GCR

MERGER REMEDIES GUIDE

FIFTH EDITION

Editors
Ronan P Harty, Nathan Kiratzis and Anna M Kozlowski

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Anna M Kozlowski

Published in the United Kingdom by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.globalcompetitionreview.com

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-80449-266-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

Allen & Overy

Analysis Group, Inc

Anderson Mōri & Tomotsune

Axinn

Cleary Gottlieb Steen & Hamilton LLP

Cravath, Swaine & Moore LLP

Crowell & Moring LLP

Daniel P Ducore

Gilbert + Tobin

Linklaters LLP

Mazars

Morgan Lewis

Progressive Policy Institute

Shardul Amarchand Mangaldas & Co

Skadden, Arps, Slate, Meagher & Flom

Thompson Hine LLP

Wachtell, Lipton, Rosen & Katz

Wilmer Cutler Pickering Hale and Dorr LLP

Overview

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

Introduction

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 analysis of the impact of the transaction turns on an informed, but prospective review of the relevant market and the competitive conditions in that market. These conditions are affected by features of the relevant industry, but also by circumstances that have economy-wide effects. In turn, any changes to markets and industrial structures will need to be considered by antitrust authorities when they assess mergers.

Antitrust authorities historically have recognised that a proposed transaction may be modified or fine-tuned to avoid potential anticompetitive effects. Specifically, antitrust authorities have often agreed to accept remedies from the parties that would eliminate the prospective harm that may result from a transaction. Recently, however, certain antitrust authorities – in particular, the Antitrust Division of the United States Department of Justice (DOJ) and the US Federal Trade Commission (FTC) – have suggested that, except in rare circumstances, mergers and acquisitions raising competitive issues should be blocked outright, casting doubt on the role of negotiated merger remedies going forward.

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1 Ronan P Harty is a partner, Nathan Kiratzis is a counsel and Anna M Kozlowski is an associate at Davis Polk & Wardwell LLP. The authors would like to express their sincere thanks to Benjamin J Hartman, an associate at the firm, for his assistance with this chapter.

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. As noted above, however, merger rules are global in nature and, therefore, the final part of the book is devoted to 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 recent trends in both policy and approach towards merger remedies by antitrust authorities in the United States, the European Union and the United Kingdom. We hope these examples will serve as a useful introduction to some of the key issues that are covered in greater detail throughout the book.

Recent trends in the United States

For many years, antitrust authorities in the United States have indicated a strong preference for merger remedies that impose 'structural' relief over those imposing 'behavioural' relief. Structural remedies generally require some form of change to the assets or businesses of the merging parties, whereas behavioural remedies typically include injunctive provisions that regulate the business conduct or pricing authority of the merging parties post-transaction. For example, the DOJ Antitrust Division's most recent Merger Remedies Manual – issued in September 2020 and since withdrawn (the 'Merger Remedies Manual') – expressly stated that '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'.[2]

Divestiture is the key form of structural remedy that has been utilised in the United States. Nevertheless, not all divestitures are viewed as equally likely to eliminate the potential anticompetitive effects of a proposed transaction. As

2 Merger Remedies Manual at 13. Consistent with the DOJ's position as set forth in the Merger Remedies Manual, the Federal Trade Commission has expressed scepticism of behavioural remedies. In its April 2023 decision ordering Illumina, Inc. to divest its acquisition of GRAIL, Inc., the Commission reversed an administrative law judge's opinion approving the deal based on Illumina's commitment to address competitive concerns through supply agreements with its oncology customers. In its opinion, the FTC wrote that '[b]ehavioral remedies provide only temporary protection, allowing the threat inherent in the merger to persist. Behavioral requirements also usually impose greater monitoring costs than divestiture remedies. [Illumina's] Open Offer embodies these and other shortcomings'. See Opinion of the Commission, *In the Matter of Illumina, Inc. and GRAIL, Inc.*, F.T.C. Dtk. No. 9401, at 67 (31 March 2023).

previously set forth in the Merger Remedies Manual, the DOJ Antitrust Division has a strong preference for divestitures of stand-alone business units over the sale of assets. The Merger Remedies Manual made clear that asset carve-outs are likely to be viewed as appropriate only in limited circumstances, such as where no stand-alone business smaller than either of the merging firms exists.[3]

The identity of a divestiture buyer has likewise been an important factor considered by antitrust authorities evaluating proposed remedies in the United States. The FTC and DOJ distinguish between 'upfront' buyers, with which the parties to a proposed merger negotiate, finalise and execute a purchase agreement and all other relevant agreements before a remedy order is accepted by the antitrust authority, and 'post-order' buyers, which are approved by an antitrust authority within a certain amount of time after the authority issues a remedy order requiring the divestiture of certain assets. Both US antitrust authorities historically made clear their strong preference for upfront buyers, as they 'minimize the risks that acquired assets will lose value' – which could result from the loss of employees, customers or opportunities – or that 'competition will be diminished while ownership of the assets remains uncertain'.[4]

While echoing these preferences, FTC leadership under the Biden Administration has generally taken a more sceptical view of merger remedies, suggesting a preference for blocking problematic mergers outright. For example, FTC Chair Lina Khan suggested a general disfavour towards merger remedies in a 6 August 2021 letter to Senator Elizabeth Warren, writing:

> *While structural remedies generally have a stronger track record than behavioral remedies, studies show that divestitures, too, may prove inadequate in the face of an unlawful merger. In light of this, I believe the antitrust agencies should more frequently consider opposing problematic deals outright.*[5]

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3 Merger Remedies Manual at 10.

4 Ian Conner, Bureau of Competition, FTC, 'The uphill case for a post-Order divestiture' (21 March 2019), available at https://www.ftc.gov/enforcement/competition-matters/2019/03/uphill-case-post-order-divestiture; see also Merger Remedies Manual at 22.

5 Letter from Lina Khan, FTC Chair, to Elizabeth Warren, US Senator (6 August 2021), available at https://www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf.

Chair Khan later stated in an 8 June 2022 interview that FTC staff should not have to work with merging parties to 'fix' proposed deals through divestitures or other means; instead, anticompetitive deals should be 'fixed on the front end by parties being on clear notice about what are lawful and unlawful deals'.[6]

Despite FTC leadership's strong stance against merger remedies, the Commission under Chair Khan has entered several consent decrees imposing merger remedies. Among others, the FTC required in August 2022 that Buckeye Partners, LP and Magellan Midstream Partners, LP divest petroleum terminals in South Carolina and Alabama as a condition of Buckeye's US$435 million proposed acquisition of 26 Magellan terminals.[7] Likewise, as a condition of Medtronic, Inc's acquisition of Intersect ENT, Inc, the Commission required Medtronic to divest a subsidiary of Intersect that overlapped with Medtronic's ear, nose and throat navigation systems and balloon sinus dilation productions business.[8] More recently, the FTC imposed what it called 'ground-breaking structural relief' to resolve antitrust concerns surrounding EQT Corporation's proposed acquisition of gas producers owned by Quantum Energy Partner, prohibiting Quantum from occupying an EQT board seat, requiring Quantum to divest its shares in EQT and dissolving a pre-existing joint venture between EQT and Quantum.[9]

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6 See Margaret Harding McGill, Axios, 'FTC's new stance: Litigate, don't negotiate' (8 June 2022), available at https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan. More recently, in 2023, then-Director of the FTC's Bureau of Competition, Holly Vedova, stated that '[w]e have neither the resources nor the mandate to function as an industrial planner . . . Therefore, parties should expect us to be skeptical and risk averse when considering offers to settle in our merger investigations . . . She likewise stated: 'the Bureau of Competition will only recommend acceptance of divestitures that allow the buyer to operate the divested business on a standalone basis, quickly, effectively, and independently, and with the same incentives and comparable resources as the original owner'. Holly Vedova, Director, FTC Bureau of Competition, Remarks at 12th Annual GCR Live: Law Leaders Global Conference (3 February 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/vedova-gcr-law-leaders-global-conference.pdf.

7 See FTC, 'FTC Approves Final Order to Protect South Carolina and Alabama Markets from Anticompetitive Gasoline Terminal Deal' (9 August 2022), available at https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-approves-final-order-protect-south-carolina-alabama-markets-anticompetitive-gasoline-terminal.

8 See FTC, 'FTC Approves Final Order Protecting Patients Who Rely on Medical Instruments Used in Sinus Procedures' (30 June 2022), available at https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-approves-final-order-protecting-patients-who-rely-medical-instruments-used-sinus-procedures.

9 See FTC, 'FTC Acts to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal' (16 August 2023), available at https://

Additionally, in two cases in 2023, the FTC accepted merger remedies after initially seeking a preliminary injunction in federal court. Notably, the Commission challenged Intercontinental Exchange, Inc's US$13.1 billion acquisition of Black Knight, Inc after the parties agreed to divest Black Knight's loan origination system to a third party, but later dropped its suit after the companies agreed to divest additional assets to address the agency's concerns.[10] Only days later, the FTC's suit to block Amgen Inc's acquisition of Horizon Therapeutics plc – the agency's first litigated challenge to a pharmaceutical merger in more than a decade – ended in a consent decree containing behavioural remedies enjoining Amgen from 'bundling' an Amgen product with Horizon's own therapeutics for rare diseases.[11] In this case, Amgen and Horizon were neither horizontal competitors, nor were they in a vertical supply relationship.

The DOJ's Antitrust Division, by contrast, has taken a stricter view of merger remedies, demonstrating an unwillingness to entertain remedies for deals it views as problematic. In remarks before the Antitrust Section of the New York State Bar Association in January 2022, shortly after his confirmation, Assistant Attorney General (AAG) Jonathan Kanter stated that:

> *complex settlements, whether behavioral or structural, suffer from significant deficiencies. Therefore, in my view, when the division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction. It is the surest way to preserve competition.*[12]

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www.ftc.gov/news-events/news/press-releases/2023/08/ftc-acts-prevent-interlocking-directorate-arrangement-anticompetitive-information-exchange-eqt.

10 See FTC Secures Settlement with ICE and Black Knight Resolving Antitrust Concerns in Mortgage Technology Deal' (31 August 2023), available at https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-secures-settlement-ice-black-knight-resolving-antitrust-concerns-mortgage-technology-deal.

11 See FTC, 'Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition' (1 September 2023), available at https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition.

12 See DOJ, 'Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section' (24 January 2022), available at https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

Kanter made it clear, therefore, that under his leadership, divestiture remedies would be 'the exception, not the rule', and that the Antitrust Division would be willing to litigate borderline cases to 'ask the courts to reconsider the application of old precedents to [modern] markets'.[13] Consistent with these policy positions, in October 2022, the DOJ quietly withdrew the 2020 Merger Remedies Manual, which was issued only two years prior under the Trump Administration. The Antitrust Division's strong position on merger remedies and overall willingness to litigate merger challenges has had significant consequences for merging parties; the DOJ and FTC sued to enjoin 10 proposed mergers in 2022, the second highest number of lawsuits since 2008.[14]

Notably, the US antitrust agencies' increased scepticism towards merger remedies has resulted in numerous 'fix-it-first' scenarios, in which the parties to a proposed merger modify the transaction to address antitrust concerns – typically through divestitures – rather than entering into a consent decree with the reviewing agency. In one example, after receiving a Request for Additional Information and Documentary Material – commonly called a 'Second Request' – regarding its proposed acquisition by Quikrete Holdings, Inc, Forterra, Inc

13 See id. On 21 April 2022, AAG Kanter made similar remarks as keynote speaker at the University of Chicago's Stigler Center. See DOJ, 'Assistant Attorney General Jonathan Kanter Delivers Keynote at the University of Chicago Stigler Center' (21 April 2022), available at https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler#_ftnref1 – 'The fifth pillar of my plan is to discharge the division's affirmative "duty" to "prevent and restrain" antitrust violations. Our duty is to litigate, not settle, unless a remedy fully prevents or restrains the violation. It is no secret that many settlements fail to preserve competition. Even divestitures may not fully preserve competition across all its dimensions in dynamic markets. And too often partial divestitures ship assets to buyers like private equity firms who are incapable or uninterested in using them to their full potential.'

14 See Practical Law Antitrust, 'Federal Merger Enforcement in Review: 2022' (30 January 2023), available at https://practicallawconnect.thomsonreuters.com/Document/I8dcabb6d8c5711ed8636e1a02dc72ff6/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=eb4cf499f6bf45bc8ddd8e7579891954&contextData=(sc.Category).

divested parts of its business to third parties 'to address some of the divestitures anticipated to be required by the [DOJ] to obtain approval under the HSR Act'.[15] The transaction closed in early 2022, and has not been challenged by the DOJ.[16]

On several occasions, however, US antitrust agencies have chosen to 'litigate the fix'. In these cases, merging parties argue before a court that a proposed divestiture or behavioural remedy will fix any alleged anticompetitive effects after failing to reach an agreement with the FTC or DOJ. Litigating the fix has posed a serious challenge for the US antitrust agencies. For instance, while the agencies may take the view that merger remedies are insufficient as a general matter, courts are accustomed to entering consent decrees with merger remedies, and the government's burden in proving that a proposed transaction violates the US antitrust laws is significant. Moreover, the legal framework for analysing divestitures and other fixes for proposed mergers in US courts is unsettled. As a result of these challenges, the agencies ultimately dropped cases seeking to enjoin mergers in three instances.[17] In settling its challenge to ASSA ABLOY's proposed acquisition of Spectrum Brands' Hardware and Home Improvement Division after only six days of trial, the DOJ stated that divestitures agreed upon by ASSA ABLOY

15 Forterra, Inc., SEC Form 8-K (24 November 2021), available at https://www.sec.gov/ix?doc=/Archives/edgar/data/0001678463/000167846321000082/frta-20211213.htm; Forterra, Inc., SEC Form 8-K (13 December 2021), available at https://www.sec.gov/ix?doc=/Archives/edgar/data/0001678463/000167846321000082/frta-20211213.htm; Forterra, Inc., SEC Form 8-K (16 February 2022), available at https://www.sec.gov/ix?doc=/Archives/edgar/data/0001678463/000167846322000013/frta-20220216.htm.

16 See GlobalNewswire, 'Quikrete Completes Acquisition of Forterra, Inc.' (18 March 2022), available at https://www.globenewswire.com/news-release/2022/03/18/2406267/0/en/Quikrete-Completes-Acquisition-of-Forterra-Inc.html.

17 See Joint Stipulation for Dismissal Without Prejudice, *Federal Trade Commission v. Intercontinental Exchange, Inc. et al.*, Case No. 23-cv-01710 (N.D. Cal. Aug. 7, 2023) (voluntarily and jointly dismissing the FTC's challenge to Intercontinental Exchange, Inc.'s acquisition of Black Knight, Inc., in light of 'significant progress the parties have made towards a potential resolution of the administrative proceeding', in which Intercontinental and Black Knight agreed to divest certain of Black Knight's businesses); see also DOJ, 'Justice Department Reaches Settlement in Suit to Block ASSA ABLOY's Proposed Acquisition of Spectrum Brands' Hardware and Home Improvement Division' (5 May 2023), available at https://www.justice.gov/opa/pr/justice-department-reaches-settlement-suit-block-assa-abloy-s-proposed-acquisition-spectrum; see also FTC, 'Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition' (1 September 2023), available at https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition.

would not 'fully eliminate the risks to competition alleged in the Complaint'.[18] Nonetheless, the DOJ concluded that 'based on the totality of the circumstances and risks associated with this litigation' the proposed divestitures were in the public interest.[19] In another case, the DOJ dismissed its appeal of a district court ruling allowing UnitedHealth Group Inc's proposed acquisition of Change Healthcare Inc to proceed in light of divestitures proposed by UnitedHealth.[20]

Recent trends in the European Union

Like the US antitrust agencies, the European Commission (EC) has a preference for structural remedies over behavioural ones. The Commission Notice on Remedies clearly states that '[d]ivestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps, and may also be the best means of resolving problems resulting from vertical or conglomerate concerns'.[21] Compared with US antitrust authorities, however, the EC has remained relatively flexible with respect to remedies, including by accepting behavioural remedies, despite comments by Commissioner Margrethe Vestager that the EC prefers 'stand-alone divestitures', also referred to as 'clean slate' remedies.[22]

Specifically, the European Commission accepted behavioural remedies in two recent transactions. Following its investigation of Meta Platforms, Inc's proposed acquisition of Kustomer, Inc, for example, the EC secured an 'access commitment' to Meta's publicly available APIs for its messaging channels to competitors, and an 'access-parity commitment' to improvements made to features or functionalities of Messenger, Instagram or WhatsApp for Kustomer's customers today.[23] More recently, the EC cleared Microsoft's proposed acquisition of Activision based on

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18 See Competitive Impact Statement, *United States of America v. ASSA ABLOY AB et al.*, Case No. 22-cv-02791 (D.D.C. 5 May 2023), at 7.

19 id.

20 See Stipulation of Voluntary Dismissal, *United States of America, et al. v. UnitedHealth Group Inc., et al.*, No. 22-5301 (2d Cir. 20 March 2023).

21 European Commission, 'Commission Notice on Remedies Acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004' (2008) ¶ 17, available at https://ec.europa.eu/competition/mergers/legislation/files_remedies/remedies_notice_en.pdf.

22 Margrethe Vestager, Keynote Speech at the Global Competition Law Centre Annual Conference, 'Competition Policy: Where We Stand and Where We're Going' (25 March 2022), available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_2079.

23 See European Commission, Press Release, 'Mergers: Commission clears acquisition of Kustomer by Meta (formerly Facebook), subject to conditions' (27 January 2022), available at https://ec.europa.eu/commission/presscorner/detail/da/ip_22_652.

Microsoft's commitment to offer free, 10-year licences of Activision's games to consumers on cloud game streaming services.[24] The EC did not, however, accept behavioural remedies in its challenge to Illumina's acquisition of GRAIL, which it subsequently fined for closing the merger without approval.[25] The EU's General Court rejected a request from Illumina to annul the European Commission's assertion of jurisdiction to review the transaction, which is currently on appeal before the Court of Justice.[26]

Consistent with Commissioner Vestager's recent statements, the EC's enforcement activity makes clear that the rigid approach suggested by some competition authorities, such as the DOJ, 'is not [the European Commission's] policy. The European Courts have held that we cannot, as a matter of principle, dismiss remedy proposals. We have to investigate the merits of every solution offered'.[27]

Recent trends in the United Kingdom

The United Kingdom's Competition and Markets Authority (CMA) has a preference for structural remedies over behavioural ones, similar to its US and European counterparts.[28] Sarah Cardell, Chief Executive of the CMA, reiterated this preference in a recent speech, stating that behavioural remedies do 'not typically address

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24 See European Commission, Press Release, 'Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions' (15 May 2023), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705.

25 See European Commission, Press Release, 'Mergers: Commission fines Illumina and GRAIL for implementing their acquisition without prior merger control approval' (12 July 2023), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3773.

26 See Court of Justice of the European Union, 'The General Court upholds the decisions of the Commission accepting a referral request from France, as joined by other Member States, asking it to assess the proposed acquisition of GRAIL by Illumina' (13 July 2022), available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-07/cp220123en.pdf.

27 Margrethe Vestager, Keynote Speech at the International Forum of the Studienvereinigung Kartellrecht, 'Recent Developments in EU merger control' (25 May 2023), available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_23_2923.

28 Competition and Markets Authority, Merger Remedies at 6 (13 December 2018) – 'The CMA views competition as a dynamic process of rivalry between firms seeking to win customers' business over time. Restoring this process of rivalry through structural remedies, such as divestitures, which re-establish the structure of the market expected in the absence of the merger, should be expected to address the adverse effects at the source. Such remedies are normally preferable to measures that seek to regulate the ongoing behaviour of the merger parties (behavioural remedies, such as price caps, supply commitments or restrictions on use of long term contracts).', available at https://assets.publishing.

the underlying causes of the competition concerns identified by the CMA', and noting that 'monitoring and implementation of behavioural remedies can be very challenging'.[29] Nevertheless, Cardell explained that the CMA may accept behavioural remedies 'where structural remedies such as divestment aren't feasible, where the harm arising from the merger will be short-lived, or where substantial relevant customer benefits will be preserved'.[30]

More fundamentally, in response to observations that the CMA is more difficult to persuade on remedies than other competition authorities, Cardell explained that the CMA has a 'highly transparent' approach to remedies and is willing to engage with merging parties regarding potential undertakings.[31]

Consistent with Chief Executive Cardell's remarks, the CMA has accepted about a dozen undertakings in lieu of reference to a Phase II investigation (UILs) since 2021, and a handful of final undertakings at the culmination of a Phase II investigation. While most required structural remedies, at least two imposed behavioural remedies. For instance, to address the CMA's competitive concerns over Korean Air's acquisition of Asiana, the CMA required certain commitments to facilitate Virgin Atlantic's entry into certain routes.[32] Likewise, in clearing Bouygues SA's proposed acquisition of Equans SAS, the CMA required the appointment of an independent third-party expert to assess bids submitted by the parties for a certain project to determine which of the bids would be most advantageous to a third party.[33] Most recently, the CMA gave preliminary approval to Microsoft to proceed with its US$69 billion acquisition of Activision Blizzard

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service.gov.uk/government/uploads/system/uploads/attachment_data/file/764372/Merger_remedies_guidance.pdf.

29 See Sarah Cardell, Speech to the UK Competition Law Conference 2023, 'UK merger control in 2023' (27 February 2023), available at https://www.gov.uk/government/speeches/uk-merger-control-in-2023.

30 id.

31 id.

32 See Competition and Markets Authority, Anticipated acquisition by Korean Airlines Co., Ltd of Asiana Airlines Inc., Decision on Acceptance of Undertakings in Lieu of Reference (3 March 2023), available at https://assets.publishing.service.gov.uk/media/6402074e8fa8f527f110a3a2/Final_Acceptance_of_UILs.pdf.

33 See Competition and Markets Authority, Anticipated acquisition by Bouygues SA of Equans SAS, Decision on Acceptance of Undertakings in Lieu of Reference (6 October 2022), available at https://assets.publishing.service.gov.uk/media/633eb569e90e0709df741cca/Bougyes_Equans_decision_for_final_acceptance_of_UILs.pdf.

– a deal that the CMA earlier blocked – after Microsoft agreed in a restructured transaction not to acquire Activision's cloud gaming rights, which would instead be sold to Ubisoft Entertainment SA.[34]

GCR Merger Remedies Guide

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 lessened 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). 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).[35] 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

34 See CMA, 'New Microsoft/Activision Deal Addresses Previous CMA Concerns in Cloud Gaming' (22 September 2023), available at https://www.gov.uk/government/news/new-microsoft-activision-deal-addresses-previous-cma-concerns-in-cloud-gaming.

35 Notably, the DOJ and FTC recently released a draft overhaul of the merger guidelines, which eliminate the previous separate treatment of horizontal and vertical transactions in favour of a unified approach. See DOJ & FTC, 'Merger Guidelines' (2023), available at https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf.

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 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 explained at the outset of this chapter, 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 prefer structural remedies.

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? In addition to divestiture, there are several 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 remedies can be beneficial in certain circumstances, particularly in jurisdictions outside the United States.

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. Non-structural remedies can also provide a means of addressing non-horizontal theories of harm, where a divestiture remedy may not be feasible. 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 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? 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.

As discussed earlier in this chapter, antitrust authorities in the United States have recently adopted a sceptical posture towards merger remedies as a whole, preferring instead to block proposed transactions that the agencies view as harmful to competition. While merging parties may still propose remedies during the investigation of a proposed transaction, this policy shift may see their efforts to 'fix' the transaction rebuffed. Chapter 9 addresses what happens when antitrust authorities opt for litigation rather than settlement despite a proposed remedy. Commonly referred to as 'litigating the fix', parties notifying proposed mergers in the United States should be aware of courts' attitude towards remedies proposed before and during litigation, and the key issues in crafting a proposed merger remedy in the spectre of litigation.

Matters concerning the implementation of the remedy are the subject of Chapter 10. 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.[36]

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36 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-mobilesprintlawsuit-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 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).

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.[37] 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 when parties do not comply with their obligations. Further, it provides an overview of some of the provisions that the DOJ started including in consent decrees under the Trump Administration 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.[38]

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 assistant director 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

37 Notably, in August 2020, the DOJ's Antitrust Division announced the creation of the Office of Decree Enforcement and Compliance, which aims to 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 https://www.justice.gov/opa/pr/assistant-attorney-general-makan-delrahim-announces-re-organization-antitrust-divisions-civil.

38 DOJ, 'Remarks of Assistant Attorney General Makan Delrahim Delivered at the New York State Bar Association' (25 January 2018), available at https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-makan-delrahim-delivered-new-york-state-bar.

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 15), China (Chapter 16), India (Chapter 17) and Japan (Chapter 18). 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.

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.

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 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 fifth edition of the *Merger Remedies Guide* provides just such analysis. It examines remedies throughout their life cycle: 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 distinguished practitioners from a range of jurisdictions, but also the perspective of former enforcers. It brings together unparalleled proficiency in the field and provides essential guidance for all competition professionals.

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ISBN 978-1-80449-266-6