

ICN Merger Working Group Project on Remedies in Merger Review: Interim Report, March 2015

1. INTRODUCTION

A key role for the International Competition Network (“ICN”) is to “*advocate the adoption of superior standards and procedures in competition policy around the world*”.¹ In 2005, following a year-long review of merger cases from around the world, the ICN Merger Working Group (“MWG”) published the Merger Remedies Review Report (the “Report”) to provide a practical guide on the choice, design and implementation of merger remedies. The Report sought to achieve this “by summarising key principles and practices employed by a wide cross-section of competition authorities, and then illustrating significant issues through case studies.”² The Report was a significant contribution to the MWG work product available at that time on merger remedies, which was primarily limited to the Recommended Practices for Merger Notification Procedures (“RPs”).³

Since 2005, a significant amount of work has been performed by competition authorities that have engaged in remedy studies or retrospectives and have accordingly updated their policies and guidance on merger remedies. Given the collective experiences over the past decade, it is timely to revisit the MWG’s remedies work product to ensure it continues to promote appropriate remedy standards and procedures around the world.

As such, the 2014-2016 project on remedies (the “Project”) seeks to review existing MWG remedies work product, engage in information-gathering by collecting members’ experiences, and update the Report and/or expand the RPs. This Project will also benefit from the 2013-2015 MWG project on International Merger Enforcement Cooperation as remedies in cross-border mergers⁴ are increasingly a key area of cooperation with attendant new challenges that need to be addressed. For instance, the teleseminar on international cooperation held on January 16, 2014 included a discussion on designing cross-border remedies. Using *UTC/Goodrich* and *Nestle/Pfizer* as case studies, presenters from the European Union, US, Canada, Mexico, Chile

¹ See the ICN’s mission statement at <http://internationalcompetitionnetwork.org/>.

² Merger Remedies Report (2005) <http://www.internationalcompetitionnetwork.org/working-groups/current/merger/workproduct.aspx>, at 1.2 (additionally noting that “Choice of remedy, of course, is ultimately dependent on each jurisdiction’s merger regime and the case at hand.”).

³ Also in 2005, the RPs were expanded to include a section on Remedies. See Recommended Practices for Merger Notification Procedures (2002, 2005) <http://internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

⁴ See also RP X.E, Interagency Cooperation (“Reviewing agencies should seek remedies tailored to cure domestic competitive concerns and endeavor to avoid inconsistency with remedies in other reviewing jurisdictions.”)

and Pakistan discussed how coordination through joint discussions with merging parties, information exchanges, and regularly scheduled calls between competition authorities allowed for, among other things: (1) a broader understanding of the relevant industries; (2) the ability to address asymmetric information provided to reviewing competition authorities by the merging parties; (3) joint development of the theory of harm arising from the merger; and (4) discussions regarding effective potential remedies.

Over the past year, the MWG held a series of information-sharing teleseminars that focussed on the key topics contained in the Report, namely: (i) the principles of remedial action; (ii) choice and design of remedies; and (iii) implementing and monitoring remedies. As the Report contained several case studies dating back over 10 years, particular emphasis during the teleseminars was put on identifying recent case studies that could provide a basis for updating the Report. The key topics in the Report were also discussed during plenary and breakout sessions at the December 2014 MWG workshop in Delhi . A summary of the discussions held during these information gathering exercises is described below.

2. THE ICN MWG TELESEMINAR SERIES ON MERGER REMEDIES

The objective of these teleseminars was to gather practical experiences and insights from competition authorities and non-governmental advisors (“NGAs”) covering various geographic regions and a wide range of cases requiring varying types and degrees of remedial action.

Through these teleseminars, the MWG sought to determine whether the practical guidance offered in the Report is still relevant and being used, as well as to identify any challenges or new areas of interest that may be relevant when considering and designing merger remedies.

A summary of each teleseminar is presented below.

2.1 Fundamental principles of appropriate and effective remedies

The teleseminar on the *Fundamental Principles of Appropriate and Effective Remedies* took place on September 25, 2014. This teleseminar featured presentations by the US Federal Trade Commission (“US FTC”), an NGA from the US (an antitrust economist), and the Canadian Competition Bureau (“CCB”). Each of the participants addressed the principles of remedial action, drawing on the five main principles identified in the Report: (i) assessment of remedies; (ii) proportionality; (iii) effectiveness; (iv) potential burdens and costs; and (v) transparency and consistency. A recent case study on *Suncor/Petro-Canada* was presented by the CCB to illustrate the use of each of these principles.

Assessment of Remedies

The presenters began by stating the fundamental premise that, when assessing the need for remedies, competition authorities need to keep in mind the main purpose of remedial action: to address the competitive harm arising from a merger without trying to increase competition in the relevant markets. Potential remedies are assessed in relation to their effectiveness in addressing the theory of competitive harm.⁵ As set out in the Report, “the assessment will be influenced by such factors as the nature of the competitive test and the extent to which the jurisdiction is permitted to take into account relevant merger benefits.”⁶ The US FTC explained that, in the US, remedies should maintain or restore competition to its pre-merger state without going beyond that to increase competition.⁷ The CCB explained that in the *Suncor/Petro-Canada* case, the chosen remedy was aimed at maintaining competition without reaching into upstream sectors where no harm was identified, especially since doing so allowed efficiencies from the integration of assets to be realizable. The NGA identified studies and retrospectives that have been undertaken by various competition authorities to assess effectiveness of remedies, including the US FTC’s 1999 Divestiture Study, as well as studies by the European Commission’s (“EC”) DG Competition in 2005, the UK Competition Commission (as it was then known) in 2010, and the CCB in 2012.

Proportionality

The presenters explained that competition authorities will attempt to balance the objective to minimize the burden on merging parties (for instance, by allowing as many of the efficiencies from the merger to be retained) with the objective of seeking an effective remedy according to the governing standard at that agency. In the presenters’ experiences, some jurisdictions (including the US and Canada) will consider requiring a remedy tailored to the competitive harm even if the harm is present in only a small part of a large transaction. The CCB explained that the remedy required in *Suncor/Petro-Canada* serves as an example of ensuring a comprehensive and proportional remedy in narrower “sub-markets” identified as higher risk for competitive harm. More generally, where a divestiture is required by an agency, the rest of the firms’ operations may be allowed to merge, while the divestiture to a suitable buyer in one or more markets at issue is intended to maintain the number of independent and effective competitors in those markets.⁸ The presenters acknowledged that in other jurisdictions,

⁵ See RP XI.A (“A remedy should address the identified competitive harm arising from the proposed transaction.”) and RP XI.A, Comment 1 (“The remedy should adequately address the potential competitive harm identified, but should not have the objective of improving premerger competition.”)

⁶ The Report at 2.2.

⁷ See RP XI.A, Comment 1 (“The object of a remedy should be to restore or maintain competition, thereby preventing competitive harm that the transaction would otherwise cause.”)

⁸ See RP XI.A and RP XI.A, Comment 1, *supra* at n.6.

mergers may be permitted to proceed without a remedy if the market at issue is small relative to the size of the transaction.

Effectiveness

The presenters stressed that an essential component of any remedy is that it be effective.⁹ In their experience, the four key factors currently set out in the Report and contained in the RPs are typically considered to ensure the effectiveness of remedial action. These are (i) comprehensive impact; (ii) minimal risk of failure; (iii) practicality; and (iv) appropriate duration. Some competition authorities may have a preference for divestitures (also called “structural” fixes or remedies) particularly because they can be designed to fully resolve the competitive harm by ensuring the continued presence of what would have otherwise been a lost competitor. Presenters noted the importance of having remedies that are quickly implemented, easily monitored, and have lasting effects in the markets at issue. When divestitures are required, presenters explained that providing a sufficient package of assets for a potential purchaser or purchasers to have full capabilities to operate those assets is also important.

The NGA explained that the effectiveness of a remedy also depends on the incentives of market participants post-remedy. For example, in a simple horizontal case, a well-designed and implemented divestiture will aim to preserve pre-merger incentives by providing the purchaser of divested assets with the same competitive incentives as the pre-merger owner of the assets. As a result, economic theory suggests that market conditions would be similar to those that existed before the merger, and there would not be a need for ongoing oversight or intervention. In contrast, when a remedy does not involve a divestiture, the merged entity’s incentives post-merger may make it less likely for the pre-merger market dynamics to continue. Accordingly, the presenters suggested that when accepting behavioural remedies, setting out terms in a remedy agreement that fully specify and anticipate potential issues is helpful.

It was noted that in practice, designing effective behavioural remedies is challenging because of the difficulties in anticipating all issues that may arise post-merger. To address these difficulties, the presenters explained that behavioural remedies often require resources and capabilities (including, for example, arbitration clauses) for ongoing monitoring and enforcement.¹⁰ Presenters also noted that behavioural remedies may more likely be effective in certain circumstances, such as where business units of the merged firm have been operated separately or where technology is not changing rapidly. In such circumstances, the inclusion of provisions for firewalls to limit the exchange of information or “must supply agreements” for access to

⁹ See RP XI.C (“Procedures and practices should be established to ensure that remedies are effective and easily administrable.”)

¹⁰ See RP XI.C (“To be effective, and to enhance administrability, a remedy should define the parties’ compliance requirements clearly and precisely

necessary inputs may be effective (as was done in *Suncor/Petro-Canada* where the remedy was designed to ensure third-party access to facilities).

Potential Burdens and Costs

The presenters stated that competition authorities recognize that remedies can impose burdens and costs upon merging parties. Consistent with what is outlined in the Report, and contained in the RPs, these include potentially foregone efficiencies, implementation costs (such as a low divestiture price, high search costs, and delays) as well as ongoing costs with monitoring behavioural remedies. The CCB suggested that requiring a single purchaser for the divestiture assets in the *Suncor/Petro-Canada* remedy both minimized the risk of remedy failure through the selection of purchasers, and minimized the burden and cost of implementation.

Transparency and Consistency

Finally, the presenters reiterated that transparency and consistency are important considerations when taking remedial action.¹¹ They emphasized that competition authorities should have clearly articulated policies and procedures for negotiating remedies and should keep parties informed of issues that arise throughout a review so that the parties may be positioned to address the concerns. Furthermore, remedies should be publicized so that businesses and the public can become informed.

2.2 Choice and Design of Remedies

The teleseminar on the *Choice and Design of Remedies* took place on November 10, 2014, featuring presentations made by the Australian Competition and Consumer Commission (“ACCC”), the German Bundeskartellamt, and NGAs from Brazil and Israel. Several cases requiring remedies formed the basis of discussion, namely: *Baxter/Gambro* (ACCC), *Pfizer/Wyeth* (ACCC), *Thermo Fisher/Life Technologies* (ACCC), *Nestle/Pfizer* (ACCC), *Agilent/Varian* (ACCC), *Perdigao/Sadia* (Brazil), *Diagnostics/MD1* (Brazil), *lochpe Maxio/Hayes Lemmerz* (Brazil), and *Funke/Springer* (Germany). As described below, the presenters used these case studies to illustrate some of the main themes contained in the Report and the RPs, including: (i) the benefits and costs of using a structural remedy; (ii) factors affecting the design of divestitures; (iii) the divestiture or licensing of intellectual property; and (iv) the use of behavioural remedies.

¹¹ See RP XI.B (“The merger review system should provide a transparent framework for the proposal, discussion, and adoption of remedies.”)

Structural Remedies

Consistent with the Report, the presenters' experiences indicated that a structural remedy is intended to restore or maintain the competitive structure of the market.¹² The presenters explained that the most commonly used structural remedy is divestiture as it directly addresses the cause of the competitive harm, and offers a straightforward solution with low monitoring costs. The presenters acknowledged that divestitures are largely irreversible, can come at a high cost to the merging parties, and may disrupt customer relationships. Nonetheless, they explained that divestitures are often considered most effective in addressing the competitive harm arising from a merger, particularly in the case of horizontal overlap between the merging parties. In such cases, divestitures can maintain competition by ensuring continued competitive pressure by establishing a new market participant or strengthening an existing competitor.

Designing Divestitures

The presenters' case experiences highlighted the three key elements of a divestiture identified in the Report and RPs, namely the scope of the divestiture package, a suitable purchaser, and an effective divestiture process. The presenters used case examples to explain how the divestiture elements may be subject to (i) composition risks; (ii) purchaser risks; and (iii) asset risks. The first two risks are closely tied together: if a divestiture package is unable to attract an acceptable purchaser, it may be because the package is not composed of appropriate assets. With regard to asset risk, the longer the duration of a divestiture process, the greater the risk that the package becomes weaker owing to the loss of crucial customers or staff members. As such, presenters emphasized that setting reasonable and not excessive time periods for divestiture is crucial to risk mitigation. The presentation of the German case *Springer/Funke* also showed that international cooperation in the design of remedies can be crucial, even when the remedies relate to different substantive issues in different national markets.

Divestiture or Licensing of Intellectual Property ("IP")

Consistent with the Report, the presenters explained that the divestiture or licensing of IP may be considered structural (as a specialized form of asset divestiture) or a structural/behavioural hybrid, depending on the degree of ongoing links between the licensor and licensee. The presenters' experiences also indicated that the design of an IP remedy is influenced by several specific factors, including: (i) the form and jurisdiction of the relevant IP; (ii) the relative specialization of the IP within the relevant market; (iii) the rate of innovation expected in the relevant market, which will impact the duration of the remedy; and (iv) the effect that the form of payment will have on competitive incentives. In the *Perdigao/Sadia* (Brazil) merger, the

¹² See RP XI.A, Comment 1, *supra* at n.8.

presenter indicated that the structural remedy included the divestiture of brands and their related intellectual property rights in order to address the competitive harm arising from a merger of the two main food producers in Brazil.

Behavioural remedies

The presenters' experiences indicated that behavioural remedies may be defined as an obligation imposed on the merged entity to either engage in, or refrain from engaging in certain conduct. They explained that behavioural remedies may allow for a wide selection of options and time frames which can be particularly useful for cases where the competitive harm is expected to be limited in duration. The presenters explained that behavioural remedies may be adopted on a stand-alone basis when structural remedies may not be an effective option because a purchaser is not available, an asset package cannot be created as a viable stand-alone business, or the assets required to resolve the competitive harm makes the underlying transaction unfeasible. For example, this may occur when in a vertical or conglomerate transaction the benefits of a merger (such as efficiencies) are significant and divestitures would not preserve those benefits. The presenters suggested that high implementation costs associated with substantial ongoing monitoring and enforcement, which are often necessary to ensure the remedy effectively resolves the competitive harm, are the main drawbacks to behavioural remedies.

Behavioural remedies may also be used temporarily in combination with a structural remedy. Presenters used case examples (*Perdigao/Sadia*, *Diagnostics/MD1*, *Pfizer/Wyeth*, *Springer/Funke*) to illustrate situations where terms proscribing the merged firm's behavior were used to complement a structural remedy. In these cases, the inclusion of certain clauses, such as firewall provisions, non-discrimination obligations, service level agreements, and/or prohibitions on future acquisitions, were required to address ongoing competition harms arising from the merger.

2.3 Implementation and Monitoring

The teleseminar on *Implementation and Monitoring* took place on January 22, 2015. Presentations were delivered by the US Department of Justice ("US DOJ"), the United Kingdom Competition and Markets Authority ("CMA"), the Portuguese Autoridade Da Concorrencia ("PCA"), and a European NGA. Each presenter provided a brief overview of remedy types with a focus on the structural remedies implemented in several cases, namely: *Johnson/Sara Lee Insecticides* (PCA), *Tv Cabo/Tvtel* (PCA), *Zon/Bragatel*, *Pluricanal Leiria*, and *Pluricanal Santarem* (PCA), *SRCL/Ecowaste* (CMA), and *Verso Paper/New Page* (US DOJ). These cases formed the basis of the discussion about the following topics contained in the Report and RPs: (i) effective implementation; (ii) use of trustees; (iii) monitoring; and (iv) post-implementation modification.

Effective Implementation

To implement an effective remedy, the presenters emphasized three main points. First, remedy clarity was considered essential so that parties can understand how they should operate and exactly what is required in order to fully comply with the terms of the remedy.¹³ The presenters also suggested that parties should be able to clearly understand the potential repercussions of non-compliance. Second, active and ongoing consultation was considered necessary to facilitate the early identification of issues. Furthermore, the presenters suggested that active consultation increases the likelihood of achieving both the parties' and competition authority's desired outcome. Third, the presenters communicated that competition authorities should evaluate past remedies in order to develop better practices and identify lessons learned.

Use of Trustees

Each presenter explained that, where appropriate, different types of trustees can assist competition authorities in monitoring the divestment process. A *monitoring trustee* (referred to simply as "monitor" in some jurisdictions) monitors and reports on the implementation of the remedy, to ensure the divestitures are carried out in the case of a structural remedy, and/or to oversee ongoing compliance with a behavioural remedy. In contrast, a *divestiture trustee* is responsible for selling the assets or businesses in a structural remedy when the merging parties cannot find a suitable buyer with a defined period of time or if an up-front buyer retracts its intent to purchase. The presenters highlighted the requirement that a divestiture trustee can only sell to a buyer deemed acceptable by the competition authority. The presenters emphasized that the person selected as either a monitoring or divestiture trustee must be independent from the merging parties (or at least the acquiring party), must not have conflicts of interest, and must be approved by the competition authority. In some cases, the same person can serve as the monitoring trustee and the divestiture trustee. Presenters cited the example in *SRCL/Ecowaste (2011)*, where a monitoring trustee working for a third party accounting firm was appointed by and accountable to the CMA, while its services were paid for by the merging parties.

Monitoring Compliance

The presenters explained that an understanding of whether the remedy is effective is only possible when competition authorities can effectively monitor its implementation. Merged firms' incentives to comply with a remedy may decrease if they feel that they will not be held responsible for compliance. Presenters suggested that relying on third party or market complaints alone is insufficient. For example, the US DOJ closely monitors compliance and

¹³ See RP XI.D ("Appropriate means should be provided to ensure implementation, monitoring of compliance, and enforcement of the remedy.")

investigates potential violations, additionally requires internal monitoring and periodic reports. It can obtain documents, seek internal audits and access employees if necessary to ensure continued compliance with a remedy. If compliance is not demonstrated, the US DOJ can bring a contempt action seeking civil and criminal penalties.

Post-implementation Modification

The presenters discussed remedy modification by delineating three modification categories: (i) revocation/peal; (ii) substitution; and (iii) expiry. They suggested that allowing not only the competition authority but also the parties, subject to the terms of the remedy, to have the ability to potentially modify a remedy to reflect substantive market changes or original remedy design flaws strengthens the process. They also explained that the potential for dialogue grows increasingly important as the remedy time frame increases in length. As the revision process is burdensome for all involved, it is important to amend remedies only when truly appropriate, such as in the *Tv Cabo/Tvtel* (PCA) case.

3. DISCUSSIONS AT THE ICN MWG WORKSHOP IN DELHI

The December 2014 MWG Workshop in Delhi, India provided an additional platform for members to discuss remedies. After a plenary session on “Remedies in Merger Cases”, attendees participated in one of four breakout sessions: (i) “overcoming challenges in designing and implementing cross-border remedies”; (ii) “the pros and cons of behavioural remedies”; (iii) “the role of third parties in designing, implementing and monitoring remedies”; and (iv) “lessons learned from ex-post remedies analysis”.

Plenary panellists discussed trends in merger remedies including increases in substantive cooperation with other competition authorities, efforts to create more consistent and transparent remedy processes, and adjusting remedy design and implementation to reflect lessons learned from past cases. Competition authorities reiterated their commitment to the underlying principles of efficient and effective remedies while recognizing the different challenges faced by competition authorities owing to the size of their economy or their experience level.

In discussing “overcoming challenges in designing and implementing cross-border remedies”, panellists noted that challenges may arise at the remedy stage owing to unaligned timing or restrictions on information-sharing at the early stage of the review process. In this regard it was observed that, where circumstances do not allow for meaningful cooperation on the substantive assessment of the merger, it may not be possible for competition authorities to achieve non-conflicting outcomes in terms of remedy design and implementation. Speakers shared their experiences with encouraging parties to facilitate information-sharing and to make

merger notifications such that the competition authorities' timetables would be aligned. When parties do this, it makes consistent outcomes more likely. Certain speakers, particularly from smaller economies, also noted that they often identify a lead competition authority in the merger review and evaluate on a case-by-case basis the need for stand-alone remedies in their jurisdiction.

In the breakout session on “the pros and cons of behavioural remedies”, panellists shared their reasons for often preferring structural remedies including the potential incentive distortions caused by behavioural remedies, the heavy resource requirements for monitoring, and the lack of permanence of the behavioural remedy. Speakers cited more positive experiences with behavioural remedies when used in conjunction with structural ones or to address non-horizontal concerns.

In “the role of third parties in designing, implementing and monitoring remedies” breakout session, panellists discussed the variety of roles that third parties play in merger review (and remedies) including: information-gathering and remedy testing with competitors, customers, and suppliers; having legal counsel provide advice to parties and the competition authorities; having analysis or testimony provided by economic or industry experts; and, the remedy implementation role of independent trustees and monitors.

The breakout session on “lessons learned from ex-post remedies analysis” highlighted the formal remedy studies and retrospectives conducted by certain competition authorities, as well as the more common informal and ongoing implementation of lessons learned from past merger remedies. Panellists shared common themes that help ensure effective remedies (particularly structural ones), including selecting the appropriate buyer and asset package.

CONCLUSION

Based on the information-sharing exercises that have taken place over the past year, it is clear that competition authorities around the world continue to employ many of the key principles and practices articulated in the Report and RPs. This is a testament to the comprehensive and relevant work that was put into creating the Report and RPs.

MWG members will further discuss remedy themes at the 2015 ICN Annual Conference in Sydney and at the 2015 MWG Workshop in Brussels. As competition authorities continue to share their remedy experiences gained over the last ten years and discuss additional topics of interest, the MWG will determine next steps for developing or revising remedy-related work product.