GCR

MERGER REMEDIES GUIDE

FOURTH EDITION

Editors
Ronan P Harty, Nathan Kiratzis and Anna M Kozlowski

Merger Remedies Guide

Fourth Edition

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Ronan P Harty

Nathan Kiratzis

Anna M Kozlowski

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Overview

Ronan P Harty, Nathan Kiratzis and Anna M Kozlowski[1]

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. The competitive conditions in the market are affected by features of the relevant industry, but also by circumstances that have economy-wide effects, such as the ongoing covid-19 pandemic. In turn, any changes to markets and industrial structures will need to be taken into account by antitrust authorities when they assess mergers. 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 about the design and implementation of merger remedies, often referring to practices and precedents from the United States and the European Union. However, as noted

1 Ronan P Harty is a partner, and Nathan Kiratzis and Anna M Kozlowski are associates, at Davis Polk & Wardwell LLP.

above, merger rules are global in nature and, therefore, the final part of the book is devoted to a review of four other jurisdictions around the world: Australia, China, India and Japan.

This chapter provides a detailed overview of each of the parts that make up this book. At the outset, however, we share some initial thoughts on the effects of covid-19 on merger remedies and give 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 are a useful introduction to some of the key issues that are covered in greater detail throughout the book. They also serve as a means of understanding the effectiveness of merger remedies negotiated in the past.

The impact of covid-19 on merger remedies

While the world continues to grapple with the short-term and long-term effects of the coronavirus pandemic, covid-19 appears to have had relatively little impact on the approach of antitrust authorities to merger enforcement and remedies. Indeed, early in the pandemic, numerous regulators committed to rigorous merger review in the face of uncertain market conditions. The US Federal Trade Commission (FTC) Bureau of Competition, for example, specifically stated that it would not 'lower the Commission's standards for effective relief' in merger matters.[2] Anticipating a rise in failing firm claims by merging parties, the Bureau likewise published a statement cautioning that it would 'not relax the stringent conditions that define a genuinely "failing" firm'.[3] The United Kingdom's Competition and Markets Authority (CMA) similarly confirmed that the pandemic would not result in a 'relaxation of the standards by which mergers are assessed' and issued a refresher on its approach to failing firm claims.[4] More recently, the CMA reiterated these sentiments in a joint statement with the Australian Competition and

2 Ian Connor, 'Antitrust Review at the FTC: Staying the Course During Uncertain Times' (6 April 2020), available at https://www.ftc.gov/news-events/blogs/competition-matters/2020/04/antitrust-review-ftc-staying-course-during-uncertain.

3 Ian Connor, 'On 'Failing' Firms – and Miraculous Recoveries' (27 May 2020), available at https://www.ftc.gov/news-events/blogs/competition-matters/2020/05/failing-firms-miraculous-recoveries.

4 Competition and Markets Authority [CMA], 'Merger Assessments During the Coronavirus (COVID-19) Pandemic' (22 April 2020), available at https://www.gov.uk/government/publications/merger-assessments-during-the-coronavirus-covid-19-pandemic/merger-assessments-during-the-coronavirus-covid-19-pandemic; CMA, 'Annex A: Summary of CMA's Position on Mergers Involving "Failing Firms"' (22 April 2020), available at https://www.gov.uk/government/publications/merger-assessments-during-the-

Consumer Commission and German Bundeskartellamt, in which they explained that competition authorities cannot base merger assessments 'on speculation or unfounded claims as to the impact of the pandemic'.[5] This continued commitment to careful merger reviews and application of necessary remedies is exemplified in the US Department of Justice (DOJ) Antitrust Division's 2020 challenge of the proposed acquisition by Dairy Farmers of America Inc (DFA) of fluid milk processing plants from Dean Food Company out of bankruptcy. Although DOJ observed that the dairy industry was in the midst of a tumultuous time and covid-19 had caused demand for milk by schools and restaurants to collapse, the regulator nevertheless required DFA to agree to divestitures to approve the deal.[6]

US Federal Trade Commission: 2017 Report

The first retrospective study considered is the US FTC Report released in January 2017.[7] The FTC Report examined 89 merger orders issued by the FTC between 2006 and 2012. Of these 89 orders, 76 imposed structural remedies. Five

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coronavirus-covid-19-pandemic/annex-a-summary-of-cmas-position-on-mergers-involving-failing-firms.

5 CMA, Joint Statement on Merger Control Enforcement (20 April 2021), available at https://www.gov.uk/government/publications/joint-statement-by-the-competition-and-markets-authority-bundeskartellamt-and-australian-competition-and-consumer-commission-on-merger-control/joint-statement-on-merger-control-enforcement.

6 US Department of Justice [DOJ], 'Justice Department Required Divestitures as Dean Foods Sells Fluid Milk Processing Plants to DFA out of Bankruptcy' (1 May 2020), available at https://www.justice.gov/opa/pr/justice-department-requires-divestitures-dean-foods-sells-fluid-milk-processing-plants-dfa.

7 US Federal Trade Commission [FTC], The FTC's Merger Remedies 2006–2012: A Report of the Bureaus of Competition and Economics (2017) [FTC Report], available at www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf. Notably, in September 2020, the FTC's Bureau of Economics announced a revamped Merger Retrospective Program and renewed commitment to retrospective research. Among other initiatives, the Merger Retrospective Program will provide an annual report on the lessons of recent retrospective studies and maintain a website devoted to research on merger retrospectives. FTC, 'FTC's Bureau of Economics to Expand Merger Retrospective Program' (17 September 2020), available at https://www.ftc.gov/news-events/press-releases/2020/09/ftcs-bureau-economics-expand-merger-retrospective-program. Relatedly, in January 2021, the FTC announced a retrospective study targeted at the 'effects of physician group and healthcare facility consolidation' between 2015 and 2020, and issued orders to provide information for that study to a number of health insurance companies. FTC, 'FTC to Study the Impact of Physician Group and Healthcare Facility Mergers' (14 January 2021), available at https://www.ftc.gov/news-events/press-releases/2021/01/ftc-study-impact-physician-group-healthcare-facility-mergers. Along those lines, in

merger orders required a mixture of structural and what can be termed non-structural or behavioural remedies.[8] Another six orders 'required only non-structural relief', and two others 'required relief other than divestiture that was designed to facilitate entry'.[9] Although 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 4 and non-structural remedies are discussed in Chapter 5.

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.[10] Of the 50 merger orders analysed, 46 were for horizontal mergers (40 involved structural remedies and six involved non-structural remedies) and four were for 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.[11] 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.[12] The remaining 17 per cent were rated 'a failure', meaning that the remedy did not maintain or restore competition in the relevant market.[13]

March 2021, the FTC likewise initiated a working group with other competition agencies to update their approach to analysing pharmaceutical mergers, including the types of remedies that work best for those mergers. FTC, 'FTC Announces Multilateral Working Group to Build a New Approach to Pharmaceutical Mergers' (16 March 2021), available at https://www.ftc.gov/news-events/press-releases/2021/03/ftc-announces-multilateral-working-group-build-new-approach.

8 The terms 'non-structural remedy' and 'behavioural remedy' are synonymous and are used interchangeably throughout this chapter.

9 FTC Report (footnote 7, above), at 7.

10 id. at 11.

11 id. at 15 and 18.

12 id.

13 On 9 July 9, 2021, President Biden signed an Executive Order setting out his administration's antitrust policies. Among other things, the Order 'reaffirms that the United States retains the authority to challenge transactions whose previous consummation was in violation of' the antitrust laws. This may signal a greater focus by the US antitrust agencies on

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 in which structural remedies were imposed, success, as defined by the FTC, was far more likely in situations when the remedy was implemented before the merger was consummated (75 per cent) versus situations in which the merger had already been consummated (26 per cent).[14] Based on these results, in 2019, the FTC's Bureau of Competition reiterated its strong preference for divesting assets to an 'upfront buyer', writing: 'While no approach is foolproof, divesting assets to an upfront buyer has been the most consistently effective means for achieving successful merger remedies.'[15] An upfront buyer is an identified buyer with which the merger parties negotiate, finalise and execute a purchase agreement and all ancillary agreements before the proposed order is accepted by the antitrust authority. On the other hand, a 'post-order buyer' refers to a situation in which the parties agree to divest certain assets to a buyer approved by the antitrust authority within a certain amount of time after the authority issues a final merger remedy order. A review of FTC consent decrees entered in the past year, on mergers across a variety of industries, confirm the agency's strong continued preference for upfront buyers.[16]

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consummated mergers going forward, including mergers with failed remedies. White House, Executive Order on Promoting Competition in the American Economy (9 July 2021), available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

14 FTC Report, at 18 and 19.

15 Ian Conner, Bureau of Competition, FTC, 'The uphill case for a post-Order divestiture' (21 March 2019), available at www.ftc.gov/news-events/blogs/competition-matters/2019/03/uphill-case-post-order-divestiture.

16 See, e.g., FTC, 'FTC Imposes Conditions on E. & J. Gallo Winery's Acquisition of Assets from Constellation Brands, Inc.' (23 December 2020), available at https://www.ftc.gov/news-events/press-releases/2020/12/ftc-imposes-conditions-e-j-gallo-winerys-acquisition-assets (requiring both Gallo Winery and Constellation Brands to divest several product lines to Precept, Sazerac and Vie-Del); FTC, 'FTC Approves Final Order Imposing Conditions on Stryker Corp.'s Acquisition of Wright Medical Group N.V.' (17 December 2020), available at https://www.ftc.gov/news-events/press-releases/2020/12/ftc-approves-final-order-imposing-conditions-stryker-corps (requiring Stryker and Wright Medical Group to divest all assets associated with Stryker's total ankle replacements and finger joint implants to DJO Global); FTC, 'FTC Approves Final Order Imposing Conditions on Arko Holdings Ltd.'s Acquisition of Empire Petroleum Partners, LLC' (7 October 2020), available at https://www.ftc.gov/news-events/press-releases/2020/10/ftc-approves-final-order-imposing-conditions-arko-holdings-ltds (requiring Arko and Empire to divest fuel assets to a number of independent competitors in seven local markets in Indiana, Michigan, Maryland and Texas); FTC, 'FTC Approves Final Order Requiring Animal Health Product Suppliers Elanco Animal

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 buyer.[17] Although 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.[18] The issues associated with divestiture, and the difficulties associated with defining an asset package that will be sufficient to restore competition, are dealt with in Chapters 4, 9, 11 and 12.

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.[19] Based on the participants' responses and a survey of publicly available market data, the FTC concluded that 39 of the 43 buyers continued to function and provide competition in the relevant markets.[20] The importance of selecting a suitable buyer in the context of a merger remedy is discussed in detail in Chapter 8.

Health, Inc. and Bayer Animal Health GmbH to Divest Assets in Three Product Markets as a Condition of Acquisition' (11 September 2020), available at https://www.ftc.gov/news-events/press-releases/2020/09/ftc-approves-final-order-requiring-animal-health-product (ordering Elanco to divest products to Dechra Limited, PetIQ, LLC and Neogen Corporation); FTC, 'FTC Approves Final Order Imposing Conditions on Casino Operators Eldorado Resorts, Inc. and Caesars Entertainment Corporation' (26 August 2020), available at https://www.ftc.gov/news-events/press-releases/2020/08/ftc-approves-final-order-imposing-conditions-casino-operators (stating that the merging parties agreed to divest casino-related assets in Nevada and Louisiana to Twin River Worldwide Holdings, Inc.).

17 FTC Report (footnote 7, above), at 21.

18 id. at 22.

19 id. at 29.

20 id.

UK Competition and Markets Authority: 2019 Report

Another recent retrospective study of merger remedies was conducted by the CMA.[21] The CMA has an established programme of evaluating its merger remedies and has undertaken reviews regularly since its creation in 2014, publishing its latest report in 2019.[22] As with the FTC Report, the CMA relied principally on interviews with market participants to evaluate the effectiveness of the merger remedy.[23] However, in contrast to the FTC Report, the CMA Report evaluates the effectiveness of 18 past merger remedies rather than surveying all remedies within a particular period.[24]

The CMA Report provided commentary on three matters that involved a particular type of non-structural remedy – the use of price controls. 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 Aluminum-Veredlung GmbH & Co (Alanod) acquired Metalloxyd Ano-Coil Ltd in 1999, giving it a 75 per cent share in the United Kingdom market for anodised aluminium coils used in lighting.[25] 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.[26] Broadly, the price control was unnecessary because market prices never approached the price control's limit.[27] 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'.[28]

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21 CMA, 'Merger Remedy Evaluations: Report on Case Study Research' (2019) [CMA Report], available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/811252/Merger_remedy_evaluations_2019.pdf.

22 id. at 2. The UK CMA's predecessor agency, the Competition Commission, published 11 case studies in four tranches between 2007 and 2012.

23 id. at 11.

24 id.

25 CMA, 'Merger Remedy Evaluations: Appendices', at 32 (2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/809667/Merger_remedy_evaluations_2019_-_Appendices.pdf.

26 id. at 33.

27 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 probably had the market power to raise prices above the control's upper limit. id. at 36.

28 id. at 36.

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.[29] The CC and OFT imposed non-structural remedies, including a price control.[30] 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'.[31]

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.[32] 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 anti-competitive 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.[33]

In 2018, the CMA acknowledged these disadvantages of price controls in a guide to merger remedies, which sets forth the regulator's approach to remedies in Phase I and Phase II merger investigations.[34] In this guide, the CMA refers to its preference for structural remedies, but explains that behavioural remedies may be necessary at times.[35] Behavioural remedies, in turn, may take one of two forms:

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29 id. at 42.

30 A second behavioural remedy was an agreement from Coloplast not to renew an exclusivity agreement with a US distributor of non-latex sheaths.

31 CMA, 'Merger Remedy Evaluations: Appendices' (footnote 25, above), at 48.

32 id. at 55.

33 id. at 67.

34 CMA, Merger Remedies (2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764372/Merger_remedies_guidance.pdf.

35 id. at 17. In a joint statement with the Australian Competition and Consumer Commission and Germany's Federal Cartel Office (Budeskartellamt) (see footnote 5, above), the

either 'enabling' or 'controlling'. Between these two forms, the CMA prefers enabling measures, that 'work with the grain of competition',[36] over controlling measures that seek to 'prevent the merger parties from exercising the enhanced market power that they are likely to acquire from a merger'.[37] Price controls, such as those described above, fall within the latter category and suffer from numerous disadvantages.[38] When implementing price controls, for example, the CMA risks setting price caps at an inappropriate level, especially when the market is characterised by volatile pricing, individually negotiated pricing and differentiated or changing products or services.[39] Furthermore, the CMA explains that price controls may deter entry or discourage innovation in the market.[40] As a result, the CMA states that it will only use non-structural 'control measures' where other remedies are not feasible or appropriate, and will probably require them on a 'temporary basis' only.[41]

Canadian Competition Bureau: 2011 Report

A retrospective study was conducted by the Canadian Competition Bureau in 2011.[42] The report studied the effectiveness of 23 merger remedies obtained by the Competition 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.[43]

In sum, 16 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.[44] The other four structural remedies were either never fulfilled (i.e., the

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CMA reiterated its preference for structural remedies, describing them as 'more likely to preserve competition' when compared to behavioural remedies, which may 'raise significant circumvention risks', become quickly outdated, and potentially 'distort the natural development of the market'.

36 CMA, Merger Remedies, at 18 (internal quotation marks omitted).

37 id. at 59–60.

38 id. at 60.

39 id.

40 id.

41 id. at 60–61.

42 Canadian Competition Bureau, 'Merger Remedies Study' (2011), available at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-merger-remedy-study-summary-e.pdf/$FILE/cb-merger-remedy-study-summary-e.pdf.

43 id. at 2.

44 id.

assets subject to the divestiture requirement were never sold to a third party)[45] or the divested businesses were 'no longer operating'.[46] Consistent with the findings in the FTC Report, the Competition Bureau also observed that divestiture tended to be more successful when the divested asset was a 'stand-alone operating business, as opposed to components of a business'.[47] Moreover, even when 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'.[48]

European Commission: Directorate-General for Competition: 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.[49] This review analysed a sample of 40 merger decisions adopted by the European Commission between 1996 and 2000, which accounted for 44 per cent of all merger decisions involving remedies during that period. Although the 40 decisions involved 130 remedies, the report only studied 96 remedies for which sufficient data was available.[50]

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.[51] DG Comp classified each of the merger remedies as 'effective',

45 id.

46 id. at 5.

47 id.

48 id.

49 European Commission: Directorate-General for Competition, 'Merger Remedies Study' (2005) [EC: DG Comp, Merger Remedies Study], available at http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf.

50 id. at 12.

51 id. at 20. In a June 2021 speech, Margrethe Vestager, Executive Vice-President of the EC, confirmed that the Commission 'generally look[s] for structural remedies for horizontal mergers between direct competitors' but considers behavioural or quasi-structural remedies in cases of vertical or conglomerate mergers that do not involve direct competitors. Margrethe Vestager, 'Defending Competition in a Digital Age' (24 June 2021), available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defending-competition-digital-age_en.

'partially effective', 'ineffective' or 'unclear'.[52] 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.[53]

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.[54] The report speculated that this disparity was probably explained by the fact that Phase II investigations generally involve more complicated merger cases with more significant antitrust concerns.[55]

GCR Merger Remedies Guide

The retrospective reviews conducted by antitrust authorities in the United States, the 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 provides comprehensive coverage of a number of key aspects of merger remedy practice, from the underlying principles to the design and negotiation of the remedy, followed by discussion of issues about 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.

The chapters in Part I 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

52 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 Directorate-General 'could not determine whether the remedy had achieved its stated objective'. EC: DG Comp, Merger Remedies Study (footnote 49, above),at 132.

53 id. at 133.

54 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 about the merger.

55 id. at 136.

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). Although 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).[56] 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 1.

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.[57]

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56 The DOJ and FTC released an updated set of Vertical Merger Guidelines in June 2020, which are silent on the preferred remedies for vertical transactions raising competitive concerns. DOJ and FTC, 'Vertical Merger Guidelines' (30 June 2020), available at www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf. Notably, the two Democrat commissioners at the time dissented, with Commissioner Rebecca Slaughter specifically referencing in her dissenting statement the fact that the guidelines did not address remedies: 'the Guidelines do not address how the Agencies will address remedies in vertical mergers. Discussion of Agency considerations regarding remedies, whether behavioral or structural, would have been helpful, and additional comment specifically on this topic could have been solicited'. Dissenting Statement of Commissioner Rebecca Kelly Slaughter, 'In re FTC-DOJ Vertical Merger Guidelines, Commission File No. P810034', at 7 (30 June 2020), available at www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf. It is possible that the 2020 Vertical Merger Guidelines will soon be amended to address these remedies, as the FTC and DOJ has announced plans to jointly review both the horizontal and vertical merger guidelines 'with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law'. FTC, 'Statement of FTC Chair Lina Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to the Merger Guidelines' (9 July 2021), available at https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-khan-antitrust-division-acting-assistant?utm_source=govdelivery.

57 Notably, in a recent letter to US Senator Elizabeth Warren, FTC Chair Lina Khan expressed her belief that the US antitrust agencies 'should more frequently consider opposing

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 2.

Ultimately, antitrust laws are directed towards protecting competition, consumers and workers. Therefore, it is vital to consider the preservation of competition and deterrence of future anticompetitive conduct in the context of remedy design. For example, remedies should not create ongoing regulation of a market, impart only temporary relief or place the risk of failure on consumers. This issue is dealt with in Chapter 3.

Part II of the book looks at specific types of remedies.

As noted above, merger remedies, as a general matter, can be divided into two types: structural and behavioural. As discussed more fully throughout this book, antitrust authorities generally have a preference for structural remedies, particularly the DOJ in the United States. In its most recent Merger Remedies Manual, released in September 2020 (the Merger Remedies Manual), the DOJ expressly states: 'Structural remedies are strongly preferred in horizontal and vertical merger cases because they are clean and certain, effective, and avoid ongoing government entanglement in the market.'[58] This language reflects earlier statements by the previous US Assistant Attorney General for the Antitrust Division, Makan Delrahim, 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'.[59] The divestiture remedy imposed by the DOJ in relation to Bayer's acquisition of Monsanto in 2018 provides an example of the agency's preference for structural

problematic deals outright', as even structural remedies 'may prove inadequate in the face of an unlawful merger'. 'Letter from Lina Khan, FTC Chair, to Elizabeth Warren, U.S. Senator' (6 August 2021), available at https://www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf.

58 DOJ, Antitrust Division, Merger Remedies Manual, at 13 (2020), available at www.justice.gov/atr/page/file/1312416/download. Although the FTC and DOJ have announced their intention to revisit the horizontal and vertical merger guidelines (see footnote 56, above), it remains to be seen whether they will review the recent Merger Remedies Manual as well.

59 DOJ, 'Remarks of Assistant Attorney General Makan Delrahim Delivered at the New York State Bar Association' (25 January 2018), available at www.justice.gov/opa/speech/remarks-assistant-attorney-general-makan-delrahim-delivered-new-york-state-bar. On 20 July 2021, President Biden announced his intention to nominate Jonathan Kanter for Assistant Attorney General for the Antitrust Division at the DOJ. It remains to be seen whether Kanter, if confirmed, will review and revise this guidance.

remedies, even in instances where vertical concerns are being addressed.[60] Similarly, the European Commission's Remedies Notice clearly states: 'Divestiture commitments are the best way to eliminate competition concerns from horizontal overlaps, and may also be the best means of resolving problems resulting from vertical or conglomerate concerns.'[61]

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? And will they need to identify the buyer of assets up front or post-order? As the FTC and the Canadian Competition Bureau found in the 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. Relying on the FTC's findings, the Merger Remedies Manual likewise sets forth the DOJ's clear preference for divestitures of stand-alone businesses.[62] By contrast, the antitrust authorities have tended to view asset carve-outs as 'inherently suspect'.[63] For example, in describing the top three challenges facing the FTC as part of his confirmation process, former Chairman Joseph Simons noted that the failure rate of asset carve-outs identified in the FTC Report (discussed above) was 'too high and need[ed] to be lowered substantially or, ideally, zeroed out altogether'.[64] Nevertheless, the Merger Remedies Manual explains that asset carve-outs may be appropriate in limited circumstances, such as when there is no existing stand-alone business smaller than either of the merging firms.[65] As for the identifi-

60 DOJ, 'Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto' (29 May 2018), available at www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened.

61 EC, Commission notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004, ¶ 17 (22 October 2008), available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2008:267:FULL&from=EN.

62 Merger Remedies Manual (footnote 58, above), at 8.

63 See DOJ, 'Deputy Assistant Attorney General Barry Nigro Delivers Remarks at the Annual Antitrust Law Leaders Forum in Miami, Florida' (2 February 2018), available at www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-remarks-annual-antitrust-law.

64 Statement on Biographical and Financial Information of Joseph J Simons, dated 31 January 2018, submitted to the US Senate Committee on Commerce, Science, and Transportation, available at www.commerce.senate.gov/public/_cache/files/6c4149af-3023-4825-90f1-3c38e279fd0d/6A0CCF409AF89DC8D5C0A84CE8730012.confidential---simons---committee-questionnaire-redacted.pdf.

65 Merger Remedies Manual (footnote 58, above), at 10.

cation of the ultimate buyer of assets, the FTC staff, as discussed above, have made clear their strong preference for upfront buyers, as they 'minimize the risks that acquired assets will lose value'; for example, because of a loss of employees, customers or opportunities, or that 'competition will be diminished while ownership of the assets remains uncertain'.[66] The DOJ expresses similar views in its Merger Remedies Manual.[67] In addition to divestiture, there are a number of alternative and often useful forms of structural remedies that can be used, including licensing and asset swap arrangements. Chapter 4 addresses issues about divestiture and other structural remedies more fully.

Although antitrust authorities often emphasise a preference for structural merger remedies, the fact remains that behavioural non-structural remedies can be beneficial in certain circumstances. Historically, the FTC has been less rigid than the DOJ in relation to the role of behavioural remedies. Bruce Hoffman, former Director of the Bureau of Competition, explained in early 2018 that the 'FTC prefers structural remedies to structural problems' but that behavioural remedies 'can prevent competitive harm while allowing the benefits of integration'.[68] As an example, in January 2019, the FTC cleared the merger of Staples Inc and Essendant Inc pursuant to Staples' commitment to establish a firewall separating its business-to-business sales operations from Essendant's wholesale business, a remedy that would restrict Staples' access to the commercially sensitive information of Essendant's customers.[69] Furthermore, courts may impose behavioural remedies despite the DOJ's preference for structural remedies. In *Steves & Sons, Inc v. Jeld-Wen, Inc*, a private antitrust litigation, the District Court for the Eastern District of Virginia required defendant Jeld-Wen, Inc to both divest itself of an earlier acquired facility and to abide by a number of behavioural remedies.[70] The Court imposed the non-structural remedies even though the United States filed

66 Ian Conner (see footnote 15 above).

67 Merger Remedies Manual (footnote 58, above), at 22. The DOJ has also stated that consent decrees may bind the divestiture buyer or other third parties that are instrumental to the enforcement of the decree. id. at 28.

68 D Bruce Hoffman, FTC, 'Remarks at Credit Suisse 2018 Washington Perspectives Conference' (10 January 2018), at 7–8, available at www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf.

69 FTC, 'FTC Imposes Conditions on Staples' Acquisition of Office Supply Wholesaler Essendant Inc.' (28 January 2019), available at www.ftc.gov/news-events/press-releases/2019/01/ftc-imposes-conditions-staples-acquisition-office-supply.

70 See *Steves & Sons, Inc. v. Jeld-Wen, Inc.*, 345 F. Supp. 3d 614 (E.D. Va. 2018), appeal docketed, No. 19-1397 (4th Cir. 16 April 2019).

a statement of interest 'express[ing] its strong policy preference for structural relief'.[71] The Merger Remedies Manual reinforces the DOJ's view that stand-alone conduct relief will be appropriate in only the most limited of circumstances.[72]

Moreover, European national competition authorities (NCAs) have demonstrated a greater openness to behavioural remedies, particularly where competition conditions may change in the short run. In July 2019, for example, France, Germany and Poland published a document encouraging the European Commission to 'pay more attention to the relevance of behavioural remedies (e.g., commitments regarding price, quality or choice of contractual partners)'.[73] Similarly, in December 2019, Martijn Snoep, head of the Dutch Competition Authority, stated that competition authorities should 'overcome their aversion to behavioural remedies'.[74] Indeed, behavioural remedies are an essential tool for many European NCAs, including the French Competition Authority, which reported in 2020 that non-structural remedies were accepted in 55 per cent of clearance decisions since 2009 in which competition concerns had been identified.[75] Likewise, EU Commissioner for Competition, Margrethe Vestager, stated in June 2019 that a range of remedies, including commitments to provide access to relevant infrastructure and technology, need to be considered with respect to concentrations in the digital economy.[76]

Importantly, 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

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71 *Steves & Sons, Inc.*, No. 3:16-cv-00545-REP, at 1 (E.D. Va. 6 June 2018), ECF 1640.

72 id. at 16 ('Stand-alone conduct relief is appropriate only when the parties provide that: (1) a transaction generates significant efficiencies that cannot be achieved without the merger; (2) a structural remedy is not possible; (3) the conduct remedy will completely cure the anticompetitive harm; and (4) the remedy can be enforced effectively.').

73 See 'Modernising EU Competition Policy' (4 July 2019), available at www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4.

74 Natalie McNelis and Michael Acton, '"Overcome Aversion to Behavioral Remedies, Netherlands", Snoep Says' (10 December 2019), available at www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1149031&siteid=190&rdir=1.

75 Autorite de la Concurrence, 'Behavioural Remedies' at 294 (18 February 2020), available at www.autoritedelaconcurrence.fr/sites/default/files/2020-01/eng_comportementaux_final_en.pdf.

76 Melanie Bruneau, et al., 'Merger control: the road ahead', *Financier Worldwide Magazine* (August 2019), available at www.financierworldwide.com/merger-control-the-road-ahead#.XyQ6QvlKiUk (describing Commissioner Vestager's speech entitled 'Merger control: the road ahead', which she delivered in Brussels on 18 June 2019).

present. In addition, practical issues can arise given the difficulties associated with regulating compliance with and enforcing breaches of non-structural remedies. Chapter 5 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 dynamic industries. These markets, which are characterised by rapid change, innovation and disruption, present unique challenges for merger control, as it is not always clear how a transaction or a potential merger remedy will affect competition in a market subject to constant change. Using the pharmaceutical and high-technology sectors as a point of reference, Chapter 6 explores some of the challenges faced by antitrust agencies when crafting merger remedies for the purpose of preventing anticompetitive behaviour and simultaneously encouraging innovation.

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 subject is discussed in Chapter 7. 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 when remedy negotiations are expected.

Related to the timing considerations is the process for identifying and approving suitable buyers. A well-designed structural remedy will be effective only 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, and the operational expertise, to run the divestiture business? Views expressed by some FTC commissioners highlight these issues. In a 2018 FTC hearing, Commissioner Rohit Chopra raised the issue of divestiture buyers 'loaded with debt', observing that heavy debt loads could make it 'harder – or even impossible – to compete'.[77] Similarly, in a statement regarding the merger of Praxair, Inc and Linde AG, Chopra observed that the FTC should carefully scrutinise private equity funds before approving them as divestiture buyers, as

77 FTC, 'Prepared Remarks of Rohit Chopra: Hearings on Consumer Protection and Competition', at 3 (6 December 2018), available at www.ftc.gov/system/files/documents/public_statements/1432481/remarks_of_commissioner_chopra_at_ftc_hearing_on_corporate_governance.pdf.

they are 'associated with . . . firm behaviour that can reduce long-term competition, including opportunistic asset sales'.[78] These considerations may be further complicated in instances where the divestiture involves highly regulated industries or industries with a strong focus on research and development. Furthermore, will the sale of the divestiture assets to the proposed buyer have the effect of creating new competition concerns? Chapter 8 deals with these issues, and the transaction mechanics and timing relating to suitable buyers, in further detail.

Matters concerning the implementation of the remedy are the subject of Chapter 9. Whereas 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.

Merger parties should also keep in mind that remedies negotiated with certain antitrust regulators may not receive approval from other government authorities, such as state attorneys general, or from the courts. With respect to the *T-Mobile/Sprint* transaction, for example, the merger parties at one point were sued by the attorneys general in more than one-third of the states despite entering into a settlement with the DOJ that required them to sell assets and enter into agreements aimed at establishing Dish Network as a fourth nationwide wireless carrier.[79]

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78 Statement of Commissioner Rohit Chopra, *In the Matter of Linde AG, Praxair, Inc., and Linde PLC*, File No. 1710086, at 2–3 (22 October 2018), available at www.ftc.gov/system/files/documents/public_statements/1416947/1710068_praxair_linde_rc_statement.pdf.

79 See New York Attorney General, 'AG James: Pennsylvania Addition to T-Mobile/Sprint Lawsuit Keeps States' Momentum Moving Forward' (18 September 2019), available at https://ag.ny.gov/press-release/2019/ag-james-pennsylvania-addition-t-mobilesprint-lawsuit-keeps-states-momentum; see also DOJ, 'Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish' (26 July 2019), available at www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package; *In the Matter of Applications of T-Mobile US, Inc. and Sprint Corporation Consolidated Applications for Consent to*

Part IV reviews issues about compliance and enforcement. When 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 in the merger remedy order. Although compliance and monitoring are fundamental elements of an effective merger remedy regime, they also result in ongoing costs for the parties and the antitrust authority.[80] Chapter 10 addresses compliance, including common provisions that are included in consent decrees. The chapter also discusses the enforcement mechanisms available when 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 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.[81]

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 11, the former assistant director of the Compliance Division of the FTC's Bureau of Competition gives insights

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Transfer Control of Licenses and Authorizations, WT Docket No. 18-197, available at www.fcc.gov/transaction/t-mobile-sprint. The plaintiff states ultimately lost their challenge of the *T-Mobile/Sprint* transaction. Decision and Order, *New York v. Deutsche Telecom AG*, No. 1:19-cv-05434-VM-RWL (SDNY 11 February 2020), Docket No. 409. In his opinion, Judge Marrero explained that the DOJ and Federal Communications Commission's conditional approval of the proposed merger did not immunise it from the plaintiff states' antitrust challenge, but stated that the court would have to assess the competitive effects of the merger as conditioned by federal regulators, treating their views as 'informative but not conclusive'. id. at 106–07 (internal quotation marks omitted).

80 Notably, in August 2020, the DOJ's Antitrust Division announced the creation of the Office of Decree Enforcement and Compliance, which will work closely with monitors and compliance officers to ensure 'effective implementation of and compliance with antitrust judgments'. DOJ, 'Assistant Attorney General Makan Delrahim Announces Re-Organization of the Antitrust Division's Civil Enforcement Program' (20 August 2020), available at www.justice.gov/opa/pr/assistant-attorney-general-makan-delrahim-announces-re-organization-antitrust-divisions-civil.

81 DOJ, 'Remarks of Assistant Attorney General Makan Delrahim Delivered at the New York State Bar Association' (footnote 59, above).

regarding the buyer approval process and mechanisms for ensuring expedited consideration of a proposed remedy by an antitrust authority. In Chapter 12, 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.

Although many aspects of merger remedy practice are common around the world, Part VI profiles some of the unique issues in Australia (Chapter 13), China (Chapter 14), India (Chapter 15) and Japan (Chapter 16). 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 aforementioned countries.

Part VI, and a number of other chapters in this book, touches 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 various antitrust authorities and in what order? Further, how can antitrust authorities design remedies that address competitive concerns across jurisdictions? Although multi-jurisdictional merger investigations may be difficult to coordinate and may result in divergent remedies, two useful resources that provide advice on avoiding such a result are the International Competition Network's 2016 'Merger Remedies Guide' and the Organisation for Economic Co-operation and Development's 2013 publication on 'Remedies in Cross-Border Merger Cases'.[82] Both publications reflect the views of antitrust authorities across the globe that extensive cooperation is necessary to achieve consistent and efficient merger remedies. To take advantage of the benefits of cooperation, merging parties should time their filing obligations in a way that will allow reviewing agencies to cooperate at key stages, and should grant appropriate confidentiality waivers that will facilitate communication and information sharing among agencies.[83] Antitrust authorities, in turn, should initiate contact with their counterparts as early as practicable (as soon as the need for remedies becomes evident),[84] and should continue regular discussions about the timing of

82 International Competition Network [ICN], 'Merger Remedies Guide' (2016), available at www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf; Organisation for Economic Co-operation and Development [OECD], 'Policy Roundtables: Remedies in Cross-Border Merger Cases' (2013), available at www.oecd.org/daf/competition/Remedies_Merger_Cases_2013.pdf.

83 OECD (footnote 82, above), at 5–6; ICN (footnote 82, above), at 29.

84 OECD (footnote 82, above), at 5; ICN (footnote 82, above), at 29.

remedy procedures, proposed divestiture buyers and draft remedy proposals.[85] Based on these communications, agencies may decide to implement separate, but non-conflicting, remedies or the same remedy.[86] If they do so, agencies may then consider implementing monitoring procedures, such as a common monitoring trustee, that will facilitate cooperation in overseeing the remedy.[87] These multi-jurisdictional efforts ultimately result in benefits for both merging parties and antitrust authorities, as cooperation often results in consistent, interoperable outcomes across jurisdictions that are more likely to succeed and minimise duplication of work for all involved.[88] Recent examples of international cooperation on remedies can be found in the *Praxair, Inc/Linde AG* and *Dow/DuPont* transactions.[89] Given the number of cross-border transactions, 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.

85 ICN (footnote 82, above), at 29.

86 id. at 20; OECD (footnote 82, above), at 5.

87 OECD (footnote 82, above), at 6; ICN (footnote 82, above), at 29.

88 ICN (footnote 82, above), at 29.

89 See, e.g., FTC, 'FTC Requires International Industrial Gas Suppliers Praxair, Inc. and Linde AG to Divest Assets in Nine Industrial Gas Markets as a Condition of Merger' (22 October 2018), available at www.ftc.gov/news-events/press-releases/2018/10/ftc-requires-international-industrial-gas-suppliers-praxair-inc (explaining that the FTC required Praxair to divest, inter alia, source contracts equal to all of Praxair's helium source contract volume, less the volumes ordered divested by the EC and China); DOJ, 'Justice Department Requires Divestiture of Certain Herbicides, Insecticides, and Plastics Businesses in Order to Proceed with Dow-Dupont Merger' (15 June 2017), available at www.justice.gov/opa/pr/justice-department-requires-divestiture-certain-herbicides-insecticides-and-plastics (stating that the DOJ and EC cooperated closely in their investigations and noting overlapping divestiture requirements in the US and European settlements).

APPENDIX 1

About the Authors

Ronan P Harty
Davis Polk & Wardwell LLP

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.

Nathan Kiratzis
Davis Polk & Wardwell LLP

Nathan Kiratzis is an associate in Davis Polk's litigation department. He earned his LLB (Hons) and BCom in economics from the University of Melbourne in 2008. He received a graduate diploma in competition law from the University of Melbourne Law School in 2016.

Anna M Kozlowski
Davis Polk & Wardwell LLP

Anna Kozlowski is an associate in Davis Polk's litigation department. She earned a BA, *cum laude*, in political science from Boston College in 2011, and earned her JD, with honours, from The George Washington University Law School in 2016.

Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, NY 10017
United States
Tel: +1 212 450 4000
Fax: +1 212 701 5800
ronan.harty@davispolk.com
nathan.kiratzis@davispolk.com
anna.kozlowski@davispolk.com
www.davispolk.com

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

As such, practical guidance for both practitioners and regulators in navigating this challenging environment is critical. This fourth edition of the *Merger Remedies Guide* provides that detailed guidance and analysis. It examines remedies throughout their life cycle: from the fundamental principles, to the remedies available, through how remedies are structured and implemented, to how enforcers ensure compliance. Insights from four jurisdictions around the world supplement the global analysis to inform the reality of multi-jurisdictional deals.

The Guide draws not only on the wisdom and expertise of 41 distinguished practitioners from 15 firms, but also the perspective of former enforcers Daniel Ducore and Diana Moss. It brings together unparalleled proficiency in the field and provides essential guidance for all competition professionals.

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