The Guide to Merger Remedies

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Ronan P Harty and Nathan Kiratzis
The Guide to Merger Remedies

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Overview

Ronan P Harty and Nathan Kiratzis

A feature common among almost all jurisdictions that have antitrust laws is a set of rules that govern mergers. Although the details of these rules may differ, a unifying theme is that mergers should not reduce competition in a properly defined market.

The assessment of the competitive effects of any given transaction is not a binary exercise. Ultimately, the assessment of the impact of the transaction turns on an informed, but prospective, review of the relevant market and the competitive conditions in that market. Often, antitrust authorities will agree to remedy the prospective harm that may result from a transaction by accepting undertakings or commitments from the parties to do particular things or act in a particular way. At this point, an additional level of ‘crystal ball gazing’ is introduced into the merger review process. The antitrust authority needs to determine an appropriate means of addressing the prospective harm arising from the merger, otherwise known as a merger remedy.

This book provides a comprehensive review of a variety of issues relating to the design and implementation of merger remedies, often referring to practices and precedents from the United States and the European Union. However, as noted above, merger rules are global in nature and, therefore, a part of the book is devoted to a review of other jurisdictions around the world, including Canada, China and Mexico.

This chapter provides a detailed overview of each of the parts that make up this book. At the outset, however, we provide an overview of four retrospective studies of merger remedies that have been conducted by antitrust authorities in the United States, the European Union, the United Kingdom and Canada. These studies provide a useful introduction to some of the key issues that will be covered in greater detail throughout the book. They also serve as a means of understanding the effectiveness of merger remedies negotiated in the past.

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The US Federal Trade Commission’s 2017 Report

The first retrospective study considered is the US Federal Trade Commission (FTC) Report released in January 2017. The FTC Report examined 89 merger orders issued by the FTC from 2006 through 2012. Among these 89 orders, 76 imposed so-called structural remedies. Five merger orders required a mix of structural and what can be termed non-structural or behavioural remedies. Another six orders ‘required only structural relief’, and two others ‘required relief other than divestiture that was designed to facilitate entry’. While structural remedies require some form of structural change on the part of the merger parties (e.g., divestment of assets), non-structural or behavioural remedies are designed to regulate the future conduct of the merger parties (e.g., regulating the prices that may be charged in the future). Structural remedies are discussed in more detail in Chapter 5 and non-structural remedies are discussed in Chapter 6.

The FTC analysed 50 of the 89 merger orders by conducting interviews with transaction parties, other significant market participants and buyers of divestiture assets, where applicable. The FTC then corroborated that information with market share information derived from sales data obtained from significant competitors. Of the 50 merger orders analysed, 46 related to horizontal mergers (40 involved structural remedies and six involved non-structural remedies) and four related to vertical mergers (all non-structural remedies). The FTC ultimately concluded that 69 per cent of the 50 merger orders studied were ‘a success’, meaning that competition in the relevant market remained at its pre-merger level or returned to that level within a short time (two to three years) after the FTC issued the order. Another 14 per cent were found to have been ‘a qualified success’, meaning that it took more than two or three years to restore competition to its pre-merger state, but the remedy ultimately did so. The remaining 17 per cent were rated ‘a failure’, meaning that the remedy did not maintain or restore competition in the relevant market.

The FTC Report also considered the timing of the implementation of a remedy on its ultimate success. The FTC concluded that of the 40 horizontal mergers where structural remedies were imposed, success, as defined by the FTC, was far more likely in situations where the remedy was implemented before the merger was consummated (75 per cent) versus situations where the merger had already been consummated (26 per cent).

Another issue considered by the FTC Report was the effectiveness of structural remedies requiring the divestiture of ongoing businesses as opposed to divestitures of a defined set of assets. The FTC found that all divestitures of ongoing businesses that were studied were successful, irrespective of whether they involved an upfront buyer or a post-order

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3 The terms non-structural remedy and behavioural remedy are synonymous and are used interchangeably throughout this chapter.
4 Id. at 7.
5 Id. at 11.
6 Id. at 15 and 18.
7 Id.
8 Id. at 18 and 19.
buyer. An upfront buyer is an identified buyer that the merger parties negotiate, finalise and execute a purchase agreement and all ancillary agreements with before the proposed order is finalised by the antitrust authority. On the other hand, a ‘post-order buyer’ refers to a situation where the parties agree to divest certain assets to a buyer approved by the antitrust authority within a certain time period after the authority issues a final merger remedy order. While the FTC found that all divestitures of an ongoing business that were reviewed were successful, as defined by the FTC, the divestitures of selected assets were successful or a qualified success in 56 per cent and 11 per cent of cases respectively. The FTC found that the other 33 per cent of orders involving divestitures of selected assets did not maintain or restore competition in the relevant markets. The issues associated with divestiture, as well as the difficulties associated with defining an asset package that will be sufficient to restore competition, are dealt with in Chapters 5, 10, 13 and 14.

The FTC Report also provided useful insights regarding the success of a remedy based on a survey of the buyers of divestiture assets. In relation to 15 of the 89 remedies that involved divestiture, the FTC conducted surveys of each of the 43 divestiture buyers. Based on the participants’ responses and a survey of publicly available market data, the FTC concluded that 39 out of the 43 buyers continued to function and provide competition in the relevant markets. The importance of selecting a suitable buyer in the context of a merger remedy is discussed in detail in Chapter 9.

The UK Competition and Markets Authority 2017 Report

Another recent retrospective study of merger remedies was conducted by the United Kingdom Competition and Markets Authority (CMA). As with the FTC Report, the CMA relied principally on interviews with market participants to evaluate the effectiveness of the merger remedy. However, in contrast to the FTC Report, the CMA Report evaluated the effectiveness of 15 past merger remedies rather than surveying all remedies within a particular period.

The CMA Report provided commentary on three matters that involved the use of price controls, a particular type of non-structural remedy. As discussed in further detail in this book, non-structural remedies are challenging to develop and implement. As the three cases regarding price controls that were surveyed by the CMA demonstrate, non-structural remedies can sometimes have unintended consequences and, therefore, varying levels of success in addressing anticompetitive effects.

In the first matter, Alanod Aluminium–Veredlung GmbH & Co (Alanod) acquired Metalloxyd Ano-Coil Ltd in 1999, giving it a 75 per cent share in the United Kingdom

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9 Id. at 21.
10 Id. at 22.
11 Id. at 29.
12 Id.
14 Id. at 9.
15 Id.
market for anodised aluminium coils used in lighting. 16 Concerned about this dominance, the CMA’s predecessors, the Competition Commission (CC) and the Office of Fair Trading (OFT), implemented several non-structural remedies, including a maximum price control. 17 Broadly, the price control was unnecessary because market prices never approached the price control’s limit. 18 In light of these findings, the CMA concluded that ‘[i]t can be difficult to control prices in industries where input costs are subject to major changes’. 19

In the second matter, Coloplast A/S (Coloplast) acquired SSL International plc in 2002, raising Coloplast’s market share in the United Kingdom for intermittent catheters to 26 per cent; for urobags to 58 per cent; and for medical sheaths to 92 per cent. 20 The CC and OFT imposed non-structural remedies, including a price control. 21 The price control was effective in lowering prices to consumers. Surprisingly, although this price control was publicised, Coloplast’s competitors maintained their prices at pre-merger levels (which were higher than Coloplast’s new price control) and Coloplast’s market share increased. In light of this, the CMA Report expressed concern that ‘price controls might force firms that are unable to compete with the controlled price out of the market or deter entry’. 22

The third matter imposing a price control was the 2003 acquisition by Draeger Medical AG & Co KGaA (Draeger) of the Air-Shields business owned by Hillenbrand Industries. 23 Draeger and Air-Shields both supplied ‘neonatal warming therapy products’ to hospitals in the United Kingdom, and the combined UK market share was estimated to be somewhere between 60 and 100 per cent. The CC and OFT implemented a two-pronged merger remedy to cure anticompetitive concerns arising out of this merger. First, the CC and OFT recommended that the NHS (the primary purchaser of healthcare products in the United Kingdom) establish maximum prices and otherwise facilitate new entrants into this market. Second, Draeger had to agree to lock in its pre-merger prices for a fixed amount of time after the merger. The CMA Report concluded that the price control remedy acted as a ‘safety net’ to prevent Draeger using its market power to raise prices for neonatal warming therapy products. 24

The Canadian Competition Bureau’s 2011 Report

A third retrospective study was conducted by the Canadian Competition Bureau in 2011. 25 The report studied the effectiveness of 23 merger remedies obtained by the Competition

16 Id. at 52.
17 Id. at 56.
18 Id. Note that for one specific anodised aluminium product for which Alanod had no real competitor, the price control was a ‘biting constraint’, because Alanod likely had the market power to raise prices above the control’s upper limit.
19 Id. at 57.
20 Id. at 63.
21 A second behavioural remedy was an agreement from Coloplast not to renew an exclusivity agreement with a US distributor of non-latex sheaths.
22 Id. at 69.
23 Id. at 76.
24 Id. at 88.
Bureau between 1995 and 2005. As with the FTC Report, the Competition Bureau’s Report relied principally on interviews with merged entities and market participants.\(^26\)

In sum, 16 out of the 20 structural remedies obtained by the Competition Bureau were characterised in the report as successful ‘in achieving their objective of eliminating the substantial lessening or prevention of competition’ after the merger.\(^27\) The other four structural remedies were either never fulfilled (i.e., the assets subject to the divestiture requirement were never sold to a third party)\(^28\) or the divested businesses were ‘no longer operating’.\(^29\) Consistent with the findings in the FTC Report, the Competition Bureau also observed that divestiture tended to be more successful where the divested asset was a ‘stand-alone operating business, as opposed to components of a business’.\(^30\) Moreover, even where the divestiture involved only components of a business, there was greater success when the purchaser already possessed the ‘infrastructure and expertise in the relevant product line’.\(^31\)

The European Commission’s Directorate-General for Competition’s 2005 Report

The final retrospective study profiled in this chapter is the Directorate-General for Competition’s (DG Comp) review of merger remedies, which was published in 2005.\(^32\) This review analysed a sample of 40 merger decisions adopted by the European Commission from 1996 to 2000, which accounted for 44 per cent of all merger decisions involving remedies during that period. While the 40 decisions involved 130 remedies, the report only studied 96 remedies for which sufficient data was available.\(^33\)

Of the 96 remedies studied there were 84 structural remedies and 12 non-structural remedies, of which 10 were access remedies and two were commitment remedies.\(^34\) DG Comp classified each of the merger remedies as ‘effective’, ‘partially effective’, ‘ineffective’ or ‘unclear’.\(^35\) Overall, the DG Comp Report found that 57 per cent of the 96 remedies studied were effective, 24 per cent were partially effective, 7 per cent were ineffective and 12 per cent were unclear.\(^36\)

Finally, DG Comp also observed that remedies imposed during its initial Phase I review period were more effective than remedies imposed during the subsequent Phase II review period.\(^37\)

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\(^{26}\) Id. at 2.

\(^{27}\) Id.

\(^{28}\) Id.

\(^{29}\) Id. at 5.

\(^{30}\) Id.

\(^{31}\) Id.


\(^{33}\) Id. at 12.

\(^{34}\) Id. at 20.

\(^{35}\) A remedy was effective if it ‘clearly achieved [its] competition objective’; partially effective if it had ‘design and implementation issues which were not fully resolved three to five years after the divestiture and which may have partially affected the competitiveness of the divested business’; ineffective if it ‘failed to restore competition as foreseen in the Commission’s conditional clearance decision’; and unclear if the DG ‘could not determine whether the remedy had achieved its stated objective’. Id. at 132.

\(^{36}\) Id. at 133.
The report speculated that this disparity was likely explained by the fact that Phase II investigations generally involve more complicated merger cases with more significant antitrust concerns.

The GCR Guide to Merger Remedies

The retrospective reviews conducted by antitrust authorities in the United States, United Kingdom, Canada and the European Union demonstrate a recognition that developing and implementing merger remedies that address anticompetitive concerns can be a very challenging exercise. This book will provide comprehensive coverage of a number of key aspects relating to merger remedy practice, from the underlying principles, through to the design and negotiation of the remedy, followed by discussion of issues relating to implementation and compliance. Insights from different jurisdictions across the globe, set out in Part VI, provide a useful and practical supplement to the topics covered in Parts I to V.

Part I is made up of a series of chapters that introduce a number of overarching principles and considerations relating to merger remedies.

Before designing merger remedies, it is critical to understand the key principles involved and the goals that any given remedy is designed to achieve. The core universal goal of all remedies is the preservation of competition that would otherwise be lost as a result of a proposed transaction. Other underlying principles are the need for a tailored remedy, the duration of the remedy, the practicality of the remedy and the various risks associated with the remedy (e.g., sufficiency of the asset package and associated remedies, suitability of the proposed purchaser and difficulties associated with implementation). While the underlying principles remain the same, their application may differ depending on whether the merger under consideration is a horizontal merger (i.e., between two or more parties at the same functional level), a vertical merger (i.e., between two or more parties at different functional levels), a mixed horizontal and vertical merger, or a conglomerate merger (i.e., between two or more parties in adjacent markets). In addition, there may be differences that arise in the application of the underlying principles depending on the industry or market in which the alleged anticompetitive merger occurs. These issues are the subject of Chapter 2.

Before embarking on a process of remedy design it is also important to understand the underlying economic considerations. The merger parties and the antitrust authority are driven by differing incentives, including in relation to the identity of the proposed divestiture buyer and the scope of the asset package. In addition, remedies will be utilised where a transaction is not so clearly anticompetitive that the antitrust authority determines that it should be blocked outright. Therefore, when designing remedies there is an important trade-off between restoring competition that may be lost as a result of a proposed transaction and preserving the efficiencies that may result from the transaction. The economic considerations relating to merger remedies are covered in Chapter 3.

37 Id. at 135–36. Phase I refers to the automatic 25-day period that the EC has to review a merger subject to the notification requirements under European competition law. Phase II, similar to a ‘second request’ under the Hart-Scott-Rodino Act in the United States, refers to the longer investigation period that follows Phase I if the EC has significant concerns concerning the merger.

38 Id. at 136.
Ultimately, antitrust laws are directed towards protecting competition and promoting consumer welfare. Therefore, it is vital to understand consumer considerations in the context of remedy design. This issue is dealt with in Chapter 4. Poor remedy design has the potential to adversely impact consumers.

Part II moves on to look at specific types of remedies.

As noted above, merger remedies can, as a general matter, be divided into two types – structural and behavioural. As discussed more fully throughout this book, antitrust authorities have a preference for structural remedies. Earlier this year, the US Assistant Attorney General for the Antitrust Division, Makan Delrahim, stated that the use of consent decrees should be ‘consistent with a view of the Antitrust Division as a law enforcement agency, not a regulatory one’. Delrahim went on to say that ‘behavioral conditions are fundamentally regulatory, imposing government supervision on what should be free markets.’ In late May 2018, the US Department of Justice (DOJ) announced the largest-ever US antitrust divestiture (at approximately US$9 billion) in relation to Bayer’s acquisition of Monsanto. The remedy in Bayer/Monsanto provides an example of the agency’s preference for structural remedies, even in instances where vertical concerns are being addressed.

Divestiture is the key form of structural remedy. A critical issue to consider will be the scope of any divestiture that forms part of a merger remedy. For example, will the parties be required to divest a stand-alone business or an asset package? As the FTC and the Canadian Competition Bureau found in retrospective studies reviewed earlier in this chapter, divestitures of ongoing businesses were found to be more effective in contrast to divestitures of an asset package. If an asset package is to be divested, however, what should this package include in order to preserve competition? Recently, the US Deputy Assistant Attorney General for the Antitrust Division described some of the risks associated with asset carveouts and described this form of divestiture as ‘inherently suspect’. Further, in describing the top three challenges facing the FTC as part of his confirmation process, Chairman Joseph Simons has stated that federal antitrust agencies have been too permissive in dealing with mergers and acquisitions. He specifically noted that the failure rate of asset carveouts identified in the FTC Report (discussed above) was ‘too high and need[ed] to be lowered substantially or, ideally, zeroed out altogether’. In addition to divestiture, there are a number of alternative and often useful forms of structural remedy, including licensing and


asset swap arrangements, that can be used. Chapter 5 addresses issues relating to divestiture and other structural remedies more fully.

While antitrust authorities repeatedly emphasise a preference for structural merger remedies, the fact remains that behavioural non-structural remedies can be beneficial in certain circumstances. When partnered with structural remedies, non-structural remedies can ‘fine-tune the remedy’ and restore any competition that may be lost if only a structural remedy were utilised. Obviously, the risk of ‘over-remedying’ is also present. In addition, practical issues can arise given the difficulties associated with regulating compliance with and enforcing breaches of non-structural remedies. Chapter 6 looks at various types of non-structural remedies, including those that are focused on conduct within the merged entity and others that are focused on how the merged entity deals with customers and others in the industry moving forward.

Finally, Part II looks at the important issue of merger remedies in regulated industries. In many circumstances, parties to a transaction are subject to a dual review model, meaning the transaction is scrutinised by the antitrust agencies applying the general merger review framework as well as assessment by an industry-specific agency that administers a regulatory regime. Using the telecommunications, banking and energy sectors as a point of reference, Chapter 7 explores some of the challenges and benefits that a dual review system can create when remedies are being framed. Ultimately, merger remedies should not go further than they need to in order to address the competitive harm posed by a transaction.

In the vast majority of cases, the design and selection of remedies will be informed by process and implementation considerations. Part III covers these issues in detail.

A fundamental process consideration, particularly in the context of multi-jurisdictional merger reviews, is timing. This is the subject of Chapter 8. In circumstances where parties anticipate that remedies may be required, it will be important to consider an appropriate outside or long-stop date in the transaction agreement. Further, the parties should give careful thought to review timing and sequencing of merger filings, particularly where remedy negotiations are expected.

Related to the timing considerations is the process for identifying and approving suitable buyers. A well-designed structural remedy will only be effective if the beneficiary of the assets is able to use them in a way that maintains or enhances competition. For example, will the proposed buyer possess the competitive and financial viability, as well as the operational expertise to run the divestiture business? These considerations may be further complicated in instances where the divestiture involves highly regulated industries or industries with a strong focus on R&D. Furthermore, will the sale of the divestiture assets to the proposed buyer have the effect of creating new competition concerns? Chapter 9 deals with these issues, as well as the transaction mechanics and timing relating to suitable buyers, in further detail.

Matters relating to the implementation of the remedy are the subject of Chapter 10. While the underlying rationale for a particular merger remedy may be easy to describe at a high level, converting this into a written consent decree or regulatory instrument can be a challenging exercise for the antitrust authority. There is an information asymmetry between the antitrust authority and the parties. The authority will rely on the parties to provide sufficient information regarding the proposed buyer and the divestiture business to allow it to craft the remedy. In addition, the parties will need to draft commercial agreements for the
disposal of the divestiture assets to the approved buyer, which are consistent with and give effect to the remedy negotiated with the antitrust authority. These drafting exercises are often complicated because of their substance but also because of the fact that their negotiation involves a number of stakeholders with differing motivations.

Part IV reviews issues relating to compliance and enforcement. Where parties do not comply with the terms of a regulatory instrument or agreement, the effectiveness of a merger remedy may be curtailed. For these reasons, antitrust authorities often incorporate monitoring, compliance reporting and inspection requirements into the merger remedy order. While compliance and monitoring are fundamental elements of an effective merger remedy regime, it also results in ongoing costs for the parties and the antitrust authority. Chapter 11 provides practical insights from a practitioner who regularly serves as a compliance monitor. In particular, the chapter addresses challenges arising during the sale process as well as common hurdles encountered when implementing and monitoring asset maintenance, hold separate and ring-fencing obligations. Chapter 12 then addresses matters relating to compliance, including common provisions that are included in consent decrees. The chapter goes on to discuss the enforcement mechanisms available where parties do not comply with their obligations. Further, it provides an overview of some of the provisions that the DOJ has started including in consent decrees in order to increase the parties’ incentive to comply. These include lowering the standard for violations to a ‘preponderance of the evidence’ and also requiring the parties to pay the DOJ’s investigatory and litigation costs in the event of a successful enforcement action.43

The substance of Parts I to IV demonstrates that the area of merger remedies is complicated and there is no one-size-fits-all methodology for addressing anticompetitive concerns. Therefore, first-hand perspectives from an antitrust authority and private practice provide a useful lens through which to look at practical considerations when negotiating merger remedies. Part V provides these different perspectives. In Chapter 13, the former head of the Compliance Division of the FTC’s Bureau of Competition gives insights regarding the buyer approval process and mechanisms for ensuring expedited consideration of a proposed remedy by an antitrust authority. In Chapter 14, a practitioner outlines strategies for engaging with the antitrust authority in relation to a merger remedy, including tips for presenting the divestiture package and proposed purchaser to the antitrust authority.

While many aspects of merger remedy practice are common around the world, Part VI profiles some of the unique issues in the jurisdictions of Brazil (Chapter 15), Canada (Chapter 16), China (Chapter 17), India (Chapter 18), Japan (Chapter 19) and Mexico (Chapter 20). The relevance of these chapters is not limited to practitioners within each of the countries covered. Rather, the insights will be particularly useful for practitioners coordinating a multi-jurisdictional transaction that may raise antitrust issues in one or more of the countries covered in Part VI.

Part VI, as well as a number of other chapters in this book, touch on various issues that are unique to the negotiation of remedies in the context of multi-jurisdictional mergers. For example, when should the parties engage in discussions regarding remedies with

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various antitrust authorities and in what order? Parties should be aware that antitrust authorities (via confidentiality waivers) will engage with one another and likely discuss various issues relating to the remedy, including the structure and content of the remedy, whether to require a single purchaser, the viability of the divestiture business, the duration of the divestiture period and the implementation risks associated with the remedy.

Another issue that will likely arise in the context of multi-jurisdictional mergers is whether a remedy that is sufficient to address concerns of one antitrust authority will also address the concerns of another? If not, how should this disparity be addressed? For example, in order to address local concerns an authority may need to design its own bespoke solution, which is modelled on a remedy that has been accepted in other jurisdictions.

Given the number of transactions that cross national borders and are considered by antitrust authorities in numerous jurisdictions, future editions of this book will continue to consider the complexities associated with multi-jurisdictional merger remedy practice.

We thank each of the authors for their contribution and trust that you will find this publication to be a helpful resource in your merger remedy practice.
Appendix 1

About the Authors

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Ronan Harty is a partner in Davis Polk’s Litigation Department. He provides general antitrust counselling to US and non-US companies and represents clients in enforcement agency investigations, domestic and cross-border acquisitions and joint ventures, and litigations.

Mr Harty joined Davis Polk in 1986. He received a Bachelor of Civil Law from University College, Dublin with first-class honours in 1984. In 1986, he received an LLM from the University of Michigan Law School, where he was awarded a Cook Fellowship for Legal Research. In 1991, he served as an assistant (stagiaire) in the Cabinet of Sir Leon Brittan, Vice President of the European Communities Responsible for Competition Policy.

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Successfully remediying the potential anticompetitive effects of a merger can be more of an art than a science. Not only is every deal specific, but, as noted by Ronan Harty in his introduction, every remedy contains an element of ‘crystal ball-gazing’; enforcers need to look into the future and successfully predict outcomes.

As such, practical guidance for both practitioners and regulators in navigating this challenging environment is critical. *The Guide to Merger Remedies* – published by Global Competition Review – is unique in providing this detailed guidance and analysis. It examines remedies throughout their life cycle: from the fundamental principles; to the remedies available; through how remedies are structured and implemented; and including how enforcers ensure compliance. Insights from around the world, ranging from Brazil to China, supplement the global analysis to inform the reality of multi-jurisdictional deals.

Drawing on the wisdom and expertise of 47 distinguished practitioners from 18 firms, the Guide draws together unparalleled proficiency in the field and provides essential guidance for all competition professionals.