parts 3 and 4 of this Guide. If a merger results in significant competitive harm for which there is no effective remedy, the merger will normally be challenged or prohibited.

## **2.2 Tailored to Harm**

To be effective, remedies must resolve the competition concerns the merger gives rise to so that competition can be maintained or restored in the markets affected by the merger. Therefore, competition authorities should require a merger remedy that is directed at and proportionate to (“tailored to”) addressing the competitive harm. Competition authorities should use the remedy process to achieve objectives related to competition and competitive harm. Basing remedies on the application of economic and legal analysis to the facts of the merger under investigation is most likely to result in effective relief.

Tailoring the remedy to the harm allows competition authorities to require the least intrusive remedy without compromising effectiveness. In certain instances, it may not be possible to design an effective remedy that includes only the assets specific to the market(s) where competitive harm has been identified. As explained in section 3.3.1, in these cases, it may be necessary to impose a remedy that is broader in scope and covers products or geographic areas beyond those in which there is likely to be competitive harm. When a competition authority requires a remedy that the merging parties are not willing to agree to, for instance, because it limits the economic value of the deal to the acquiring firm, the merger may be abandoned by the merging parties.<sup>2</sup>

In multijurisdictional mergers, competition authorities may have different legal or economic frameworks and/or varying levels of competition concerns depending on the facts and the competitive structure in their jurisdiction. They may therefore accept or require remedies tailored to their individual jurisdiction. However, when markets and competition concerns extend beyond an individual jurisdiction, competition authorities may consider remedies that are the same or similar to those in other jurisdictions.<sup>3</sup>

## **2.3 Effectiveness**

Assessing the effectiveness of a proposed remedy involves consideration of several important factors, namely competitive impact, duration, practicality and risk. While each merger is case-specific and jurisdictions have differing merger regimes, consideration of these factors during each review process will also help ensure consistency of remedies across jurisdictions.

---

<sup>2</sup> Alternatively, depending on the system in the jurisdiction concerned, the merging parties may litigate the merger or the competition authority may adopt a decision prohibiting the merger, which can subsequently be appealed by the merging parties.

<sup>3</sup> This is described further in section 3.5.

***i. Competitive Impact***

A remedy should be designed to address the identified competition harm that is likely to result from the merger, with due consideration to how the remedy changes the competitive dynamics of the market and the incentives of the merging parties post-remedy. Setting out terms in the Remedy Order that specify and anticipate potential issues that may arise during the implementation phase is important to help ensure the intended competitive impact (e.g. restoring competition) and protect against the merging parties' ability to thwart the intended competitive impact.

***ii. Duration***

A remedy should address the competitive harm over its expected duration. Because a merger results in a permanent change of the market structure, a remedy must durably prevent the anti-competitive effects that would result from the merger. Remedies that address the competition concerns quickly are preferable to remedies that are expected to have an effect only in the longer term or where the timing of the effect is uncertain and where future events may undermine the effectiveness. Therefore, it is common for remedies to have a specified end date or termination provision.

***iii. Practicality***

A remedy should be capable of being implemented, monitored and enforced bearing in mind the need for detecting non-compliance and the resources involved in the enforcement of the remedy. Practicality requires that the terms of a remedy be clearly expressed in the Remedy Order.<sup>4</sup> Ambiguous remedies are difficult to assess, implement and enforce. Furthermore, as described in Part 4, remedies generally should also provide for flexibility in the event of changed circumstances, especially in cases where the remedy continues over a long duration.

***iv. Risk***

Inherent in accepting any remedy is a degree of risk to the competition authority's goal of maintaining or restoring competition, whether related to the remedy package, the purchaser in a divestiture, the characteristics and dynamics of the market or the remedy implementation. The major risks to the competition authority include the following:

- a. Package or Composition Risk relates to the adequacy of the business or assets to be divested in a structural remedy and/or the conditions and prohibitions set out in a non-structural remedy (to circumscribe the conduct of the merged entity) to address the likely competitive harm that has been identified. This also relates to the risk that the business or assets to be divested in a structural remedy may deteriorate significantly prior to divestiture.
- b. Purchaser Risk relates to identifying an appropriate purchaser of the business or assets to be divested in a structural remedy.
- c. Implementation Risk relates to the potential failure of effectively implementing the remedy, by fault of the merging parties or other market forces. This includes risks associated with circumvention, monitoring and distortion (as further explained in Parts 3 and 4 of this Guide).

Risk tolerance may vary by jurisdiction, depending on specific laws or policies within that jurisdiction (such as the legal authority to modify a remedy in the event of non-compliance or changed circumstances). Risk tolerance will also vary by case and remedy context.

---

<sup>4</sup> As noted by ICN Recommended Practice XI.C: "To be effective, and to enhance administrability, a remedy should define the parties' compliance requirements clearly and precisely."

When assessing the effectiveness of proposed remedies, potential costs and burdens on competition authorities, merging parties and/or the marketplace should also be considered.

This includes the following

- **Foregone merger efficiencies or other pro-competitive benefits:** Mergers that raise competition issues in one or more relevant markets may nonetheless generate efficiencies for the merging parties or have a pro-competitive impact such as increased quality, choice and innovation.<sup>5</sup> In certain circumstances, jurisdictions that assess such pro-competitive benefits may want to consider how they are impacted by remedy design.
- **Remedy impact costs:** While the intent of a remedy is to address competition concerns and maintain or restore competition in markets affected by a merger, a remedy may introduce market distortions and inefficiencies which may have unintended or unwanted consequences. This is more likely to be the case where conduct or behavioural remedies are used to determine market outcomes, particularly over a long period of time.
- **Remedy operating costs:** Any remedy will have financial cost and resource implications during the implementation phase both for the competition authority and the merging parties. While these may be modest in some cases, they may be more significant in others, depending on the nature of the remedy, the extent of ongoing monitoring, and the level of further enforcement that may be required. Competition authorities should consider any unnecessary resource or cost commitments, without compromising the effectiveness of the remedy.

## 2.4 Transparency and Consistency

Transparency and consistency in the design and implementation of remedies reinforce the fairness, legitimacy and effectiveness of remedies.<sup>6</sup> To achieve these goals, competition authorities should be open and transparent with respect to both procedural and substantive considerations during the remedy process, subject to preserving confidentiality.

Identifying the factors used by competition authorities in their analyses and decision-making processes allows for greater consistency and predictability in the design of remedies.<sup>7</sup> The use of guidelines or other policy statements that describe established criteria (for example, for finding a suitable purchaser in a divestiture remedy) and model texts containing provisions that are generally applicable to certain types of remedies promote transparency and may make the remedy design process more efficient.

In addition, early and ongoing dialogue between the investigating competition authority and the merging parties throughout the investigation, related to both the potential competitive harm arising from the merger as well as the design and choice of remedies, can facilitate a

---

<sup>5</sup> Jurisdictions differ in how efficiencies and other benefits are defined and assessed. For those competition authorities that consider efficiency claims, such claims are generally only relevant if it can be shown by the merging parties that they arise from the merger and would not otherwise occur; are likely and timely; and, for some, are expected to result in significant benefits to customers in the market(s) of concern.

<sup>6</sup> As noted by ICN Recommended Remedies Practice B, “The merger review system should provide a transparent framework for the proposal, discussion, and adoption of remedies.”

<sup>7</sup> See Annex 4 for a list of merger remedies guidelines published by various competition authorities.

timely resolution to an otherwise anti-competitive merger. In multijurisdictional mergers, such dialogue among competition authorities also increases the likelihood that remedies will be consistent, timely and effective.

## II. PROCEDURAL CONSIDERATIONS

### 2.6 Timing

Depending on the merger regime, remedies may be proposed by merging parties at established stages or at any stage of an investigation. In either case, whether a competition authority is in a position to determine the effectiveness of a proposal will depend on several factors, including whether there is sufficient information to determine the scope of competitive harm, sufficient details about the remedies from the merging parties, and sufficient evidence from the investigation and from third parties about the likely impact of the remedies.

Merging parties may have strong incentives to propose remedies, but it should be recognized that the incentives of merging parties are not necessarily identical to the objectives of the competition authority. This can affect whether or not a remedy is offered at all and also the nature, scope and terms of a proposed remedy. As described in sections 3.6 and 4.3, information from third parties may be helpful in determining the need for a remedy and its design and implementation.

### 2.7 Timing Alignment in multi-jurisdictional Mergers

International cooperation is voluntary and competition authorities have full discretion to determine the extent of cooperation throughout the review process.<sup>8</sup> If competition authorities decide to engage in extensive cooperation, including on remedies, they, together with merging parties, should strive to align the timing of respective remedy procedures.<sup>9</sup> When the timing of remedy discussions is not aligned, the remedies imposed have a greater risk of divergence and incompatibility. Strategies for cooperating competition authorities looking to align such timing are discussed in the [International Cooperation Guide](#). They include the following:

- Initiate contact as early as possible when it becomes evident that remedies may be required, even prior to the merger notification.<sup>10</sup>
- Either separately or in a joint call with the merging parties, discuss practical steps to achieve timing alignment.<sup>11</sup> Merging parties can help facilitate alignment of key decision-making stages, including remedy decision-making, through timing of their notifications or responses to information requests, providing confidentiality waivers, and requesting or agreeing to timing extensions.<sup>12</sup>
- Communicate with each other about respective timetables and processes, particularly when remedies are proposed, including any internal deadlines, when each competition

---

<sup>8</sup> See International Cooperation Guide Part III, Overarching Principles and Part V.2, Remedies

<sup>9</sup> See International Cooperation Guide, ¶ 5, 40

<sup>10</sup> See International Cooperation Guide ¶ 14

<sup>11</sup> See International Cooperation Guide ¶ 21

<sup>12</sup> See International Cooperation Guide ¶ 20, ¶ 23, and ¶ 42.

authority expects to have initial views on potential remedies, and when each expects to receive written proposals from the merging parties.<sup>13</sup>

- Communicate with other relevant competition authorities early about potential divestiture proposals and buyers to increase opportunities to share views and concerns prior to approvals on common divestiture proposals and buyers.<sup>14</sup>

## **PART 3 – CHOICE AND DESIGN OF REMEDIES**

### **3.1 Effective Design**

Remedy design is case-specific and fact-intensive. It requires an understanding of the competitive harm, how to tailor the remedy to that harm, and how the proposed relief will maintain or restore competition lost by the proposed merger.

Clear, unambiguous and careful drafting of remedies is a key element in assisting their rapid and effective implementation. The need for clarity in remedy design may require particular precision and significant detail regarding the substantive and implementation commitments being entered into by the merging parties. This includes the scope of assets that are included and excluded from a divestiture package as well as key obligations regarding the ongoing conduct of the merging parties. When drafting remedies, competition authorities should also remain mindful of merging parties' incentives and opportunities to circumvent the remedy.

In addition, communicating competition concerns to merging parties increases the likelihood that appropriate remedies may be proposed. Similarly, when merging parties provide detailed information on the content of the remedies being offered, the conditions for their implementation and their suitability to eliminate the competition concerns, competition authorities are better able to assess the workability and effectiveness of the proposed remedies and to adequately consult third parties. A discussion of the appropriateness of specific remedy proposals can be focused by written submissions (e.g. term sheets) from the merging parties. The competition authority's preliminary assessment of remedy proposals may help the merging parties to improve their proposals.<sup>15</sup>

Subject to appropriate safeguards for confidentiality, the views of third party market participants may aid competition authorities in their assessment of remedy proposals and in remedy design. As described in section 3.6, the feedback collected during such consultations may help to clarify and refine remedy proposals, although authorities should recognize that third parties may have various incentives to support or criticize the proposed remedies.

### **3.2 Types of Merger Remedies**

Merger remedies are conventionally classified as either structural or non-structural. An effective package of remedies may contain a combination or "hybrid" of both structural and non-structural elements. In some cases, an effective remedy may be unavailable and a competition authority may seek to prohibit the merger in its entirety.<sup>16</sup>

---

<sup>13</sup> See International Cooperation Guide ¶ 22 and ¶ 24

<sup>14</sup> International Cooperation Guide ¶ 41

<sup>15</sup> See Case Example 1 [Nestle/Pfizer](#), in Annex 6.

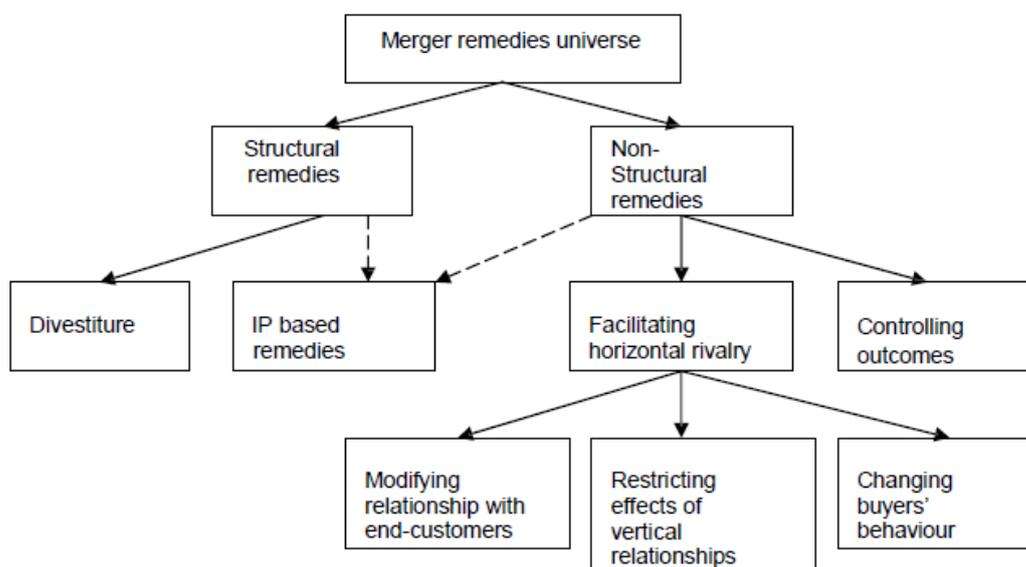
<sup>16</sup> See Case Example 2 [Tönnies/Tummel](#), in Annex 6.

Structural remedies are generally one-time remedies intended to maintain or restore the competitive structure of the market. Structural remedies typically involve the sale of one or more businesses, physical assets or other rights to address the competitive harm, either by strengthening an existing player, creating a new source of competition or a mix of both. Such remedies provide independent firms with incentives to maximize profits separately from the merging parties so as to maintain competition in the market. In many cases, a well-designed structural remedy can preserve some of the efficiencies that a proposed merger offers.

Non-structural remedies, often referred to as “conduct” or “behavioural” remedies, are ongoing remedies that are designed to modify or constrain the future conduct of merging firms. By contrast to structural remedies, non-structural remedies do not restructure firms or asset ownership – they permit integration subject to specific operating rules. Non-structural remedies seek to change marketplace behaviour to encourage competition through conditions or prohibitions on behaviour that prevent the merged firm from undermining competition.

Non-structural relief may be necessary to ensure a structural remedy will be effective. A divestiture with an interim supply obligation is a common example, where the purchaser is unable to manufacture the product for a transitional period and a supply agreement can help prevent the loss of a competitor from the market in the short term.<sup>17</sup> Hybrid remedies may also be effective when, for example, a merger involves multiple markets or products and competition is best preserved by structural relief in some relevant markets and by non-structural relief in others.

**Figure 1: Overview of the Merger Remedies Universe**



<sup>17</sup> See Case Example 3 [Zimmer/Biomet](#), in Annex 6.

### 3.2.1 Structural and Non-structural Considerations

The goal of all merger remedies is to effectively address the competitive harm resulting from the merger. Competition authorities strive to tailor whatever remedies or combination of remedies are most likely to effectively address the competitive harm while preserving the benefits of the merger.

Competition authorities generally prefer structural relief in the form of a divestiture to remedy the anticompetitive effects of mergers, particularly horizontal mergers. Such preference is based on several benefits, including:

- Structural remedies directly address the cause of competitive harm arising from the elimination of a competitor as a result of the merger and have durable impact by creating a new or enhanced competitive player;
- They tend to be self-policing and thus incur low ongoing monitoring costs and be less market distorting; and
- They can be simple, certain, relatively easy to administer, readily enforceable and can be accomplished in a short period of time.

In certain circumstances, structural remedies may not be possible or desirable. For example:

- They may not be possible where divesting the assets required to address the competitive harm makes the transaction unfeasible. In such cases, the competition authority may instead seek to prohibit the merger.
- The characteristics of an industry may not support a viable divestiture due to: the absence of suitable purchasers; limited options to create or support a viable standalone business; risk of significant customer attrition; or, risk that a purchaser will be unable to carry on the business going forward.
- In some vertical mergers, structural remedies may result in significant foregone efficiencies.<sup>18</sup>

Non-structural remedies can take a wide range of forms and can be an effective method to remedy likely anticompetitive effects, particularly in respect of a vertical merger or in other circumstances where a structural remedy is not appropriate. While they are normally not sufficient to address competition concerns resulting from horizontal overlap, they may be more easily tailored to the competition concerns in situations where, for example:

- The likely efficiencies arising from a merger are significant (and the jurisdiction permits these benefits to be taken into account). Non-structural remedies can be tailored to preserve those efficiencies, for example, by requiring supply obligations, licensing, or information firewalls based on objective criteria such as third party benchmarks (as further explained in section 3.4.1).
- The competitive harm is expected to be limited in duration owing to fast changing technology or other factors such that the remedy need only function for a limited time.
- Non-structural interim relief (such as technical assistance) is necessary as a complement to a structural remedy until structural measures (i.e. divestitures) are fully operative.

---

<sup>18</sup> See section 2.3.

- The remedy prescribes certain conduct in connection with a regulatory system, so that the monitoring/policing function may be undertaken by a specialized regulatory agency.

The following factors may be relevant to competition authorities when considering (stand alone) non-structural remedies:

- There may be high implementation costs associated with ongoing monitoring and enforcement which may be necessary to ensure the remedy effectively resolves the competitive harm.
- Such remedies risk market distortion as it can be difficult to design a non-structural remedy that will adequately replicate the outcomes of a competitive market. They may prevent the merged entity from efficiently responding to changing market conditions and may restrain potentially pro-competitive conduct by the merged entity.<sup>19</sup>
- They may require behaviour that is at odds with the firm's efforts to maximize its profit, and therefore introduce incentives for non-compliance. Compared to divestiture remedies, non-structural remedies may be more vulnerable to circumvention and manipulation by the merging parties.
- It may be difficult to determine the appropriate duration of a non-structural remedy, since it is often difficult to gauge how long it will take for new entry or expansion or other relevant changes to the market to occur.

### **3.3 Designing Structural Remedies**

Divestitures are the most common form of structural remedy for anticompetitive horizontal mergers. The design of effective divestitures involves the sale of an acceptable divestiture package, to a suitable purchaser, through an effective divestiture process.

#### **3.3.1 Acceptable Divestiture Packages**

Determining what is an acceptable divestiture package is a critical question in designing effective relief. The focus of the inquiry is whether the proposed divestiture includes the assets and resources necessary for the purchaser to compete effectively and thereby maintain or restore competition that would otherwise have been lost as a result of the merger. To be successful, a structural remedy typically requires clear identification of the requisite assets, tangible, intangible or a combination of both. A well-designed divestiture package addresses and overcomes whatever obstacles or barriers led to the determination that other competitors would not discipline a post-merger increase in market power.

##### ***1) Divestiture of an existing business***

To achieve the goal of maintaining or restoring competition, competition authorities often require the divestiture of an existing, autonomous business unit of either the acquired or acquiring firm operating in the relevant market. An existing business entity typically

---

<sup>19</sup> A possible example involves price controls for airline fares on routes where there is a lack of competition. These price controls are usually set by reference to fares for routes where there is sufficient competition. The price controls may have an anti-competitive impact because market players setting the fares on competitive routes take into account the fact that these fares serve as a benchmark for non-competitive routes.

possesses all the physical assets, personnel, customer lists, supplies, information systems, intangible assets (such as intellectual property), and management infrastructure necessary for the efficient production and distribution of the relevant product(s). Divestiture of an intact, ongoing, standalone business has the lowest composition risk as the business has already demonstrated its ability to compete in the relevant market and generally ensures that the buyer will be able to compete immediately following implementation of the remedy. It also requires the fewest assumptions about the viability of the proposed divestiture, minimizing a competition authority's risk that it will be unable to obtain an effective remedy. For these reasons, a divestiture of an existing business is generally the preferred form for a remedy.

Competition authorities generally require merging parties to show that their proposed divestiture will have the likely effect of maintaining or restoring competition. Merging parties should demonstrate that the business unit contains all necessary components, that it is separable from the merging businesses, and that the buyer will be able to maintain or restore competition upon implementation of the remedy. The merging parties should explain the unit's business operations and provide relevant financial information about the business entity. Necessary components for an asset divestiture generally include:

- manufacturing and other facilities;
- access to key inputs and other supply;
- identification of and access to personnel;
- sales, marketing and distribution capabilities;
- supply, service, and customer relationships and contracts;
- intellectual property, whether owned or licensed, including know-how and trade secrets as well as information technology;
- research and development (“R&D”) capability;
- licenses, permits, and authorisations by governmental organisations;
- capital resources;
- customer, credit and other records; and
- any thing else necessary to compete effectively in the relevant market.

In some circumstances, the divestiture of a business in a relevant market may not be sufficient to maintain or restore competition and thus would not be an acceptable divestiture package. A competition authority may consider including additional assets in the divestiture package when necessary to effectively preserve competition, and thus be tailored to the competitive harm. For example, in some industries, it is difficult to compete without offering a full line of products. Similarly, integrated facilities may produce multiple products and separation would harm production efficiencies. In such cases, when there is a demonstrated need, a competition authority may include additional assets in the divestiture package (even when the competitive concern relates to only a subset of those products), in order to ensure a competitively viable divestiture.<sup>20</sup> In other industries, it may be necessary to offer a network of outlets or a supply source that is located beyond the geographic markets in which competition harm is likely in order to enable the purchaser to compete effectively.<sup>21</sup>

If there is uncertainty with respect to whether any purchaser will be interested in a proposed divestiture package, a competition authority may consider including additional valuable

---

<sup>20</sup> See Case Example 4 [Merck/Sigma-Aldrich](#) and Case Example 5 [ZF/TRW](#), in Annex 6.

<sup>21</sup> See Case Example 6 [Holcim/Lafarge](#), and Case Example 7 [Edeka/Tengelmann](#), in Annex 6.

assets in the Remedy Order, often referred to as “crown jewels”. These assets could replace or augment the initial asset package in order to increase the likelihood that a suitable purchaser will be found in the event that the initial package is not saleable.

## 2) *Divestiture of less than an existing business*

The divestiture of a collection of assets or part of a business of one of the merging parties may constitute an acceptable asset package if the assets to be divested are sufficient to allow the buyer to compete effectively in the relevant market.

Merging firms may have an incentive to divest fewer assets than are required for the buyer to compete effectively, and therefore should provide evidence that the asset package is sufficient for the proposed buyer to operate in a way that maintains or restores competition in the relevant market. If the merging parties propose to exclude any significant components of an existing business, they should explain why the components are not being included, what a buyer would use instead, and how a buyer will be able to integrate the divested components into its own operations. Any carve outs should not undermine the viability of the asset package or the buyer’s competitiveness.<sup>22</sup> For example, a buyer of divested assets may have its own assets that are good substitutes for some of those of the existing business (e.g., its own distribution system or sufficient excess capacity), and thus the inclusion of such additional assets may be unnecessary, costly, and potentially inefficient. Similarly, manufacturing facilities may not need to be divested if appropriate third-party contract manufacturing is readily and competitively available.

If it is determined that the divestiture of a collection of assets less than an existing business will remedy the competitive concerns in a particular merger, it is preferable that all the divested assets come from either one or the other of the merging parties. A mixture of assets from both merging parties (a “mix and match” solution) may increase composition risk. It is more difficult to determine whether the assets can be operated together effectively because the assets have not been combined in the past and may require some reconfiguration. Therefore, mix and match divestiture proposals typically require more fact-specific, detailed, and time-consuming evaluation. The merging parties must present sufficient evidence to convince the competition authority that the asset package is viable and that it will enable the buyer to compete effectively. The merging parties’ operational employees tend to be the most knowledgeable about these issues. Suppliers, customers, competitors, and other possible buyers may also provide instructive evidence.

Concerns about the viability of divesting less than a business or that a mix and match package would not be attractive to a potential purchaser can be alleviated by requiring that a pre-identified purchaser be approved by the competition authority prior to closing of the merger as further described in section 3.3.2(ii).<sup>23</sup>

---

<sup>22</sup> In order to minimize risk regarding viability and competitiveness, competition authorities may consider seeking a “reverse carve-out”, whereby the merging parties divest an entire business but carve out the parts of the business that are not necessarily required for the remedy to be effective. See Case Example 8 [Nordhessen/Werra-Meißner](#), in Annex 6.

<sup>23</sup> See Case Example 7 [Edeka/Tengelmann](#), in Annex 6.

### **3) Divestiture or licensing of intellectual property (“IP”)**

When IP is a critical asset or the barrier to precluding competition, the remedy must require the merged firm to provide one or more parties with all relevant and necessary rights to that asset, either by sale or through licensing. A purchaser or licensee should have full rights to develop and implement improvements; otherwise, its incentives to invest in R&D could be diminished, and thus lessen its competitiveness in the market of concern.

Divestiture/sale of IP is generally preferable to a licensing arrangement because it eliminates the lasting relationship between the merged entity and its competitors.<sup>24</sup> A remedy that requires an assignment or license of an IP right that is exclusive, irrevocable, and non-terminable with no ongoing royalties will effectively be structural and require little to no ongoing commitments. In contrast, a license that requires a licensee to rely on the licensor for upgrades, supplies, etc. will most likely result in some form of hybrid remedy that may require some degree of monitoring.

Permitting the merged firm to retain access to critical IP may present a competitive risk. Without the right to exclude the merged firm (or third parties) post-merger, a buyer may find it more difficult to differentiate its product(s) and may be a lesser competitive force in the market. If the purchaser is required to share rights to IP, it may not engage in investment and marketing that it might have otherwise. However, there may be circumstances when the merged firm needs to keep rights to the IP in order to achieve efficiencies that are not possible through a licensing agreement. In such situations, a non-exclusive license may preserve competition as well as the buyer’s competitiveness. In considering the design and scope of IP remedies it is generally preferable to strike an appropriate balance between preserving incentives for innovation and addressing competitive harm.<sup>25</sup>

#### **3.3.2 Timing of Divestiture**

During the design phase for divestiture remedies, it must be determined whether the divestiture will be implemented prior to or following closing of the merger in question. Below are the possible scenarios.

##### **(i) Post-closing divestiture**

In most merger remedies, competition authorities require that the terms of the Remedy Order (including the identification of a divestiture package) be determined prior to clearing a merger, but allow the identification and approval of a suitable purchaser to occur following closing of the merger. The competition authority must be confident based on the information that it collects that the asset package will be sufficient to attract a purchaser that will maintain or restore competition and will not degrade before it is divested. (Scenario A in Figure 2.)

---

<sup>24</sup> In divestitures involving IP, the merging parties may be required, for a period of time, to provide technical assistance to the buyer, or access to (or transfer of) key employees when the relevant product involves highly sophisticated or complex technologies.

<sup>25</sup> Patent lawyers and others knowledgeable about the transfer and use of IP in the industry and access to those involved in the development of the IP can be important sources to inform a remedy involving IP.

Once the merger has closed, timing can be a critical factor in determining whether a merger remedy is effective. Without safeguards such as the inclusion of hold separate provisions, the competitive capability of a divestiture package may deteriorate significantly prior to completion of a divestiture, for example through loss of customers or key employees. Delay in implementation of a divestiture increases the period in which competition may be affected. In addition, merging entities may have little incentive to maintain or aggressively compete with assets that will be operated by a competitor in the future. A competition authority's concerns regarding interim competitive harm and the diminished viability and competitive significance of the assets to be divested may impact (i) whether an acceptable divestiture is possible; (ii) the scope of the package of assets necessary to be divested; (iii) the timing for finding an approved buyer; and, (iv) whether hold separate provisions are required.

**Hold separate and/or preservation of assets provisions:** Hold separate provisions are intended to preserve the viability of the assets to be divested and prevent interim competitive harm by requiring that they be operated independently from the businesses to be retained by the merging parties pending divestiture. Specific terms will depend on the facts of the case and on what business units can be held separate as a practical matter. For example, if the assets are part of a larger operating unit, the entire unit may need to be held separate. Terms may also require the protection of the assets' competitively sensitive information, incentives for employees to remain with the held separate entity until the divestiture, and commitments to maintain certain levels of capital spending. As further described in section 4.4, competition authorities generally require the appointment of a hold separate manager to oversee the operation of the held separate business and monitor compliance with the Remedy Order provisions.<sup>26</sup>

In the absence of formal hold separate provisions, the competition authority should require the merging parties to maintain and preserve the assets pending divestiture (even if not operated separately) to ensure that there is no deterioration of the assets' competitive strength.<sup>27</sup> This option relies on the merging parties, in the first instance, to preserve the assets, with oversight usually tasked to a third party monitor.<sup>28</sup>

A divestiture to a pre-identified purchaser that will take over the assets immediately following consummation of the merger may not need a hold separate or asset maintenance requirement, but it should be a consideration for all other circumstances where the competitiveness of the assets to be divested is subject to the risks of deterioration or party manipulation.

**Period to complete a remedy:** In a post-closing divestiture, competition authorities allow merging parties to seek a suitable buyer during an initial sales period and, if they are unable to do so, require that an appointed divestiture trustee carry out the divestiture during a

---

<sup>26</sup> See Case Example 5 [ZF/TRW](#), in Annex 6.

<sup>27</sup> See Case Example 9 [YAMADA DENKI/BEST DENKI](#), in Annex 6

<sup>28</sup> Different jurisdictions use differing terms to refer to individuals with third party oversight. These include, *inter alia*, divestiture trustee, monitoring trustee, monitor or hold separate manager. For ease of reference, unless otherwise stated, the term "trustee" is used as a general term to describe individuals who have been appointed or approved by the competition authority to have oversight functions related to a Remedy Order.

subsequent sales period.<sup>29</sup> While the specifics of an appropriate remedy will differ from case to case, the time period to complete a divestiture should be prompt.<sup>30</sup>

**Purchase Price:** To reduce implementation risk and help ensure that a suitable buyer for a divestiture package will be found as soon as possible, competition authorities typically require that a divestiture occur “at no minimum price” after the initial sale period has passed and the divestiture process is carried out by a divestiture trustee.

*(ii) Pre-identified purchaser divestitures*

In some jurisdictions, competition authorities have the ability to require approval of an identified purchaser of a specific package of assets before a merger is consummated. This type of divestiture could occur under two possible scenarios, differentiated only by when the purchaser enters into an agreement with the merging parties relative to the decision of the competition authority in regards to the merger.<sup>31</sup>

- 1) The merging parties identify a purchaser and enter into an agreement *during the merger review process* and before closing of the merger. The competition authority therefore incorporates the purchaser and the divestiture package into its enforcement decision about the merger and the need for any additional remedial action. The closing of the divestiture normally occurs shortly after the authority’s decision is made. (Scenario B in Figure 2.)
- 2) The merging parties identify a purchaser and enter into an agreement *after the merger review is completed*, and before closing of the merger. The competition authority approves the purchaser in a separate buyer approval procedure that is completed after the merger enforcement decision. After this approval is obtained, the merging parties can consummate the merger and the divestiture. (Scenario C in Figure 2.)

Divestiture to a pre-identified purchaser can be beneficial.<sup>32</sup> For competition authorities, it may reduce purchaser, package and implementation risks as described in Part 2, avoid a potentially lengthy post-closing sale process and create more certainty that the divestiture will be implemented and effective in maintaining and restoring competition. Merging parties may be able to limit the assets in a divestiture package if they can successfully show agencies they are not required by the identified and approved purchaser for the remedy to be effective. On the other hand, it puts more time pressure on merging parties to provide all the requisite information so that the competition authority can complete its evaluation of a proposed purchaser prior to closing the merger. It also puts time pressure on the pre-identified buyer, who must conduct its own valuation and evaluation of the divestiture package. This type of divestiture typically includes a provision for alternative relief in the event that the pre-approved purchaser does not complete the purchase, such as the appointment of a divestiture trustee to sell the assets.

---

<sup>29</sup> Divestiture trustees are further discussed in section 4.4.

<sup>30</sup> In many jurisdictions, this may range from six to twelve months, though in others this may be as little as 90 days, including both the initial and subsequent sales periods and the time needed to complete the divestiture.

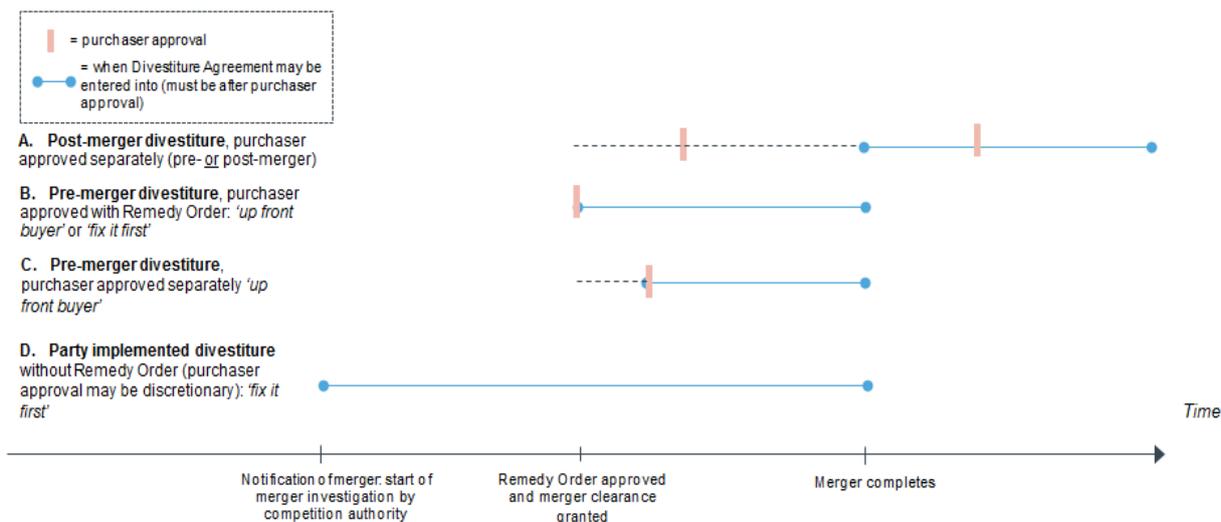
<sup>31</sup> In several jurisdictions, both scenarios encompass what is referred to as an “Upfront Buyer,” while in others, such as the European Union, the first scenario is referred to as a “Fix it First Remedy,” whereas the second refers to an “Upfront Buyer.”

<sup>32</sup> See Case Example 10 *Johnson & Johnson/Synthes* in Annex 6.

**(iii) Party-implemented divestitures<sup>33</sup>**

In some circumstances, merging parties may propose to implement a divestiture with a self-selected purchaser without a Remedy Order. This is done before the competition authority makes a final determination about the merger. (Scenario D in Figure 2.) While this type of self-selected divestiture may be a quicker path to preserve competition in the market, it lacks an enforceable Remedy Order. In practice, it is quite rare that a self-implemented divestiture to a self-selected purchaser meets the rigorous thresholds required to ensure an effective remedy.

**Figure 2: Timeline related to Divestiture Scenarios**



**3.3.3 Design Elements for the Remedy Order**

When designing a structural remedy, it is important to set out provisions in the Remedy Order that impact the implementation of the divestiture. An assessment of how these provisions are implemented and whether the merging parties comply with them is discussed under Part 4.

**(i) Suitable purchasers**

Because competition authorities have a crucial role in ultimately approving the purchaser, a key design issue for divestiture remedies includes setting out the relevant criteria for suitable purchasers of the divested businesses in the Remedy Order. The goal of a divestiture is to ensure that the approved purchaser possesses both the means and the intention to effectively maintain or restore competition in the market(s) harmed by the merger. To accomplish this goal, a suitable buyer must have financial capability, managerial expertise and operational capability, be independent from the merging parties, demonstrate intent to compete in the relevant market, and its purchase of the divested assets must not itself raise competition issues. When there are concerns about the viability of the divestiture package, competition authorities may also require the purchaser meet additional requirements, such as having prior experience in the industry. As further described in Part 4, information regarding the

<sup>33</sup> In some jurisdictions, this is called a “Fix-it-first Remedy”.

characteristics of the buyer as well as a competitive assessment related to that buyer will allow the competition authorities to determine whether a prospective purchaser is financially and competitively viable and ultimately an effective competitor.

*(ii) Divestiture Agreement*

Because the package of assets to be divested is a critical component of an effective remedy, the purchase and sale agreement and all ancillary agreements between the merging parties and the prospective purchaser (the “Divestiture Agreement”) should be subject to review by the competition authority.

*(iii) Transitions and entanglements*

In some circumstances, the buyer of a divestiture may need additional, short-term assistance or transition services from the merging parties in order to transition to operating the assets independently. Competition authorities may consider, on a case-by-case basis, remedy provisions that include a short-term continuing relationship post-divestiture (e.g., supply contracts, technical assistance) to ensure the viability of the purchaser as it begins to compete. In such hybrid remedies, any transitional agreements that form part of the Divestiture Agreement should also be subject to review by the competition authority. The duration and costs to the buyer associated with such agreements are particularly relevant to the effectiveness of the remedy. Retention of equity or other interests in the divested business is strongly disfavoured by competition authorities as it may reduce incentives to compete. Similarly, competition authorities strongly disfavour the merged firm financing the purchaser because it creates an entanglement between competing firms and distorts the firms’ incentives to compete vigorously. The challenges and concerns associated with such entanglements are discussed further in section 4.2 when approving a suitable purchaser.

*(iv) Duration*

Divestiture remedies may include clauses requiring merging parties to notify the competition authority before reacquiring the divested assets for period of time (such as 10 years), or even obtaining the approval of the competition authority before doing so.

### **3.4 Designing Non-Structural Remedies**

Because a remedy should be tailored to remove the competitive harm, different competitive concerns will necessitate different types of conditions on a firm’s conduct. Non-structural remedies come in many forms and are directed at the internal operation of the merged firm and/or affect how the firm interacts with customers or competitors. Where appropriate, non-structural remedies that facilitate competition (for example, by improving information to customers, reducing switching costs and opening up tender processes) are generally more effective and thus more desirable than those that aim to control outcomes (such as price controls, service level agreements and supply commitments). In order for non-structural remedies to be effective, it is necessary to ensure that monitoring, oversight, and enforcement are feasible.<sup>34</sup> It will also be important to evaluate the costs and market distortions that may ensue from implementing such remedies.

---

<sup>34</sup> As noted in the ICN Recommended Remedies Practice D, “Appropriate means should be provided to ensure implementation, monitoring of compliance, and enforcement of the remedy.”

While a complete list of possible non-structural remedies is beyond the scope of this Guide, some of the more common examples that competition authorities may consider are described in Annex 2. For a discussion on risks associated with price controls, see Annex 3.

### **3.4.1 Design Considerations for Non-structural Remedies**

#### ***(i) Clarity of terms***

The requirements or prohibitions set out in a Remedy Order and placed on a merged firm's conduct in non-structural remedies require careful consideration. Clear, precise drafting of what a firm is required to do and not do is essential since the merged firm is likely to interpret ambiguous language to its advantage. Competition authorities should consider whether the meaning of specific terms and conditions could be debatable and recognize the incentives that a firm may have to push the boundaries of the conditions, minimize, or otherwise evade the remedy.

Specifying all the aspects of required conduct is an important task given uncertainty about the future, information asymmetry between the competition authority and the merged firm (especially with respect to the merged firm's costs), the need to address contingencies, and the complexity of competition and rival interaction in many markets. Competition authorities may seek useful benchmarks for the conditions placed on a firm's conduct, such as citing commercial terms or practices used in other geographic or similar product markets or industry-wide standards, or using commercially reasonable or nondiscrimination provisions.

Crafting the terms of a non-structural remedy to anticipate future market conditions can be more difficult in emerging or dynamic markets than in mature markets in which costs and technology are less likely to change significantly during the remedy period. Competition authorities should carefully consider these challenges in deciding whether to pursue a non-structural remedy and how it is designed.

#### ***(ii) Timing and duration***

Non-structural remedies can be imposed for varying lengths of time. An appropriate period for a non-structural remedy will depend on the expected duration of the harm to competition and other case circumstances, for example, the timing of expected innovations in the market. Non-structural remedies should have a term that is as long as necessary to prevent the identified harm to competition arising from the merger, and generally should not be put in place for an indefinite duration. Short remedy periods may be insufficient to encourage needed entry or innovation, whereas longer term remedies may become irrelevant or constrain competition in the face of marketplace changes.

The risk of market changes and the continued relevance of the remedy can be addressed by ongoing, post-implementation monitoring and an ability to impose or seek modifications to the remedy. Competition authorities may also address this by including a review clause in the Remedy Order, providing an option to remove or adjust a remedy after it has been implemented for a set period of time preferably against specified objectives or criteria.

#### ***(iii) Oversight***

Remedies that seek to impose conditions, requirements, or prohibitions on a firm's conduct may require the firm to operate counter to its self-interest, business incentives, and past practices. Non-structural remedies may also create an ongoing relationship between the merged entity and a competitor(s) which may decrease incentives for that competitor to

notify instances of non-compliance. Therefore, non-structural remedies require that the Remedy Order specify provisions regarding ongoing oversight and compliance monitoring by the competition authority, or an independent monitor or monitoring trustee who is appointed by the competition authority and tasked to carry out the monitoring function (as further described in section 4.3 and 4.4).

When designing non-structural remedies, competition authorities should ensure that monitoring and enforcement are feasible and that non-compliance or evasion is detectable and subject to effective sanctions or penalties.<sup>35</sup> To be effective, the Remedy Order often includes reporting requirements for the firm to provide specific information to the competition authority or to the monitor to determine compliance, either on request or at specific intervals. Non-structural remedies rely on the competition authority's ability to enforce the Remedy Order provisions unilaterally or in court, or may employ a dispute resolution mechanism, for example via arbitration proceedings which, depending on the jurisdiction, can be used by the competition authority and/or third parties if provided for in the Remedy Order.<sup>36</sup>

#### *(iv) Costs*

The ongoing oversight (including compliance reporting, and, when necessary, enforcement actions against non-compliance) required of a non-structural remedy can be resource-intensive to both the competition authority and the monitored firm. Because these tasks may not be well-suited to a competition authority's primary expertise of investigation, in practice, the monitoring task is often entrusted to an independent trustee. Such monitoring costs are typically borne by the merging parties.

### **3.5 Additional Considerations with International Cooperation**

The key factors for designing an effective remedy and the considerations relating to the nature and scope of a remedy described above also apply to multijurisdictional reviews and there are likely to be benefits from discussing remedy choice and design with other reviewing authorities.

The various issues that a competition authority may wish to discuss with its counterparts for purposes of drafting its Remedy Order include<sup>37</sup>:

- the structure and content of the remedy;
- specific purchaser criteria;
- whether to require a single purchaser;
- the viability of the divested businesses;
- the duration of divestiture periods and transitional services;
- the use of trustees; and,
- any remedy implementation risks.

The discussions may result in competition authorities deciding to coordinate or separately negotiate these issues with the relevant merging parties.

---

<sup>35</sup> See Case Example 11 [Edizione Holding/Autostrade](#) in Annex 6, which illustrates the difficulties of monitoring compliance with non-structural remedies and the failure of the monitoring trustee.

<sup>36</sup> See Case Example 12 [Telkom/BCX](#), in Annex 6.

<sup>37</sup> See also International Cooperation Guide Part V.2 Remedies,

Below are further aspects to designing remedies for multijurisdictional merger reviews in the context of international cooperation. The extent of coordination and consensus on remedy design will vary depending on the particular facts of each merger investigation and the legal framework under which the competition authority operates. Depending on the characteristics of the merger under consideration, and to the extent consistent with applicable rules, cooperation on remedies may involve one competition authority taking on an informal coordinating role in relation to discussions on remedies.<sup>38</sup>

- (i) **Separate remedies.** In some investigations, competition authorities may coordinate to avoid conflicting remedies but determine that separate remedies are appropriate. The resulting remedies may be different in substance or, even if they mirror each other (*e.g.*, the remedies involve the same divestiture package, same purchaser and/or the same monitor), the competition authority may decide to have its own Remedy Order.<sup>39</sup>
- (ii) **'Complies with' remedy.** A competition authority's remedy may require the merging parties to comply with a remedy accepted by another competition authority. However, merging parties may be required to seek purchaser approval in each jurisdiction, and thus each competition authority may want to have its own Remedy Order in order to be able to enforce such provisions in its own jurisdiction. Having its own Remedy Order may also be necessary to ensure enforceability in the event of deliberate non-compliance with the remedy.<sup>40</sup>
- (iii) **'Take account of' or reliance on other remedies.** In some investigations, a competition authority may choose to take account of, or to rely entirely on, the remedy imposed by another competition authority. This may occur if the competition authority determines the other authority's remedy will adequately address competition concerns and any implementation issues that may arise. In such cases, the competition authority will generally not have its own Remedy Order.<sup>41</sup>

Competition authorities working together to design remedies may need to consider the enforceability of remedies across jurisdictions. For example, although some competition authorities may be able to obtain a remedy involving the sale of assets in another jurisdiction, other competition authorities may not be able to obtain such divestitures. Competition authorities that are informed of remedies offered to other competition authorities can have more efficient and effective negotiations with the merging parties when seeking to address their own concerns.

### 3.6 Market Testing with Third Parties

Third parties can play an important role in the process of designing and vetting proposed remedies before they are finalized. In some jurisdictions, competition authorities "market test" remedies by obtaining feedback from customers, suppliers and/or competitors to help determine whether a proposed remedy could adequately address substantive concerns

---

<sup>38</sup> See International Cooperation Guide ¶ 9

<sup>39</sup> See Case Example 6 *Holcim/Lafarge*, in Annex 6.

<sup>40</sup> See Case Example 13 *CSAV/HGV/Kuhne Maritime/Hapag-Lloyd*, Case Example 14 *Ahlstrom/Munksjö*, and Case Example 15 *Syniverse/ WP Roaming*, in Annex 6.

<sup>41</sup> See Case Example 16 *Novartis/GlaxoSmithKline*, and Case Example 17 *Cisco/Tandberg*, in Annex 6.

identified during an investigation. Market testing may occur as part of the review of the competitive effects of a merger, and/or informally or formally during a distinct remedy phase of an investigation. Market testing is usually non-public and includes commercially interested third parties with relevant views on the appropriateness of the remedy.

As part of the investigation of a merger's competitive effects, competition authorities can use third parties to gather information relevant to the design of remedies. For example, competitors' views on whether they have sufficient capacity to supply a market may inform remedy design regarding how much capacity needs to be divested to ensure a purchaser will have sufficient capacity to be effective. If third parties have identified specific barriers to entry, a remedy may include measures to address these barriers. Once a remedy is proposed, third parties may be provided with varying levels of information (ranging from a general discussion to an overview of a non-confidential version of the remedy) such that they can comment on its likely effects on competition in the market by questionnaires, telephone discussions, or meetings.

Third parties may be able to verify the effectiveness of a proposed remedy or identify potential weaknesses or ways in which the remedy could be improved. Market testing of a proposed divestiture remedy, for example, can allow a competition authority to verify factual information provided by the merging parties; assess whether the business to be divested will be an effective competitor; and determine whether there is any interest in the remedy package on the part of potential purchasers. Based on the nature of the feedback, a competition authority may revise a remedy proposal and re-market test the revised proposal.<sup>42</sup>

However, market testing can pose challenges for both competition authorities and third parties. Competition authorities should be mindful of confidentiality concerns of the merging parties, including early disclosure of the outcome of a merger review, and be aware of biases of third parties that may have a commercial interest in a particular outcome. In earlier stages of an investigation, a competition authority is usually focused on obtaining factual information from third parties, which is analysed by the competition authority itself; in market-testing, competition authorities may be asking third parties for subjective views on the adequacy and feasibility of a proposed remedy, which may involve a complex analysis in time-limited circumstances. For example, third parties that are competitors may be motivated by a desire to delay or prevent a merger that would result in a more efficient competitor and/or by an interest in having assets divested either to reduce the effectiveness of the post-merger competitor or to benefit by acquiring the assets to be divested. It is therefore important for competition authorities to critically evaluate third party feedback and assess it relative to the totality of the information obtained during the investigation.

In jurisdictions where market testing by the competition authority does not occur or is not common, third parties may nevertheless play an important role at the remedy phase. For example, in some jurisdictions, a Remedy Order may be published for public comment after it is agreed upon between the competition authority and the merging parties but before it is finalized. Similarly, finalising a remedy may, in some jurisdictions, be part of a public hearing process in which third parties can participate. Depending on the legal framework, third parties may also be able to challenge a remedy following its acceptance by the competition authority.

---

<sup>42</sup> See Case Example 1 [Nestle/Pfizer](#), in Annex 6.

## **PART 4 – IMPLEMENTATION AND MONITORING OF REMEDIES**

### **4.1 Effective Implementation**

The need for clarity, simplicity, consultation and inclusion of reporting mechanisms in the design of a Remedy Order are among the factors that assist in effective implementation and ongoing monitoring of remedies. In addition, it is desirable to provide some continuity of staffing within the competition authority between the stages of designing remedies and their implementation. This helps to ensure that familiarity with the circumstances associated with a merger is applied to implementation of the Remedy Order.

### **4.2 Considerations when Approving Divestitures**

The implementation of a remedy requires an evaluation of critical factors and information by competition authorities to ensure the merging parties comply with the Remedy Order. This includes receipt by the merging parties of the requisite approvals of the competition authority.

#### ***(i) The Divestiture Agreement and ancillary agreements***

As noted above, a competition authority should carefully review the proposed Divestiture Agreement, including all appendices, additions and ancillary agreements between the merging parties and the prospective purchaser. This is important to ensure that the Divestiture Agreement transfers all assets required to be divested, details additional obligations such as any transitional services, and contains no provisions inconsistent with the terms of the Remedy Order. The Divestiture Agreement should mirror, and if necessary, expand on the language in a Remedy Order. A competition authority should evaluate any Divestiture Agreement while recognizing that it is an agreement between two firms that are or will be competitors and should protect against any incentives that the merging parties to the agreement may have to not be robustly competitive.

A competition authority may request appropriate changes to the Divestiture Agreement to meet the objectives of its Remedy Order. Merging parties may seek to expedite remedy discussions and evaluation by providing a draft Divestiture Agreement as soon as feasible. Competition authorities may consider questioning the merging parties, the proposed purchaser, and perhaps seeking input from third parties about the operation or necessity of provisions in the Divestiture Agreement that raise questions.

#### ***(ii) Approving a suitable purchaser***

With sole discretion to approve a purchaser, a competition authority must be satisfied that a purchaser of a divestiture meets all the necessary criteria to ensure the remedy addresses the competitive harm effectively. While additional specific purchaser criteria may be required by competition authorities depending on the case in question, the main requirements for suitable purchasers include the following:

- (a) Financial Capability:** A proposed purchaser must show that it has sufficient financial resources to purchase the divested business, to make the necessary investments to ensure the divested business is a viable and effective competitive force in the market, and be committed to remaining in the market.
- (b) Managerial Expertise:** A proposed purchaser must show it has or will have the managerial expertise to run the divested business.

- (c) **Operational Capability:** A proposed purchaser must show it has or will have the resources it needs to run the divested business. Detailed information about the proposed purchaser's own assets and operations will be particularly relevant when the divestiture package is comprised of less than an existing standalone business.
- (d) **Independence:** To compete effectively post-divestiture, a proposed purchaser must show it will be independent of the merging parties and that there are no significant post-merger connections, such as financial ties to the merged firm. When a continuing relationship with the seller cannot be avoided due to the need for transitional agreements, competition authorities should seek to minimize the duration of the arrangements and consider requiring independent monitoring. A purchaser that requires seller financing may not be financially sound and is unlikely to be regarded as an effective competitor independent of the seller.<sup>43</sup>
- (e) **Intention to Compete:** Related to the need for independence, the proposed purchaser will need to show it has sufficient ability and intentions to compete vigorously with the merging parties. If a potential purchaser intends to sell off parts of a divested business or use the divested assets for purposes other than to compete in the market(s) affected by the merger, then the divestiture will likely not be effective.
- (f) **Not raise competition issues:** Having analyzed the market under the proposed transaction, the competition authority should apply its investigative learning and skills to evaluate the potential competitive impact of the divestiture. Divestiture to an already significant competitor may itself raise competition concerns and not be effective in maintaining or restoring the competition lost as a result of the merger. On the other hand, divestiture to a significant existing player may mean that the divested assets go to an experienced company with knowledge and expertise of the relevant market.

To evaluate these criteria, a competition authority may rely on several sources of information, including:

- the purchaser's balance sheets, historical financial documents, existing and future business plans, the make-up of its executive team;
- the purchaser's past experience in acquiring assets and integrating operations;
- interviews with the purchaser's management;
- the Divestiture Agreement including any ancillary arrangements;
- financial instruments, such as loan documents and any covenants; and
- the views of third party industry participants, including current and future customers, suppliers, competitors, other potential purchasers, as well as lenders and other creditors of the proposed purchaser, particularly those involved in financing the proposed purchase.

#### 4.2.1 Additional Considerations with International Cooperation<sup>44</sup>

In multijurisdictional reviews, competition authorities may want to cooperate with international counterparts when evaluating prospective purchasers, particularly in the approval of common purchasers of divested businesses and also on the terms of related Divestiture Agreements between the merging parties and the purchaser. Discussions among competition authorities could include whether prospective purchasers meet the requirements set out in each respective Remedy Order. Early dialogue among competition authorities can

---

<sup>43</sup> See Case Example 18 [Funke/Springer](#), in Annex 6.

<sup>44</sup> See International Cooperation Guide ¶ 46 and ¶ 4.

help facilitate consistent implementation of the approved remedies and avoid, for example, the selection of a potential purchaser that raises competitive concerns in one or more jurisdiction but not in others.<sup>45</sup>

### 4.3 Monitoring

Effective monitoring is critical to ensure a remedy's effectiveness and it should be conducted pro-actively rather than solely in response to complaints. Because a firm's incentives to comply with a Remedy Order are related to the risks and costs of non-compliance, its incentives to comply decrease the less effective it perceives the monitoring of its compliance to be. As further described in section 4.4, the appointment of a third party trustee or monitoring agent accountable to the competition authority may be necessary to enable the authority to have sufficient resources and expertise to carry out monitoring effectively.

In certain cases, third party market participants may have an interest in ensuring compliance with a remedy, and where appropriate, may be consulted with respect to the functioning of the Remedy Order and the merging parties' compliance. It is easier to consult market participants, such as customers and competitors, where the market participants are relatively well informed, or are intended beneficiaries of a remedy. However, in assessing their input, competition authorities should critically evaluate the information they provide. Having a Remedy Order that is public and readily accessible and a monitoring process that is sufficiently transparent will facilitate the competition authority's dialogue with these third parties.

In general, it is desirable to set out stages at which the firm's compliance will be assessed throughout the duration of a Remedy Order. For a divestiture, remedy monitoring is likely to be most intense up to the point at which the divestiture takes place. Monitoring of non-structural remedies will continue for as long as the Remedy Order is in place. Reporting periods typically can range from monthly, to once per year, depending upon the nature of the remedy, and the intensity or frequency of the commitments undertaken. The competition authority should make clear in its Remedy Order what information the merged firm will be required to produce at any reporting period and, if possible, should also include a provision requiring access to information that the authority considers necessary to monitor compliance at any point in time.<sup>46</sup>

### 4.4 Use of Third Party Trustee Oversight

#### 4.4.1 Types of Trustees

If provided for in the Remedy Order, a competition authority may appoint or approve the appointment of a trustee(s) during the implementation phase to assist in various aspects of implementation such as monitoring, divestment and hold separate obligations.

##### (i) *Monitoring trustee*

A trustee may be appointed as a **monitoring trustee** as soon as possible to facilitate the ongoing monitoring of behavioural commitments, including ongoing or interim provisions. This function may include interpreting the application of commitments, providing non-

---

<sup>45</sup> See Case Example 3 [Zimmer/Biomet](#), in Annex 6.

<sup>46</sup> See Case Example 12 [Telkom/BCX](#), in Annex 6.

binding views to a competition authority concerning implementation or effectiveness of the Remedy Order and presenting periodic reports on the progress of the remedy's implementation. A monitoring trustee can also be useful to oversee certain aspects in a divestiture remedy, such as the preservation of the businesses or assets to be divested. Individuals or companies with expertise in auditing, financial analysis, such as accounting firms or investment banks, are typically selected as monitoring trustees.

*(ii) Divestiture trustee*

When a remedy involves a divestiture process, a trustee who acts as a **divestiture trustee** may be appointed to carry out and oversee the divestiture process if the merging parties fail to sell the divestiture package within the period specified in the Remedy Order.<sup>47</sup> This function may include non-binding views on the suitability of a purchaser. Individuals or companies with expertise in financial analysis and selling assets, such as investment bankers or accounting firms, are typically selected as divestiture trustees.

*(iii) Hold Separate Manager*

When a remedy involves a divestiture process after the merger is allowed to close, an **independent manager** or **hold separate manager** may be appointed to manage the day-to-day operations of the business(es) to be divested so as to maintain its independence and competitiveness from the merged firm and preserve the effectiveness of the remedy. The hold separate manager will require the necessary executive powers, competencies and capacity to carry out this function.

#### **4.4.2 Trustee Considerations**

Competition authorities benefit from the use of third parties as trustees as they often have specialized expertise and lessen the burden on the authority's resources affected by the merger. Trustees should be independent of the merging firms, have appropriate qualifications for the task and should not be subject to conflicts of interest. The scope and limits of the trustee's responsibilities should be clearly set out in the trustee mandate, which will be approved or specified by the competition authority. The trustee should carry out the instructions of the competition authority in accordance with the mandate and cannot accept instructions or be dismissed by the merging firms.

Payment terms for the trustee should be established in the trustee mandate so that disputes can be avoided or managed. The trustee is usually paid by the merging parties though the trustee must be independent of the merging parties and solely act on behalf of the competition authority.

The competition authority or overseeing court can either select the trustee directly or approve one nominated by the merging parties. In selecting or approving a trustee, it is useful to interview the persons to be appointed, check their availability and resources to fulfill the tasks, and assess the extent of expertise needed for the task.

In relation to multijurisdictional mergers, cooperating competition authorities may wish to discuss the use and reporting obligations of common monitoring trustees and hold separate managers who will oversee implementation of the remedy or the management of the divested businesses. Also, while not required to be set out in the Remedy Order, there are practical

---

<sup>47</sup> See Case Example 3 [Zimmer/Biomet](#), in Annex 6

benefits to the competition authorities coordinating the appointment of a trustee (whether as monitoring agent, divestiture agent and/or hold separate manager.)<sup>48</sup>

## **4.5 Compliance with Remedy Order**

### **4.5.1 Compliance enforcement**

Effective remedies require effective compliance provisions and a process to address non-compliance. Competition authorities should therefore have adequate powers to enforce remedies, or seek court enforcement of remedies, with the aim of preserving effective post-merger competition.

Enforcing compliance may occur in the course of monitoring the implementation of remedies and in various situations. For example, in post-closing divestitures, the process of approving suitable purchasers provides an opportunity to monitor the implementation of the divestiture. Periodic reports from merging parties as well as trustees also provide competition authorities with information needed to oversee and track whether commitments are properly met.<sup>49</sup> In addition, competition authorities may be called upon to answer questions of interpretation regarding Remedy Order provisions. Competition authorities thus can exercise checks on how remedies are being implemented.

### **4.5.2 Non-compliance**

Competition authorities should establish procedures to determine how to address non-compliance in accordance with their legal framework. This could include unilaterally imposing measures or seeking action from courts to address the merging parties' failure to implement or comply with a Remedy Order.

The merging parties' failure to properly implement a Remedy Order may result from their deliberate action or inaction. Non-compliance may consist of the merged company refusing to comply with the Remedy Order or adopting conduct directly at odds with its commitments. A remedy may also be frustrated by conduct which does not violate commitment provisions. In the case of non-structural remedies, merging parties can adopt the measures required under the Remedy Order but still behave in ways that circumvent the intended result and, as a consequence, impede competition.<sup>50</sup>

Deliberate non-compliance requires swift enforcement action because it aims at or has the effect of impeding competition and such harm may not be easily reversed. Individual jurisdictions differ in the type of measures or penalties they can impose on merging parties in cases of deliberate non-compliance. Competition authorities should nevertheless contemplate all available options to ensure that the Remedy Order is properly implemented. To the extent that the Remedy Order contains legally binding conditions and obligations attached to approving a merger, where it is feasible, such approval or clearance may be withdrawn in the

---

<sup>48</sup> See Case Example 1 [Nestle/Pfizer](#), Case Example 19 [Pfizer/Wyeth](#), Case Example 20 [UTC/Goodrich](#), and Case Example 6 [Holcim/Lafarge](#), in Annex 6. See also International Cooperation Guide ¶ 47.

<sup>49</sup> See Case Example 21 [ASML/Cymer](#), in Annex 6

<sup>50</sup> For example, in television mergers, companies that commit to making channels available to their competitors ("wholesale-must-offer" remedies) may seek to circumvent their obligations by deteriorating content available on the channels concerned. See Case Example 22 [Canal Plus/TPS](#), in Annex 6, for an example of how this issue can be addressed.

most serious cases of non-compliance. Alternatively, competition authorities may consider substituting or seeking new measures in place of the remedies that the merging parties failed to implement. However, if the initial Remedy Order would remain effective if properly implemented, competition authorities or courts overseeing the Remedy Order should order the merging parties to comply with the remedy or, if appropriate, to impose fines. The ability to impose fines can often deter deliberate non-compliance.<sup>51</sup>

Alternatively, the merging parties' failure to properly implement a Remedy Order may not be deliberate. Merging parties who are diligent in their attempt to implement a Remedy Order may nonetheless be unable to fulfill their obligations due to factual or legal circumstances over which merging parties have no influence or control. For example, the merged company may fail to implement a divestiture remedy due to difficulties in finding a suitable buyer. In some jurisdictions, third parties, who are not bound by the Remedy Order, may also exercise a right to oppose a divestiture in circumstances in which they are legally entitled to do so (e.g., third parties may exercise pre-emption or blocking rights).

If non-compliance results from the Remedy Order being impossible to implement, competition authorities can consider whether alternative remedies may be effective to address the relevant competition concerns. As noted above, including crown jewel provisions within the Remedy Order may mitigate this outcome in cases where the implementation of the proposed remedy was uncertain from the outset. In cases where alternative remedies were not included in the initial remedy package but may be available, competition authorities should consider revising the Remedy Order in order to substitute initial measures with new ones if their legal framework allows them to do so.

## **4.6 Post implementation modification**

### **4.6.1 Revision Clauses**

Competition authorities are unable to control or predict every factor capable of impacting the implementation of remedies. Remedy Orders therefore may include a revision clause allowing for remedies to be justifiably modified. Modifications can range from extensions of implementation deadlines to remedy substitutions or waivers to implement commitments.

Modifications pertaining to implementation, such as divestiture deadlines or deadlines for submitting periodic reports, may be granted provided the merging parties can show that they do not impede the implementation of the remedies adopted or that they were not able to meet deadlines due to factors outside their control.<sup>52</sup>

Substantive revisions or waivers may be justified when they relate to significant and permanent changes in market conditions which affect or diminish (but not augment) the initial competition concerns. In order to justify substantial revisions, the merging parties or the competition authority must demonstrate that the changes in market conditions either alleviate the need for the Remedy Order or require that the Remedy Order be changed in order to remain effective.

### **4.6.2 Procedures for Revisions**

---

<sup>51</sup> See Case Example 11 [Edizione Holding/Autostrade](#) in Annex 6.

<sup>52</sup> See Case Example 11 [Edizione Holding/Autostrade](#) in Annex 6.

Competition authorities and overseeing courts should consider how post-implementation modifications are to be requested, examined and decided. The criteria used to assess revision requests and time limits within which merging parties may submit such requests should also be clearly set out and will vary according to the legal or administrative framework in a jurisdiction.

In some jurisdictions, non-substantive or limited modifications that do not require a material change in the design of remedies may be adopted informally. More substantial modifications, albeit rare, may require that the effectiveness of remedies, market conditions or the merger's effects be investigated or approved by the authority or a court. Such changes may also impact third parties and, therefore, may be informed by third party consultations. To the extent that the revision requested or changed circumstances identified by a competition authority involve substantive reviews or impact third parties, the competition authority should consider engaging the formal process established in their legal or administrative framework in order to open revision proceedings, seek third party observations, and seek or adopt formal revision decisions.<sup>53</sup>

#### **4.7 Periodic Reviews**

Assessing the impact of past merger remedies within the competition authority, with or without the views of the merging firms and third parties, can be an effective way to learn from past experiences and improve remedy decision making and implementation.

In general, there are two types of reviews done by competition authorities. The first is an immediate follow-up, carried out shortly after the Remedy Order is implemented, to check if the implementation was completed correctly. This can be done through the use of publicly available resources about the company and the industry, as well as “lessons learned” reviews by the competition authority itself. The review can also be done with limited external contacts, for instance, by discussions about the process either with a trustee involved in the matter or with international counterparts, in the case of multijurisdictional mergers. A competition authority may also consider informal interviews with the purchaser of divested businesses, the merging parties, and/or other market participants.

The second type of review carried out periodically by some competition authorities is a more formal, comprehensive study of remedies in different merger cases and the competition authority's remedy process. In these types of reviews, competition authorities usually select a number of remedies to review for effectiveness. As described in Part 2 of this Guide, relevant factors for this assessment include the impact, duration, practicality and risks associated with the Remedy Order, taking into account the particular legal or administrative framework of the jurisdiction in question. The competition authority can interview the merging parties, the purchaser, other potential purchasers, competitors, customers, and suppliers as well as the trustees involved. Information about the market can also be requested from the merging parties and other market participants. An *ex post* evaluation of whether Remedy Orders were effective allows competition authorities to learn from prior experience and identify best practices in order to increase opportunities for achieving effective remedial action in future cases. A list of *ex post* reviews that have been undertaken by some competition authorities may be found in Annex 5.

---

<sup>53</sup> See Case Example 23 [Banca Intesa/Sanpaolo IMI](#) in Annex 6.

## **Annex 1:**

### **Practical Tips for Competition Authorities Cooperating on Merger Remedies**

Competition authorities have discretion over the level of international cooperation in a particular merger matter, and the jurisdiction/s with whom they may cooperate. The benefits of cooperation on merger remedies include:

- Helping to promote consistent, interoperable and transparent outcomes across jurisdictions;
- Increasing the likelihood of efficient and successful remedy implementation; and
- Reducing gaps in information among competition authorities, and minimizing unnecessary duplication of work for merging parties and competition authorities.

If a competition authority considers cooperation may be useful with one or more counterpart authorities in other jurisdictions, the primary points of engagement which could occur are summarized in the checklist below. For further details, see the Merger Working Group's Practical Guide on International Cooperation of 2015.

- ✓ Initiate contact as soon as it becomes evident that remedies may be required, even at the outset of the investigation
- ✓ Use introductory calls to establish lines of communication and discuss scheduling of regular status calls, timetables for key events, and areas of potential overlap
- ✓ Seek waivers early to ensure smooth exchange of information, including covering remedy proposal and decision-making stages
- ✓ Begin remedy discussions as soon as the likely competitive harms are developed to allow sufficient time for discussion and testing
- ✓ As soon as possible, exchange and compare draft remedies with cooperating competition authorities
- ✓ Engage in early dialogue and coordinate reviews of proposed divestiture buyers, including review of documents
- ✓ Look to coordinate Remedy Orders to extent possible
- ✓ As appropriate, discuss market testing common purchasers, including undertaking joint inquiries with third parties and customers on the effectiveness of the remedy
- ✓ Coordinate selection of hold separate managers and monitoring trustees
- ✓ Inform cooperating competition authorities of approaching final decision and timing of release of public statement
- ✓ Coordinate monitoring of Remedy Order obligations
- ✓ Consider regular discussion of issues related to hold-separate period and divestitures

## Annex 2:

### Examples of non-structural remedies

Non-structural remedies cover a wide range of potential applications such as supply agreements, technical assistance, access remedies, licensing and firewalls. These examples are not exhaustive.

- Limited non-structural remedies, such as short-term supply agreements or technical assistance between the merged entity and the purchaser of the divested business, can be useful in certain circumstances. The aim of such remedies is to maintain the viability of the divested business for a transitional basis and, therefore, to assist divestiture remedies. Technical assistance may be particularly useful in cases that involve the divestiture of complex production facilities and/or the transfer of technology. However, an ongoing relationship between the merged entity and the purchaser of the divested business or assets can be detrimental to competition. The price or cost of technical assistance should be clearly set out in the Remedy Order, and is often based on fully allocated or direct costs.
- Non-structural remedies may also consist of changes to existing contractual arrangements such as exclusive long-term supply agreements which, without modifications, could impede effective competition, for example, by foreclosing a divestiture purchaser from obtaining business (in a horizontal merger) or closing off access to upstream or downstream markets. In certain cases, modifications may not be sufficient but rather the termination of an existing long-term exclusive agreement may be required.<sup>54</sup> Such termination may be necessary to open the market to competition otherwise foreclosed by long-term contracts. In some situations, for example, in vertical mergers where the merged entity controls an input that its competitors need to remain viable, prohibitions on restrictive contracting practices may be required to limit the merged entity's ability to enter into restrictive or exclusive contracts to ensure that competitors continue to compete effectively by having access to the essential input.
- Access remedies prescribe competitor access to key infrastructure, networks, key technology, including patents, know-how, or other IP rights. The control of these assets may lead to concerns of foreclosure of competitors that depend on them. Granting access on a non-discriminatory and transitional basis, may, for example, facilitate market entry, eliminate foreclosure concerns, or provide competitors with information or IP rights on which they depend. The use of access remedies usually requires, however, that an actual entry of new competitors is sufficiently likely and timely or that competitors will likely use remedies in order to eliminate foreclosure concerns or disclose information.<sup>55</sup> Access remedies are often complex in nature and necessarily include difficult-to-craft conditions under which access is granted. Such remedies may be more workable when a benchmark against which the terms offered by the merged entity can be compared. Access remedies can be applied in combination with divestitures.

---

<sup>54</sup> It may be sufficient to allow the customer the option to terminate, rather than requiring termination absolutely.

<sup>55</sup> See Case Example 17 [Cisco/Tandberg](#), Annex 6.

- Licensing remedies consist, for example, of granting licenses to IP rights, such as technology, patents or know-how, or, where appropriate, brands. Licensing remedies can be applied, for example, when the competitive concern arising from a merger is focused on the aggregation of IP rights that can be used to prevent competition. While the divestiture of the IP may be appropriate, where the IP covers a broad range of products, a licensing remedy may be preferred and effective. If the competition authority is seeking a remedy that involves IP, it may often seek an exclusive license without any field-of-use and geographical restrictions on the licensee, that grants the licensee all rights to use the IP to develop new products and technology as well as to enforce the IP rights. In sectors where market participants cooperate by licensing patents to each other a remedy may require that licenses are provided to the same extent and under similar conditions as prior to the merger. As regards brands, an exclusive time-limited license for a brand may allow the licensee to re-brand the product in the period foreseen. Licensing remedies may, however, be problematic as they may involve uncertainties, establish an ongoing relationship with the licensor and the licensee with the effect that the licensee's competitive behaviour may be influenced, and may give rise to disputes between the licensor and the licensee. This may be the case where IP covers products not included in the relevant market of concern, and where the license includes a field-of-use.
- Non-discrimination provisions can be used as a remedy or part of a remedy when, for example, there is a concern that an upstream firm will have incentive to favor the acquired downstream firm by offering less attractive terms to, or refusing to deal with, the acquired firm's competitors (for example by giving lesser quality product, slower delivery times, reduced service, unequal access to upstream firm's products). The aim of non-discrimination provisions is to require the upstream firm to offer the same terms to all downstream competitors. Such remedies may be more workable when a benchmark against which the terms offered by the merged entity can be compared.<sup>56</sup> However, these provisions require extensive monitoring and their effectiveness as a remedy is uncertain. This type of remedy is not accepted in some jurisdictions.
- Non-structural remedies may also consist of firewalls for information. Firewalls aim to prevent the dissemination of information within a firm, for example, to ring-fence the business to be divested and to ensure the merged firm does not obtain any business secrets or other confidential information. Firewalls can be used, for example, in vertical mergers where an upstream monopolist acquires one of the few downstream firms that compete against one another. If there is a risk that this upstream firm will share information with the acquired firm to facilitate anticompetitive behaviour firewalls can be used to prevent these harms, often for a limited duration. When designing a firewall, it is essential to ensure that the provision prevents the targeted information from being disseminated and used for commercial purposes. While monitoring may not detect all breaches of firewall or ring fencing obligations, rigorous monitoring is needed to ensure that the firewall is adhered to and is effective. However, the effectiveness of this remedy is uncertain. This type of remedy is not accepted in some jurisdictions.

---

<sup>56</sup> See Case Example 12 [Telkom/BCX](#), in Annex 6.

- Non-structural remedies may consist of the removal of links with a competitor, for instance, waiving of rights linked to a minority shareholding such as representations on the board, veto rights and information rights which are relevant for behaviour in terms of competition. These rights are usually required to be waived comprehensively and permanently. However, this may not be possible under the applicable corporate law of a jurisdiction.<sup>57</sup>
- Non-structural remedies may also contain so-called transparency provisions or anti-retaliation provisions. While difficult to write and enforce, transparency provisions could require the merged firm to make certain information available to a regulatory authority that it otherwise would not be required to provide. The aim of anti-retaliation remedies is to prevent the merged entity retaliating against customers or other parties who enter into contracts or who do business with the merged entity's competitors.

---

<sup>57</sup> See Case Example 23 [Banca Intesa/Sanpaolo IMI](#) in Annex 6.

### **Annex 3:**

#### **Risks Associated with Price Controls as a Remedy**

Merging parties may offer to not raise prices as a remedy for an anticompetitive horizontal merger. However, price (and output) controls raise a variety of issues, including:

1. Price controls involve a level of regulation that is not consistent with competition principles. Remedies are designed to restore competition and not to establish a regulatory framework. Such regulation is more suited to regulatory agencies with the authority and expertise to regulate and oversee pricing.
2. Price controls require monitoring. Tracking prices in a specific industry or otherwise ensuring compliance with price controls is outside the traditional capabilities of most competition agencies and may require significant resources. (By contrast, once divestitures are completed, the remedy requires little to no monitoring by the competition authorities or courts.)
3. Because prices subject to controls cannot fluctuate and react to market forces, such as supply, demand, or input costs, fixed prices will either be too high or too low. Those fixed prices could lead the merged entity to make too many or too few of the products since it cannot set prices according to supply and demand.
4. Merging parties may offer to maintain prices when they expect the prices to fall, so the price control may actually inflate prices.
5. Price controls will end eventually, and prices may increase above competitive levels if the market structure has not changed.
6. Setting a price for a product will distort the role prices play in the affected market. For example, price controls may reduce an incentive for a firm to enter a market, which may reduce the quantity or diversity of goods or services.
7. Price controls may divert the company's efforts to cut costs and improve products to efforts to evade the price controls.
8. Price is only one aspect of competition. Controlling prices may result in the merged entity changing another aspect of its business, such as reducing quality.

Possible alternative options for competition authorities contemplating price controls may include the following:

1. The competition authorities could request substantiation from the merging parties on their claims that divestitures are difficult or impossible.
2. Seek views from possible purchasers on whether assets/businesses of the merging party could be sold.
3. Competition authorities could discuss coordination on remedies with other competition authorities reviewing the same merger.
4. The competition authority could choose to reevaluate the likely competitive effects of the transaction. If the competition authority is not certain about the likelihood of anticompetitive effects, it may decide to clear the merger rather than to accept price controls. Alternatively, if anti-competitive effects are certain, competition authorities may consider prohibiting the merger outright.

## Annex 4:

### List of Selected Guidelines on Merger Remedies from Various Jurisdictions

**Australia:** Merger Guidelines

<https://www.accc.gov.au/system/files/Merger%20guidelines.pdf>

**Brazil:** Horizontal Merger Guidelines

[http://www.cade.gov.br/internacional/Horizontal\\_Merger\\_Guidelines.pdf](http://www.cade.gov.br/internacional/Horizontal_Merger_Guidelines.pdf)

**Canada:** Information Bulletin on Merger Remedies in Canada

<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02170.html>

**European Union:** Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004

[http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008XC1022\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008XC1022(01))

**Finland:** Guidelines on the Application of the Competition Act

<http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/suuntaviivat/en/guidelines-1-2011-mergers.pdf>

**France:** Merger Control Guidelines

[http://www.autoritedelaconcurrence.fr/doc/ld\\_mergers\\_final.pdf](http://www.autoritedelaconcurrence.fr/doc/ld_mergers_final.pdf)

**Germany:** Guidance on Substantive Merger Control

[http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20-%20Substantive%20Merger%20Control.pdf?\\_\\_blob=publicationFile&v=6](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20-%20Substantive%20Merger%20Control.pdf?__blob=publicationFile&v=6)

**Japan:** Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination

[http://www.jftc.go.jp/en/legislation\\_gls/imonopoly\\_guidelines.files/110713.2.pdf](http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/110713.2.pdf)

Policies Concerning Procedures for Review of Business Combination

[http://www.jftc.go.jp/en/legislation\\_gls/imonopoly\\_guidelines.files/pcbr.pdf](http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/pcbr.pdf)

**New Zealand:** Mergers and Acquisitions Guidelines

<http://www.comcom.govt.nz/dmsdocument/10188>

**United Kingdom:** Merger Assessment Guidelines

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284449/OFT1254.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT1254.pdf)

**United States:**

Department of Justice: Antitrust Division Policy Guide to Merger Remedies

<https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf>

Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies

<https://www.ftc.gov/tips-advice/competition-guidance/merger-remedies>

Frequently Asked Questions About Merger Consent Order Provisions

<https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq>

## Annex 5:

### List of Selected *Ex Post* Reviews and Studies of Merger Remedies

**Canada:** Ex Post Merger Review: An Evaluation of Three Competition Bureau Merger Assessments, August 2007

<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02447.html>

**European Union:** Merger Remedies Study, October 2005

[http://ec.europa.eu/competition/mergers/legislation/remedies\\_study.pdf](http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf)

**European Union:** Ex-post evaluation analysis of two mobile telecom mergers: T-Mobile/tele.ring in Austria and T-Mobile/Orange in the Netherlands, November 2015

<http://ec.europa.eu/competition/publications/reports/kd0215836enn.pdf>

**United Kingdom:** Understanding past merger remedies (July 2015)

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/448223/Understanding\\_past\\_merger\\_remedies.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448223/Understanding_past_merger_remedies.pdf)

**United States:** A Study of the Commission's Divestiture Process (1999)

<https://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf>

**Organization for Economic Co-operation and Development:** Impact Evaluation of Merger Decisions

<http://www.oecd.org/daf/competition/Impactevaluationofmergerdecisions2011.pdf>

## **Annex 6:**

### **Case Examples**

#### **Case Example 1: Nestle/Pfizer**

##### *Competition Commission South Africa (CCSA)*

In February 2013, the Competition Tribunal (Tribunal) conditionally approved a merger between Nestlé SA (Nestlé) and the locally conducted infant nutrition business of Pfizer Inc. (Pfizer). This transaction formed part of the global acquisition by the Nestlé group of Pfizer's infant nutrition interests. The Tribunal found that the South African IMF market was distinctly concentrated with only three significant competitors in the markets for infant, follow-on for babies (7 to 12 months) and growing up milk (GU), being Nestlé, Pfizer and Aspen. The Tribunal also found that the specialty milk market is concentrated with four competitors being Nestlé, Pfizer, Aspen and Abbott.

The parties proposed a remedy encompassing a transactional re-branding arrangement in respect of Pfizer's infant and follow-on milk (IFFO Milk), GUM and specialty milk brands. The parties believed that the proposed remedy would ensure that the independent third party purchaser achieved stability and permanence in its own branding of the products and gained market acceptance of its own products to effectively compete in this market by the end of the 10 years.

The CCSA engaged in a market testing exercise in order to determine whether the proposed remedy would be effective. Market participants indicated to the CCSA that the proposed remedy was not workable. The CCSA proposed to the Tribunal, an alternative remedy which would maintain the pre-merger competitive landscape by creating a viable new entrant in the IMF market that will effectively compete with the merged entity, thereby also maintaining the pre-merger landscape.

The testing of the remedy proposed by the parties with market participants was essential in determining the likely practical effects of the proposed remedy. Moreover, it allowed the CCSA a benchmark from which to amend the proposed remedy, mindful of the shortcomings of the proposed remedy of the parties. During this process the CCSA and the Tribunal along with the parties openly discussed the possibility of a merger remedy and how it will look should it be imposed. This allows for ease of understanding the remedy and ensuring compliance by the parties. The CCSA engaged with international competition authorities including the French and Australian competition authorities in order to discuss the proposed remedy and its workability. Moreover, the CCSA used the same firm used in Australia as the monitoring trustee. This primarily allowed for the South African and Australian competition authorities to monitor the implementation of the conditions given that the conditions imposed were the same.

## **Case Example 2: Tönnies/Tummel**

### *Bundeskartellamt*

Tönnies, the leading operator of sow slaughterhouses in Germany, intended to buy a competitor, the slaughterhouse Tummel. To compensate for the expected lessening of competition in the market for the purchase of cull sows and the distribution of sow meat, Tönnies offered to suspend its sow slaughtering activities at Tummel's plant for about two years. In an additional proposal Tönnies suggested to offer slaughtering capacities to third parties, i.e. providing them with slaughtering services on the basis of three to five year contracts.

The Bundeskartellamt rejected these proposals and prohibited the merger. The proposed remedies would have required a permanent monitoring of the market conduct of Tönnies and would not have solved the competition problems raised by the merger. The disuse of capacities at the acquired plant would not have been sufficient to effectively compensate for the loss of competitive pressure that Tummel was exercising on Tönnies.

## **Case Example 3: Zimmer/Biomet**

### *European Commission*

In March 2015, the European Commission conditionally cleared the proposed acquisition of Biomet Inc by Zimmer Holdings Inc., both of the United States. Both companies produce orthopaedic implants and related surgical products. The Commission had concerns that the merger, as initially notified, could have resulted in price increases for a number of orthopaedic implants in the European Economic Area (EEA).

The European Commission accepted a remedy package composed of three divestment businesses producing the relevant orthopaedic implants, including instrumentation, any improvements and pipeline projects. The divestments also included intellectual property rights and know-how; the transfer of licenses, permits and authorisations; the transfer of access to CE marks (the certification that allows a medical device to be sold in the European Economic Area); customer contracts, leases, commitments, orders and records; key personnel, technical assistance and training. Furthermore, Zimmer committed for a transitional period to supply the divestment businesses' product lines at reasonable conditions. In addition, the companies committed not to implement the transaction before one or more suitable purchasers were found and approved by the Commission for all of the divested businesses.

The case, although involving separate national markets, was characterised by extensive cooperation with the US FTC as the transaction led to a number of similar competition concerns in the two jurisdictions. The two agencies engaged in coordination regarding the suitability of potential purchasers early on in the process. This was important since, if the parties were to proceed to propose a global package for purchase by the same purchaser in both jurisdictions, certain potential purchaser candidates would trigger prima facie competition concerns in the EEA and/or the US. Ultimately, however, different buyers for separate US and EEA divestment businesses were approved.

### *Japan Fair Trade Commission (JFTC)*

In March 2015, on the premise that the remedy would be taken, the JFTC concluded that the Transaction would not substantially restrain competition in the UKA and artificial elbow joints markets.

The JFTC received the notification of the transaction from Zimmer, Inc. (“Zimmer”) and Biomet, Inc. (“Biomet”) based on the regulations of the Antimonopoly Act (competition law in Japan), and opened its investigation. The JFTC kept exchanging information and cooperating with the United States Federal Trade Commission (USFTC) and the European Commission (EC) which also investigated the same transaction.

If the Transaction closed, the market share of the Parties would go up to approximately 90% in the UKA (one type of artificial knee joints) market, and 60-70% in the artificial elbow joints market, which would create a significant gap from those of competing rivals. Additionally, competition previously held between the Parties would be lost. Meanwhile, each competitive pressure in the UKA market and the artificial elbow joints market are limited. Therefore, the JFTC raised concern that the Transaction would substantially restrain competition in the UKA market and artificial elbow joints market in Japan.

The Parties proposed a remedy to the JFTC mainly as follows:

- (1) Tangible assets (e.g., inventory, design history, experimental and clinical data) and intellectual property rights (e.g., patents, trademarks, know-how) pertaining to the Parties’ leading brands corresponding to approximately 50% of the market share in the UKA and approximately 20% of the market share in the artificial elbow joints in FY2012 are to be divested;
- (2) Buyers are to be enterprises which have adequate experience and capability in the orthopedics and artificial joints business and be independent of and financially unrelated to the Parties, and need to be selected in light of the criteria such as possessing the funds, specialty and incentive to maintain and develop the divested business. The possible buyers are to be notified to the JFTC and are to obtain clearance from the JFTC after concluding contracts with the buyers;
- (3) If the Parties don’t reach agreement or conclude contracts with buyers by a certain period of time, an independent third party (divestiture trustee) carries out disposal of the business listed in (1) above after obtaining an approval from the JFTC, and,
- (4) The time limit to execute the divestitures should be done within 3 months.

### **Case Example 4: Merck/Sigma-Aldrich**

#### *European Commission*

In 2015, the European Commission conditionally approved the proposed acquisition of Sigma-Aldrich by Merck. Both companies are active world-wide in the life science sector. The Commission had concerns that the merged entity would have faced insufficient competitive pressure from the remaining players in the markets for certain laboratory chemicals, with a risk of price rises.

In order to address the European Commission's competition concerns, the two companies offered a comprehensive remedies package, covering all the main steps in the manufacture,

supply and distribution of those products. In particular, the commitments include: (i) divestment of Sigma's manufacturing assets in Seelze (Germany), where most of the solvents and inorganics sold by Sigma in Europe are manufactured; (ii) divestment of certain brands and trademarks on a worldwide basis; and (iii) granting a temporary license to the Sigma-Aldrich brand for the supply of solvents and inorganics in the European Economic Area; and transfer of customer information and a solution to ensure a temporary channel to the market. In fact, the European Commission had found that the divestiture of a wide portfolio of solvents and inorganics was crucial to the viability of the Divestment Business. According to the findings of the market investigation carried out as part of the competitive assessment and the market test of the proposed remedies, it is indispensable for a player to establish itself as a competitor to offer a broad range of products across the entire spectrum of solvents and inorganics. The product portfolio of solvents and inorganics under the Divestment Business was sufficiently broad to ensure viability given that the divested solvents and inorganics covered a wide spectrum of laboratory and inorganics, including best-in-class Sigma products and allowed the beneficiary to compete on a worldwide level with some of the divested products.

### **Case Example 5: ZF/TRW**

#### *United States Federal Trade Commission (US FTC)*

In September 2014, ZF Friedrichshafen AG (“ZF”) agreed to acquire TRW Automotive Holdings Corp. (“TRW”) for approximately \$12.4 billion. Both ZF (headquartered in Germany) and TRW (headquartered in Michigan, USA) manufactured a wide variety of car and truck components, such as chassis, powertrains, and suspension systems, and had production facilities located throughout the United States, Canada and Mexico. The US FTC cooperated with Mexican authorities, the Canadian Competition Bureau, and the European Union’s Directorate-General for Competition. Cooperation began early in the investigation and included biweekly phone calls.

The US FTC concluded that the merger would substantially lessen competition in the North American market for sales of heavy vehicle tie rods – rigid steering link connectors for vehicles weighing six tons or more – where ZF and TRW were two of only three suppliers of those products. As part of its review, the European Commission determined that the merger would reduce competition in a different market in Europe – chassis components for cars and trucks. To resolve concerns in both jurisdictions, ZF decided to sell TRW’s entire Linkage and Suspension Business (“L&S Business”) in North America and Europe, a single divestiture that satisfied concerns raised in both regions. The divestiture included five manufacturing plants located in the United States, Canada, the Czech Republic and Germany, as well as a German research lab. While the US FTC on its own might not have required such an extensive divestiture package, the companies opted to sell a broader package of assets in order to resolve all outstanding competition reviews and proceed with their merger.

The L&S Business divestiture included more than the product market alleged in the US FTC’s complaint – everything needed for an acquirer to compete effectively in North America – and included products that would ensure the divested business would be viable. Accordingly, the US FTC was confident that ZF/TRW could meet their divestiture obligation after the Order was issued – a “post-order divestiture.” The case was then settled and announced publicly on May 5, 2015. This followed the EC’s March 2015 clearance, which

was subject to ZF's commitment to divest TRW's chassis components businesses in the European Economic Area.

In June 2015, ZF and TRW requested the US FTC's approval to divest the L&S Business to THK Co., Ltd., a Japanese company that manufactures other lines of parts for the automotive industry. THK had previously acquired TRW's Asia-Pacific automotive linkage and suspension business and had integrated it into its ongoing operations. The US FTC approved the divestiture on August 28, 2015.

ZF/TRW demonstrates that a robust divestiture package, essentially the entire and already-existing linkage and suspension business of one of the merging parties, can often lead to a certain and expedited remedy. Note that the time between the US FTC's settlement, when the ZF/TRW merger could proceed, and divestiture was less than four months. During that time, the L&S Business was held separate pursuant to a separate US FTC order issued at the time the matter was settled. The US FTC's public documents on this case are available at <https://www.ftc.gov/enforcement/cases-proceedings/141-0235/zf-friedrichshafen-trw-automotive-matter>

### **Case Example 6: Holcim/Lafarge**

#### *Canadian Competition Bureau (CCB)*

Along with several competition authorities around the world, in 2014 the CCB reviewed the global merger between Holcim Ltd. and Lafarge S.A., who at the time were two of the world's largest manufacturers of cement and related products. After completing its investigation, the CCB found that the merger would result in a substantial lessening or prevention of competition in the supply of cement and related products in Canada.

The Parties initially proposed to divest Holcim Canada, comprising all its assets and businesses located in Canada. However, the CCB determined that additional assets needed to be included in the divestiture package in order for it to be a viable, standalone business and for the remedy to be effective. As a result, the Parties agreed to include a cement plant located in Montana, United States, which was considered an important source of supply to the cement terminals located in Alberta, Canada. A Consent Agreement, registered with the Competition Tribunal in May 2015, required Holcim to divest to one or more purchasers to be approved by the CCB during an initial sale period. If a suitable buyer was not found by the expiry of the initial sale period, a divestiture trustee would be appointed to sell the assets at no minimum price. A monitoring trustee was appointed to oversee the Parties' compliance with the Consent Agreement and a hold separate manager was appointed to oversee the operations of the assets to be divested until completion of the divestiture.

Throughout its merger investigation, including the remedies phase, the CCB coordinated with the US Federal Trade Commission (US FTC) and the European Commission (EC) to align its merger review process. This involved the exchange of information via regular bilateral and trilateral teleconferences and emails in regards to process, timing and considerations in the design and implementation of remedies. In addition, as some of the assets being sold served both US and Canadian markets, the Bureau worked very closely with the US FTC to ensure the remedies proposed in each jurisdiction were not conflicting. Due to the similarities in the

businesses being divested, the hold separate manager and the monitoring trustee appointed in Canada were the same as those appointed in other jurisdictions.

### **Case Example 7: Edeka/Tengelmann**

#### *Bundeskartellamt (Bka)*

The Bundeskartellamt cleared subject to divestments the plan of Edeka (Germany's leading food retailer) and Tengelmann (at the time of the decision the fifth largest food retailer in Germany) to merge their two discount chains Netto and Plus in a jointly controlled joint venture.

Without the divestments, the proposed merger would have raised serious competition concerns in around 70 regional markets. In the assessment of the competition situation on the regional markets affected by the merger, the Bundeskartellamt also took into consideration the competitive landscape of the neighbouring geographic markets. It turned out that the regional markets that raised concerns and the neighbouring markets formed clusters in which Edeka was the market leader. Therefore, the parties' strong market position could not be countered by strong competitors on neighbouring markets.

The parties offered to divest all Plus outlets in the markets which the authority considered problematic to avoid a prohibition of the merger. All in all, this concerned approx. 400 outlets. As part of the remedies, additional outlets (outside the regional markets affected) had to be added where this was necessary to form a suitable package for the potential buyer. In order to be effective, the package(s) had to consist of one cohesive network of outlets within the respective clusters. Infrastructure facilities of the parties, in particular warehouses or logistical facilities, were to be included as well where this was required by the buyer for an efficient supply of the acquired outlets.

### **Case Example 8: Nordhessen/Werra-Meißner**

#### *Bundeskartellamt (Bka)*

The Bundeskartellamt prohibited a merger between two municipal hospital operators. *Gesundheit Nordhessen* operates six hospitals with around 1,700 beds in the greater area of the city Kassel. It intended to acquire *Gesundheitsholding Werra-Meißner*, which operates two hospitals with around 500 beds in the adjacent administrative district of Werra-Meißner.

The planned merger would have strengthened the dominant position of the target company on the market for acute hospitals services in the Werra-Meißner district. *Gesundheit Nordhessen* was the second largest provider of hospital services in this area. The parties proposed two different divestment remedies to prevent a prohibition of the merger. Both proposals were rejected by the Bundeskartellamt as insufficient to remove the competition concerns.

With the first proposal the parties offered to divest the cardiology “divisions” of two hospitals in the affected geographic market to one of their competitors. These divisions did not form separate organisational units but were part of the internal medicine departments. With the second (alternative) proposal the parties offered to sell the surgery departments of the two

hospitals belonging to *Gesundheit Werra-Meißner*, which were separate organisational units within the hospitals, but did not amount to a “standalone” business.

In both alternatives, the divestment business would have provided its services at the premises of the two hospitals owned by *Gesundheit Werra-Meißner*. The two hospitals would have committed not to provide these specific services themselves. In both cases, the parties and the buyer would additionally have concluded a tenancy agreement for the rooms in the two hospitals, an agreement for the hospitals to supply the necessary nursing and medical staff and (for the divested cardiology divisions) an agreement for the buyer to use the hospitals’ medical equipment. The buyer would have had to cooperate closely with the merging parties’ hospitals, e.g. to coordinate the use of operating rooms or the services of anaesthetists. With regard to the surgery departments it would have been inevitable for the buyer to coordinate the allocation of cases with the merging parties given that the medical services provided by the divestment business were not clearly distinguishable from the services provided in other departments. With regard to the cardiology divisions the buyer would hardly have been able to invest in medical equipment himself, because he would have been contractually obliged to use the existing equipment of its competitor. Because the divestment business would have been dependent on the infrastructure and human resources of the merging parties, the Bundeskartellamt was not convinced that the market position would be transferred to the buyer on a permanent basis and that the buyer would be able to operate as an effective competitor.

### **Case Example 9: YAMADA/BEST**

#### *Japanese Federal Trade Commission (JFTC)*

In December 2012, the JFTC concluded that, along with the remedies to address competitive concerns proposed by YAMADA DENKI, the transaction would not substantially restrain competition in a particular field of trades.

An electric appliance retailer YAMADA DENKI planned to acquire the stocks of BEST DENKI, a company retailing electric appliances as well.

After the JFTC identified competitive concerns in 10 geographic markets, YAMADA DENKI proposed to the JFTC the following remedies to address the concerns.

1. YAMADA DENKI will transfer either of the Parties’ retail stores located in each of 10 geographic markets to a third party, and conclude the transfer agreement by June 30th, 2013 (The JFTC’s review was closed on December 10th, 2012.). In areas where a transfer agreement would not be concluded or implemented by the date, a bidding procedure should be promptly undertaken under appropriate and reasonable methods and conditions.
2. During the period until the store transfers are completed, YAMADA DENKI will not impair the business value of the stores and shall not set unreasonably disadvantageous prices for consumers at the to-be-divested stores.
3. During the period until the store transfers are completed, YAMADA DENKI will regularly report to the JFTC the sales prices of the electrical appliances offered at each store, and timely report to the JFTC the status of the implementation, etc. of its store transfers.

## **Case Example 10: Johnson & Johnson/Synthes**

*United States Federal Trade Commission (US FTC)*

In April 2011, Johnson & Johnson (“J&J”) agreed to acquire Synthes, Inc. for over \$21 billion. J&J is the well-known manufacturer of many health care products, dividing its businesses into three main segments: consumer, pharmaceutical, and medical devices and diagnostics. Synthes was primarily a medical devices manufacturer in five main lines: trauma, spine, cranio-maxillofacial, biomaterials, and power tools. The US FTC’s investigation concluded that the acquisition would lessen competition in the manufacture and sale of “volar distal radius plating systems,” or “DVRs.” DVRs are used to treat fractures of the wrist in cases where external casting will not suffice. The DVR plates are applied surgically, and fastened with related screws, to provide solid joint realignment and easier post-surgical freedom of movement. Once inserted, they are generally not removed. J&J and Synthes accounted for over 70 percent of the United States sales of DVR in 2010, with Stryker and Acumed accounting for a small remainder. To resolve the US FTC’s competitive concerns, J&J agreed to divest its own DVR assets. Because of the highly technical nature of the product, and the possible uncertainty that an approvable buyer could be found, J&J agreed to an “upfront buyer,” and entered an agreement to divest to Biomet, Inc. Biomet is a recognized orthopedics company with an established brand name, nationwide sales force, and existing relationships with surgeons and hospitals.

J&J’s divestiture to Biomet included more than J&J’s DVR business assets. J&J agreed to sell Biomet J&J’s entire “trauma line” of products, covering DVR and other assets.

This matter demonstrates the US FTC’s consistent insistence upon upfront buyers in mergers involving medical devices, even though J&J agreed to sell more than the products of the overlap market. Medical devices are highly complex, and must meet rigorous technical and regulatory standards; accordingly the US FTC insists that the terms of the divestiture – and the proposed buyer – be finalized and acceptable before the agency agrees to let the transaction proceed.

## **Case Example 11: Edizione Holding/Autostrade**

*Italian Competition Authority (ICA)*

This case provides an example of the difficulties associated with monitoring the compliance of behavioural remedies, implying sometimes a need to reassess the case with the risk of long lasting litigation. The case highlights the crucial role played by the advisor and its relationship with the merged entity (its mandate) for an effective implementation of the remedy measures.

As a primary tool for monitoring the implementation of remedies, in the conditional clearance decision the ICA generally requests the merging parties to send to the ICA periodical reports on the state of implementation of the measures. With reference to divestiture measures, the

ICA can fix, in the decision, a number of characteristics the buyer should have and, consequently, approves the purchaser of each divested asset. In case of non-compliance with the remedies, the ICA may open a proceeding to ascertain the violations and may impose fines up to 10% of turnover.

**The Merger:** In January 2000 the ICA opened an investigation into the acquisition of a controlling interest in Autostrade (the company in charge of the motorways management) by Edizione Holding, a company operating in various markets, including the motorway catering market through its subsidiary Autogrill. In the ICA's view, the concentration could reinforce Autogrill's market power: the ICA considered that even if the catering services were allocated by public tender, those tenders could not be regular if privileged information were available to companies belonging to the same holding company.

In March 2000 the ICA authorized the merger on condition that:

- i) Autostrade would not directly supply catering services, but entrust catering licences to third parties through competitive transparent and non-discriminatory tender procedures;
- ii) Autostrade would entrust the management of the tenders to third parties;
- iii) the share of motorway catering points entrusted directly or indirectly to Autogrill (72%) would not increase.

**Monitoring issues:** In 2002 the ICA impose a 15€m fine on Edizione Holding (the acquirer) for failure to comply, in particular with the remedy (ii): i.e., it had directly participated in the design and implementation of the tender procedures, including the definition of the participation criteria and the award mechanism. Furthermore, the ICA ascertained that the advisor appointed by the merging parties had failed to accomplish its duties, in particular to set up and implement tender procedures without any influence or interference from Autostrade and after an independent assessment of the market for the motorway catering services. As a result, new advisor was appointed by Autostrade in 2003.

In November 2004 the ICA closed a second proceeding concerning Edizione Holding's failure to comply with the remedies: the ICA found that the tender procedures initiated by Autostrade in October 2003 were organized so as to advantage Autogrill. During the investigation Edizione Holding cancelled 18 completed tenders. The other tenders not yet completed were held under different rules. The Authority imposed a fine on Edizione Holding of €6.79 million, equal to 1.2% of the company's turnover.

## **Case Example 12: Telkom/BCX**

### *Competition Commission South Africa (CCSA)*

In May 2015, the CCSA recommended to the Competition Tribunal, that the merger between Telkom SA SOC Limited (Telkom) and Business Connexion Group Limited (BCX) be approved, subject to conditions. Telkom was primarily a fixed telecommunications services provider and BCX was primarily an Information Communication Technology (ICT) service provider. The CCSA was of the view that the overall market position of Telkom post-merger will mean that it will be able to offer a full suite of goods and services without any procurement from any third party. This was considered in the context of Telkom's market power in the upstream market for the provision of wholesale fixed lines which are an essential input in the provision of downstream services.

In considering Telkom's ability to engage in foreclosure strategies, the CCSA considered the impact of a settlement agreement between the CCSA and Telkom following a complaint of abuse of dominance by Telkom. As part of the settlement, Telkom agreed to introduce a transfer pricing programme in relation to particular products offered to its downstream rivals. In implementing the programme Telkom agreed to non-discriminatory pricing for the provision of particular services by its wholesale operation to its downstream rivals in relation to its retail operations. Telkom also agreed to implement a retail pricing policy which entailed its retail operation setting its prices on a cost-plus and non-discriminatory basis in relation to its downstream rivals. The practical impact of the settlement agreement meant that Telkom had to implement a functional separation of its wholesale and retail operations in order to ensure that Telkom treats its downstream rivals on a non-discriminatory basis as well as protect the confidential information of these rivals from its retail operations.

The merger transaction presented concerns that could give rise to anti-competitive conduct dealt with under the settlement agreement. Therefore given the complexity of having to apply the merger remedy alongside the settlement agreement, extensive monitoring obligations were placed on the parties. Monitoring obligations included a statement of compliance with the merger remedies by the Chief Executive Officer of Telkom in Telkom's annual report for the duration of the application of the merger remedies, annual audits by independent accountants or economists, access to cost and pricing information to the CCSA, and reports on any variations of products that are subject to the transfer pricing programme.

The CCSA is responsible for monitoring and ensuring compliance with the merger remedies. These are extensive and ongoing remedies which require a lot of resources to monitor and ensure compliance and where necessary enforcement action. The merger remedies also extended the dispute resolution mechanism in the settlement agreement which allowed for a dispute resolution mechanism agreed to by both the CCSA and Telkom. This would ensure expedited resolution of disputes as well as opportunity for Telkom and the CCSA to reach agreement on remedial action where necessary.

### **Case Example 13: CSAV/HGV/Kuhne Maritime/Hapag-Lloyd**

#### *European Commission*

In 2014, the European Commission investigated the proposed merger between Hapag Lloyd, a German shipping company with worldwide activities, and rival Compañía Sud Americana de Vapores S.A. ("CSAV") of Chile. The merger created the fourth largest container liner shipping company worldwide, after Maersk, MSC and CMA CGM. The activities of Hapag Lloyd and CSAV overlapped in the container liner shipping business and had limited vertical links. As many other carriers, the two companies offered container liner shipping services mainly through cooperation agreements with other shipping companies known as "consortia". Consortia members decide on capacity setting, scheduling and the list of ports of call, which are all important parameters of competition.

The Commission examined the effects of the merger on competition in the market for container liner shipping services on twelve trade routes connecting Europe with the Americas, Asia and the Middle East. The Commission found that the merger, as initially notified, would have created new links between previously unconnected consortia. The Commission had concerns that these new links would have resulted in anti-competitive effects on two trade routes: the route between Northern Europe and the Caribbean, and the

route between Northern Europe and South America's West Coast. On these routes, the merged entity, through the consortia that the two companies belong to, may have influenced capacity and therefore prices to the detriment of shippers and consumers.

In order to address these concerns the companies offered to terminate the two consortia in which CSAV currently participates on these two trade routes – i.e. the Euroandes consortium and the Ecuador Express consortium, both with MSC. This will eliminate the additional links between previously unrelated consortia that the merger would have created on the two routes. In view of the remedies proposed, the Commission concluded that the proposed transaction, as modified, would not raise competition concerns anymore.

The Chilean national competition authority, Fiscalía Nacional Económica ("FNE") also investigated this transaction. Cooperation between the European Commission and the FNE took place on the basis of waivers. As it was not possible to align the timing in this case, the European Commission conditionally cleared the transaction prior to the FNE reaching a decision on substance. Against this background, the FNE closed its investigation after taking note of the commitments offered by the parties to the European Commission – it considered that the risks to competition were appropriately addressed by those commitments.

#### **Case Example 14: Ahlstrom/Munksjö**

##### *Brazil's Council for Economic Defence (CADE)*

In November 2012, CADE was notified of an operation between two European companies, Ahlstrom Corporation and Munksjö AB, producers of special papers.

The operation, originally, could implicate a high degree of concentration in the pre-impregnated decorative paper - PRIP market (used in furniture indoors as kitchens, bedrooms and offices), and in the heavy weight abrasive paper backings market (used for the manufacture of abrasive coating, which are used to polish materials in many industrial operations), since there were not any prospects of new entrants in the sector nor any rivals sufficiently able to compete in these markets.

To address such competitive concerns, Munksjö and Ahlstrom proposed to CADE, in form of an Merger Control Agreement (ACC, for its acronym in Portuguese), the sale of Ahlstrom's assets used in the production of PRIP and abrasive paper backings to a third party. The Agreement proposed to CADE was equivalent to the commitments presented to the European Commission.

The importance of international cooperation between competition agencies was highlighted during the investigation phase and especially when designing and implementing the remedies. Not only did the companies involved in the merger have all assets located abroad, but their main competitors and clients were also foreign companies, with little or no local representatives in Brazil. The Commission's input was crucial to CADE's understanding of the competitive concerns raised by the merger and, afterwards, to design a remedy involving the divestment of assets located in Europe that would be able to solve those concerns in the Brazilian market.

CADE and the European Commission kept an open dialogue even during the implementation of the remedy.

## **Case Example 15: Syniverse/ WP Roaming**

### *Brazil's Council for Economic Defence (CADE)*

In May 2013, CADE approved the acquisition of WP Roaming III SARL (MACH) by Syniverse Holdings, Inc., subject to remedies.

After a deep market investigation, CADE concluded that the transaction would result in high degrees of concentration in the GSM data clearing and Near Real Time Roaming Data Exchange (NRTRDE) markets, which are technology services provided to mobile network operators. GSM data clearing allows MNOs to charge for roaming services when a user of a mobile device connects to a network different from his or her home network. NRTRDE, in turn, is a service that allows fraud detection in roaming services.

To address CADE's competition concerns, Syniverse and MACH proposed a Merger Control Agreements (ACC, for its acronym in Portuguese) to CADE, whereby they agree to undertake a series of commitments to mitigate anticompetitive effects of the transaction.

During the case, cooperation with the European Commission was key to help CADE to better understand the market, since all potential competitors did not have activities in Brazil and, consequently, CADE's ability to obtain information was very limited. Besides, cooperation was also crucial in the negotiation of remedies, as almost all the assets of Syniverse and MACH were located abroad. According the Reporting Commissioner, "This case demonstrates the importance of fomenting dialogue between competition authorities in an increasingly globalized world. It is worth highlighting the interaction between CADE and the European Commission to exchange information and synchronize stages of the investigation". The parties committed to divest a significant part of MACH's assets in data clearing and NRTRDE businesses in Europe, where a substantial part of their operation was located. CADE's Tribunal considered that the divestiture of those assets to a third competitor would be sufficient to mitigate competition concerns also in Brazil, once all the relevant competitors in the related markets were based abroad.

## **Case Example 16: Novartis/GlaxoSmithKline**

### *European Commission*

In November 2014, the proposed acquisition of the oncology business of GlaxoSmithKline plc("GSK") of the United Kingdom by Novartis of Switzerland was notified to the European Commission. Both merging parties are active globally in the development, distribution and marketing of pharmaceutical products. The European Commission had the concerns that the transaction as originally notified would have (i) reduced the number of companies developing and marketing certain inhibitors for skin cancer from 3 to 2; and (ii) reduced innovation, with the likely abandonment of Novartis' broad clinical trial program for two specific drugs which were at the time being trialed for a number of other cancers.

In order to prevent a negative impact on competition and to protect innovation, Novartis committed to return its rights over one of the two identified drugs to its owner and licensor

Array BioPharma Inc. ("Array") and to divest the other identified drug to Array. These post-closing commitments were conditional upon the Commission's approval of a binding partnership agreement between Array and a suitable healthcare company with global R&D and EEA marketing activities.

In this case, the Commission and the US FTC held regular weekly calls, exchanged documents and information supplied by the parties, organised and attended joint calls with third parties, discussed possible theories of harm as well as market dynamics, market definition and main geographical differences. The parties' willingness and engagement was key to enabling and ensuring the smooth conduct of that cooperation process, notably in terms of sharing of confidential information during the substantive review and remedies design processes. Cooperation also took place with the CCB, CADE and ACCC. This cooperation allowed agencies to gain insight into the specificities of the healthcare competitive landscape in their respective jurisdictions. Despite some differences in the substantive assessment reflective of these specificities, compatible and non-conflicting remedies were achieved. The CCB relied on the consent order issued by the US FTC and the ACCC relied on the commitments accepted by the European Commission. This successful outcome is a clear indication of how the goodwill and engagement of the merging parties facilitates cooperation.

### **Case Example 17: Cisco/Tandberg**

#### *European Commission and US Department of Justice*

Notifications were made simultaneously to the European Commission ("Commission") and the US Department of Justice ("USDOJ"). Discussions on substantive aspects of the case between the two competition authorities took place during the Commission's phase I investigation, at a time when the US DOJ had already begun an extensive investigation. Cooperation in this case allowed the two competition authorities to achieve a common understanding of the facts of the case and a similar orientation on substance. Importantly, it also allowed them to engage in close cooperation on remedy proposals.

In the course of their investigations, the competition authorities identified serious competitive concerns in relation to the market for high-end video conferencing products video conferencing solutions. In order to address these concerns, Cisco committed, inter alia, to divest the rights attached to its proprietary protocol TIP to an independent industry body, to ensure interoperability with Cisco's solutions and to allow other vendors to participate in the development and in the updates of such protocol. Following a market test, the Commission concluded that the commitments were suitable to remove the competition concerns identified.

This structural remedy facilitates market entry or expansion irrespective of where the competitor or its target customers are located. Moreover, the remedy is designed in a manner ensuring that an independent industry body will elaborate an industry-based proposal for a standard protocol; this proposal will then be submitted to a standard setting organization.

The Commission ultimately cleared the case by way of a phase I decision with commitments. The US DOJ concluded that the transaction was not likely to be anticompetitive taking account of the evolving nature of the videoconferencing market and the commitments that Cisco made to the Commission.

The successful alignment of remedy discussions was reflected by the fact that press releases on the outcomes of the case were published by the two agencies on the same day.

### **Case Example 18: Funke/Springer**

#### *Bundeskartellamt (Bka)*

The media corporation Funke Media Group intended to buy the TV programme magazine business of the Axel Springer Group. To compensate for the expected lessening of competition the parties offered to sell several programme magazines to another media company (Klambt).

The parties' initial plan was to finance the purchase price with the help of a vendor loan granted by Funke to Klambt. Together with another loan to Klambt and a guarantee provided both by Springer, the financing granted by the merging parties would have accounted for well over 75 percent of the total purchase price. The loan agreements had a term of more than 20 years. They obliged Klambt to share the profits with Funke and to disclose to them sensitive information relating to the divestment business. The loan agreements also contained early termination rights to the benefit of Funke. The divestment business would be operated by a newly established and separate subsidiary of the Klambt group. The subsidiary would be solely liable for the repayment of the loans.

These terms and conditions raised considerable doubts that Klambt, as the purchaser of the divestiture package, would be sufficiently independent of Funke, the purchaser in the original merger transaction. The financing scheme also raised doubts whether Klambt would be capable and willing to bear the economic and entrepreneurial risk of operating the TV programme magazine business. Klambt's equity ratio in the project was very low and its entrepreneurial risk correspondingly limited. This was not sufficient to expect Klambt to compete vigorously with Funke.

The merger project could ultimately be cleared after the financing scheme had been fundamentally revised. In the new scheme Funke no longer granted a vendor loan and Klambt roughly doubled its equity ratio. The new (and solely liable) subsidiary of Klambt was expected to have an equity ratio of about 30 percent within five-to-six years after the transaction, which would enable it to make investments on its own. Funke's share in the financing scheme was replaced by a subordinated loan and a guarantee to secure a bank loan granted both by Springer. This did not raise any concerns because Springer, having sold its programme magazines to Funke, was no longer active in the market. The loan agreements did not contain any of the rights for the lender or guarantor provided for in the previous agreements and had a significantly shorter term. Klambt could thus be regarded as a suitable purchaser.

### **Case Example 19: Pfizer/Wyeth**

#### *European Commission*

In July 2009, the European Commission approved the proposed acquisition of the US pharmaceutical and health care products company Wyeth by the US global pharmaceutical company Pfizer. The approval is conditional upon Pfizer's commitment to divest several types of animal health vaccines, pharmaceuticals and medicinal feed additives in the European Economic Area (EEA) or in specific Member States. The Commission had concerns that the transaction, as originally notified, would have raised competition issues in the field of animal health products on a number of national markets. In the light of the commitments offered by Pfizer, the Commission concluded that the proposed transaction would not significantly impede effective competition in the European Economic Area or any substantial part of it.

The Pfizer/Wyeth case demonstrates the potential benefits, in some cases, of remedy implementation cooperation even in situations where different jurisdictions accept different sets of divestment packages reflecting different competition concerns arising in separate national markets. In this case concerning a merger in the pharmaceutical sector, the Commission cooperated with a number of other reviewing agencies, and in particular with the US FTC. Two sets of divestment packages were designed to address different competition concerns arising in the separate US and EU national markets. On the basis of waivers of confidentiality, the Commission and the US FTC exchanged information on the parties' assets and closely coordinated the design of the US and EU divestment packages. Cooperation between the two agencies was beneficial in addressing a challenge regarding remedy implementation. This challenge related to a product which was needed for the EU divestment business on a transitional basis until that business was equipped with manufacturing lines for the product. The manufacturing equipment for this product constituted part of the US divestment business. An arrangement was provided for in the contractual arrangements of the US remedy package, whereby the purchaser of the US divestment business would supply the product to Pfizer, who would in turn supply that product to the purchaser of the EU divestment business. The divestment remedies accepted by the Commission and the US FTC, respectively, were monitored by two different trustees. A useful way of cooperation between the trustees was yet found, whereby one trustee would sub-contract on an ad-hoc basis the other trustee to have his advice on specific technical issues.

### **Case Example 20: UTC/Goodrich**

*United States Department of Justice (US DOJ)*

In July 2012, US DOJ, the EC and CCB coordinated on a cross-border remedy in connection with the challenge to the proposed merger of UTC and Goodrich, the largest merger in the history of the aircraft industry. As originally proposed, the merger would have led to competitive harm in the markets for several critical aircraft components, including generators, engines and engine control systems.

This transaction had potential competitive effects in many countries. The cooperation between the various investigating agencies enabled the achievement of the non-conflicting remedy of divestitures of assets located in the United States, Canada, and the United Kingdom. Cooperation ensured that the conditions imposed were consistent across

jurisdictions and did not impose conflicting obligations on the merged entity. The same day the United States announced its resolution and consent decree, the EC and the CCB issued statements regarding their investigations.

After the announcement of the settlements, US DOJ and the EC worked together to coordinate implementation of the two remedies. The two jurisdictions worked together to approve the acquirers of the assets require to be divested in both jurisdiction's commitments. As a result of their vetting process, US DOJ and the EC concluded that divestiture to these buyers, all of whom had the requisite acumen, experience, financial capability, and intention to operate the assets as a going concern, would restore competition in the affected markets. US DOJ and EC continued to work together on the implementation of the remedies, including coordinating on selection of the monitor/trustee. US DOJ and EC appointed a common trustee, who worked with each agency to ensure the successful implementation of the two remedies.

### **Case Example 21: ASML/Cymer**

#### *Japanese Federal Trade Commission (JFTC)*

In May 2013, taking the measures proposed by the Parties, etc. into consideration, the JFTC concluded that the transaction would not cause the input foreclosure. (In this case, other points such as customer foreclosure were also concerned. Remedies were proposed to each concerns.)

ASML US Inc. ("ASML US"), the subsidiary of ASML Holdings N.V. (hereinafter "ASML") that runs business of manufacturing and selling lithography system used in the front-end process of semiconductor manufacturing, planned to acquire all the shares of Cymer Inc. ("Cymer") which runs business of manufacturing and selling light sources composing an important part of the lithography system. In manufacturing lithography system, ASML procures light sources from Cymer. Therefore, the transaction forms vertical merger; the light sources market is defined as the upstream market and the lithography system market is defined as the downstream market.

After the JFTC showed ASML US competitive concern that the transaction may potentially raise the risk of input foreclosure, ASML US proposed the following remedies to address the concern:

1. With respect to Deep Ultraviolet Light sources (one type of light sources) in which the parties make transaction, Cymer will continuously do business with Company X (downstream company) and Company Y (downstream company) under fair, reasonable and non-discriminatory (FRAND) terms of trade as well as in the manner of paying regard to and being consistent with the existing agreements. Moreover, with respect to Extreme Ultraviolet Light sources (another type of light sources), after the merger, Cymer will do business with Company X and Company Y under FRAND

terms of trade as well as in the manner of paying regard to and being consistent with the industry standard.

2. Cymer will implement joint development activities with Company X and with Company Y under reasonable terms of trade. With respect to Deep Ultraviolet Light sources, Cymer will implement it in the manner consistent with the existing agreements.
3. For five years from the execution of the merger, the parties will report the status of compliance with the measures mentioned above to the JFTC once a year.
4. The report mentioned 3 above is to be created by an audit team independent from parties, which will be appointed subject to a prior approval of the JFTC.

### **Case Example 22: Canal Plus/TPS**

*France's Autorité de la Concurrence (Autorité)*

In 2006, the Autorité cleared the acquisition of pay-TV provider TPS by leading rival Canal Plus. Both TPS and Canal Plus held broadcasting rights for premium content (sports and movies) and represented the bulk of the downstream retail market for pay-TV services in France. The clearance decision was subject to several behavioural commitments (included an obligation to make certain channels available at wholesale for competing distributors, a so-called “wholesale must-offer” remedy).

In 2011, the Autorité found that Canal Plus had failed to comply with certain core commitments, imposed a fine and decided to withdraw the deal's clearance, obliging Canal Plus to file a new merger notification. After an in-depth investigation, the Autorité found that the acquisition (i) strengthened Canal Plus' dominant position on the downstream retail market for pay-TV services and (ii) created vertical effects by strengthening Canal Plus' market power on the upstream market for content acquisition. Furthermore, a retrospective analysis showed that Canal Plus had successfully impeded competition from Internet Service Providers (ISPs) on the retail market after the merger in 2006. Finally, the Autorité found that the merger raised other anticompetitive effects, including conglomerate effects on the emerging market for non-linear pay-TV (subscription video on demand), e.g. allowing Canal Plus to bundle the acquisition of linear and non-linear pay-TV broadcasting rights.

In order to solve the horizontal effects identified, the new remedy designed by the Autorité forced Canal Plus to offer all existing and future non-premium film channels to competitors, thereby preventing it from diverting attractive content from channels under the wholesale-must-offer obligation to other channels. The Autorité also ordered Canal Plus to include competing premium channels in its own bundles under non-exclusive distribution agreements. In order to solve the vertical effects, the remedy imposed limits on Canal Plus's purchasing behavior, forcing it to form unbundled mono-platform bids when negotiating with channel editors for exclusive distribution agreements (thereby enabling ISPs to compete against Canal Plus for exclusive distribution rights on their own proprietary platform). The order also blocked Canal Plus from purchasing exclusive non-linear broadcasting rights.

### **Case Example 23: Banca Intesa/Sanpaolo IMI**

*Italian Competition Authority (ICA)*

This case study illustrates the application of a mixture of structural and behavioural remedies to address competitive concerns raised by the structure of corporate governance as well as the level of market concentration shared by the merging parties. In particular, this case highlights the possibility of revoking or revising merger remedies when changes in the market conditions or regulatory framework make them obsolete, unnecessary or disproportionate, and at request of the merging parties, the Italian Competition Authority (ICA) may revoke or revise the remedies previously imposed even if conditional clearance decisions do not normally contain explicit revision clauses.

**The merger:** The Italian Competition Authority (ICA) found that the merger between Banca Intesa and Sanpaolo IMI in the new bank Intesa Sanpaolo would have significant anticompetitive effects in several markets. For a more detailed description of the merger assessment and remedies, see the 2006 annual report (p. 32-33).

The investigation revealed that in the life insurance sector the elimination of competitive pressure between Banca Intesa and San Paolo could lead to a significant reduction in competitive pressure between Intesa Sanpaolo, the new merged entity, and Generali, in view of the existing structural and commercial ties between the two groups. Generali was already active in the life insurance market and was going to become one of the major shareholders in the new bank, thus having influence on Eurizon insurer, a competitor of Generali owned by San Paolo IMI. According to the ICA, the new merged entity and Generali would have the ability and incentive to exercise market power in a coordinated manner in some life insurance sub-markets.

**The remedies:** In the life insurance sector, the Authority imposed a cross-selling ban of life insurance products offered by one merging party through branches of the other merging party. The Authority also prescribed the adoption of a series of measures aimed at ensuring that the members of the Supervisory Board and the Management Board of the merged entity appointed by the competitor Generali, or in any case having direct or indirect personal ties to Generali, would neither participate in discussions or vote on resolutions regarding the business strategy of Eurizon and of its subsidiaries in the production and/or distribution of life insurance policies nor be given information on the business strategy of Eurizon and/or its subsidiaries.

**Revision of remedies:** In 2010, the ICA revised the measures regarding the life insurance sector on request by the merged entity Intesa Sanpaolo, in light of Intesa Sanpaolo's restructuring of its insurance business. For the purpose of the revision, the ICA carried out an extensive investigation to assess the developments of the market conditions in the life insurance markets since 2006 and evaluate the revision instances advanced by the merged entity.

In 2014 the latter requested the repeal of the 2010 measures imposed for the life insurance sector since, in their view, the evolution of the governance structure between them and the new regulatory framework had rendered those measures no longer necessary: in particular, Generali participation in Intesa Sanpaolo decreased below 2 per cent; in 2012 a law was passed prohibiting interlocking directorates which was one of the recommendations issued by the ICA following the publication of the outcome of a sectoral inquiry concerning corporate governance in the banking and insurance sectors in 2008. After a new assessment of the market conditions, the ICA accepted the request from the parties and granted the revocation of those measures affecting the life insurance sector.